

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

% *Reserved on: 28th August, 2018*
Decided on: 4th October, 2018

+ **CRL.A. 286/2017**

PUSHPA & ORS. Appellants
Represented by: Mr. Saurabh Kansal, Advocate
for Ms. Pallavi S. Kansal,
Advocate.

versus

STATE OF NCT OF DELHI & ORS. Respondents
Represented by: Mr. Ashok Kumar Garg, APP
for the State

+ **CRL.A. 764/2017**

RAJU Appellant
Represented by: Mr. Saurabh Kansal, Advocate
for Ms. Pallavi S. Kansal,
Advocate.

versus

STATE Respondent
Represented by: Mr. Ashok Kumar Garg, APP
for the State.

+ **CRL.A. 767/2016**

VJAY @ VINAY @ BABLE Appellant
Represented by: Mr. Saurabh Kansal, Advocate
for Ms. Pallavi S. Kansal,
Advocate.

versus

STATE Respondent
Represented by: Mr. Ashok Kumar Garg, APP
for the State

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By these appeals, appellants Pushpa, Poonam, Pooja, Raju and Vijay @ Vinay @ Bable challenge the impugned judgment dated 30th November, 2016 wherein Pushpa, Poonam and Pooja were convicted for offences punishable under Section 394 IPC read with Section 395/34 IPC and Section 412 IPC and Raju and Vijay @ Vinay @ Bable were convicted for offences punishable under Section 395 read with Sections 397/412 IPC in FIR No. 369/2011 registered at PS Prashant Vihar and the order on sentence dated 5th December, 2016 directing Pushpa, Poonam and Pooja to undergo rigorous imprisonment for a period of three years and to pay a fine of ₹5,000/- each and in default whereof to undergo simple imprisonment for a period of one month each for the offence punishable under Section 394 IPC read with Section 395/34 IPC and rigorous imprisonment for a period of three years and to pay a fine of ₹5,000/- each and in default whereof to undergo simple imprisonment for a period of one month each for the offence punishable under Section 412 IPC. Raju and Vijay @ Vinay @ Bable were directed to undergo rigorous imprisonment for a period of seven years and to pay a fine of ₹10,000/- each and in default whereof to undergo simple imprisonment for a period of six months for the offence punishable under Section 395 IPC read with Section 397/34 IPC and rigorous imprisonment for a period of three years and to pay a fine of ₹10,000/- each and in default whereof to undergo simple imprisonment for a period of six months each for the offence punishable under Section 412 IPC.

2. Assailing the conviction, learned Counsel for appellants submits that conviction under Section 394 and Section 395 IPC cannot be sustained

together. Learned Trial Court erred in returning the finding of ingredient of Section 395 IPC as it does not provide for hurt. He also submits that since there was injury, Section 395 IPC cannot be invoked. He further submits that SI Manoj Kumar (PW-12) was the only witness who deposed that the knife could not be recovered. The nature of injury was simple. He submits that the only allegation against the appellants Pushpa, Poonam and Pooja as per the statement of Poonam Ahuja (Ex.PW-8/C) was the suspicion about their involvement as they did not come on calling by the complainant Poonam Ahuja (PW-1) so they might be involved in the robbery. He submits that HC Ram Kumar (PW-3) did not lift chance prints from the door. Poonam Ahuja was the only eyewitness and there were no allegations in the rukka. However, after a month, the complainant mentions about the involvement of Poonam, Pooja and Pushpa in her statement recorded under Section 161 Cr.P.C. dated 30th August 2011.

3. Per contra, learned APP for the State submits that the articles have been identified and seized from the appellants. Prosecution has proved its case from the evidence of the complainant and other witnesses.

4. Brief facts of the case are that on 9th August 2011, at about 1:05 P.M., information was received regarding theft at E-28, Prashant Vihar, Sector-14, Rohini. Aforesaid information was recorded vide DD No. 20A (Ex.PW-8/A) and was assigned to SI Manoj Kumar. He along with Ct. Om Prakash reached the place of incident i.e. House No. E-28, Ground Floor, Prashant Vihar where they met the complainant Poonam Ahuja and found that the articles in the house were lying scattered and the iron almirahs were lying open. Thereafter, the crime team was called. SI Anil Kumar inspected the spot and prepared a report vide Ex.PW-4/A. HC Ram Kumar collected the

chance prints from the panel of almirah with the help of black powder and sent the same to Finger Bureau, Kamla Market for analysis. Ct. Rajbir took the photographs of the scene from different angles vide Ex.PW-2/A-1 to Ex.PW-2/A-9.

5. Statement of Poonam Ahuja was recorded vide Ex.PW-1/A wherein she stated that on 9th August 2011, at about 12:00 P.M., her husband Sanjay Ahuja had left for Village Libaspur, Samaypur Badli for his printing press and she was at home with her two house maids Pushpa and Poonam (appellants herein). She was ironing the clothes in her room and the two maids were cleaning the house. In the meantime, at around 12:15 P.M., a boy aged around 25/26 years, wheatish complexion, height around 5'8", thin built, came into her room all of a sudden with a knife in his hand and threatened her not to speak a word and pushed her on the bed. In the meantime, another boy entered her room who was aged around 25 years, height 5'4", and of thin built. While the first boy sat on her legs, pressed her legs and held her hands, the second boy tied her mouth with a sky blue cloth. The first boy then tied her hands with a string (kind of naada) at the back and tied her legs with a white string (naada). The first boy then asked her where she had kept her valuables. Although being tied, she was able to speak with great force and told them that nothing was kept in house. The second boy, while threatening, asked the first boy *'to take out a big knife and hurt her because only then she will tell'*. The first boy then threatened her saying *"should I take out my big knife or you are willing to tell?"*, thereafter, under threat she told them about the almirah keys which were kept in her purse. The two boys then opened the almirah and stole the cash approximately ₹4 lakhs and the jewellery consisting of 10 bangles and other

jewellery. The boys picked her up and locked her in the bathroom of adjacent room. She further stated that with great force she called out for her maid Pushpa but she did not come. Although her hands were tied, she rubbed herself on the lock and with great difficulty she was able to open the door of the bathroom and after jumping out she reached outside the house as both the maids were not visible in the house. On the street outside, the neighbour's maid untied her hands and she herself untied her legs and mouth. She further stated that when she tried to call up the police using her mobile no. 9311505427, she could not trace her mobile. Both the boys had taken her mobile with them which was make Samsung M-369, black colour. She then tried to call her husband Sanjay Ahuja on his mobile number 9811233329 through her landline number 27552693, but the call did not connect. She then called up her brother-in-law Gulshan Ahuja, who worked with her husband, on his phone number 9312505425 and narrated the whole story to her husband. She expressed her doubts about the involvement of both her maids and that Pushpa and Poonam were in connivance with the two boys. On the basis of this statement, rukka was prepared vide Ex. PW-12/A which was handed over to Ct. Om Prakash for registration of FIR.

6. Consequently, FIR No. 369/2011 (Ex.PW-8/B) was registered at PS Prashant Vihar for offences punishable under Sections 394/397 IPC. Poonam Ahuja handed over two wide strings (naada) and one sky blue chunni type cloth to SI Manoj Kumar which were seized vide seizure memo Ex.PW-1/D. Site plan was prepared vide Ex. PW-1/B and case property was then deposited with MHC(M). Poonam Ahuja was then medically examined at BSA Hospital Rohini vide MLC Ex.PW-6/A.

7. On 10th August, 2011, Poonam Ahuja produced the list of robbed

articles vide Ex.PW-1/C. Thereafter, at about 3:00 P.M., SI Manoj Kumar, on receiving secret information, along with Ct. Naveen, W/Ct. Komal and secret informer reached Mangolpur Patthar Market where 3-4 public persons were asked to join the raiding party but none of them agreed. Appellant Vijay @ Vinay @ Bable was apprehended at the instance of the secret informer and a bundle of currency notes of denomination of ₹500/- was recovered from the right side pocket of his lower totalling to ₹50,000/- and three golden bangles were recovered from the left side pocket of the lower, which were seized vide seizure memo Ex.PW-10/A. Appellant Vijay @ Vinay @ Bable was arrested vide arrest memo Ex.PW-10/B and his personal search was carried out vide search memo Ex.PW-10/C. Disclosure statement of appellant Vijay was recorded vide Ex.PW-10/D wherein he disclosed the names of the other appellants.

8. On the intervening night of 10th-11th August, 2011, SI Manoj Kumar constituted a raiding party consisting of W/Ct. Geeta, W/Ct. Neelam, Ct. Naveen, Ct. Ved Prakash, SI Surya Prakash, Ct. Dharmender, HC Roshan Lal, Ct. Ashok and Inspector Om Prakash. He along with the raiding team and appellant Vijay @ Vinay @ Bable reached Anand Vihar Bus Terminal. Ct. Dharmender, W/Ct. Geeta, W/Ct. Neelam, Ct. Ved Prakash and SI Manoj Kumar were in one team and the remaining persons were part of the other raiding team. A trap was laid at the out gate of Anand Vihar Bus Terminal at the instance of appellant Vinay @ Vinay @ Bable. Around 1:00 A.M., appellants Pushpa, Poonam, Pooja and Raju were apprehended at the instance of appellant Vijay @ Vinay @ Bable. On personal search of appellant Raju, jewellery and cash of ₹50,000/- was recovered and was seized vide seizure memo Ex.PW-7/A. W/Ct. Geeta carried out the personal

search of appellant Pushpa vide Ex.PW-7/D-5 from whom some jewellery and ₹84,620/- was recovered which was seized vide seizure memo Ex.PW-7/B-1. Personal search of Poonam was conducted vide Ex.PW-7/D-4 and some jewellery and ₹65,000/- was recovered which was seized vide seizure memo Ex.PW-7/B-2. Personal search of Pooja was conducted vide Ex. PW-7/D-6 wherein some jewellery and ₹50,000/- was recovered which was seized vide seizure memo Ex.PW-7/B-3. Appellant Pushpa, Poonam and Pooja were arrested vide arrest memos Ex. PW-7/D-3, Ex. PW-7/D, Ex. PW-7/D-2 respectively. Appellant Raju was arrested vide arrest memo Ex.PW-12/C. Disclosure statements of appellants Pushpa, Poonam, Pooja and Raju were recorded vide Ex.PW-7/C-1, Ex.PW-7/C-2, Ex.PW-7/C-3 and Ex.PW-10/X-1 respectively.

9. On 11th August, 2011, SI Manoj Kumar carried out further investigation along with W/Ct. Geeta, Ct. Naveen and Ct. Ved Prakash. Thereafter, SI Manoj Kumar along with the appellants went to Kacchi Colony, Pooth Kalan where appellant Vijay @ Vinay @ Bable led him to his house, took out a key from under the brick in front of third room and opened the lock. He took out two golden colour bangles, one gent's watch having white dial and one golden chain from the bed (diwan) which were seized vide seizure memo Ex.PW-10/X-2.

10. Thereafter, appellant Raju was brought inside the aforesaid room by Ct. Naveen who produced some jewellery from under the diwan which were seized vide seizure memo Ex. PW-10/X-3.

11. Appellant Pushpa took out jewellery items from under the clothes kept in an iron almirah which were seized vide seizure memo Ex.PW-10/X-4. SI Manoj Kumar prepared the pointing out memo of recovery vide Ex.

PW-11/A. The pointing out memo and recovery at ISBT were effected vide Ex. PW-12/D. Thereafter, case property was deposited with the MHC(M).

12. Appellants Raju and Vijay were put up for judicial TIP but both refused to join TIP. On 25th July 2011, TIP of the case property was conducted. On 30th August 2011, the case property i.e. cash and jewellery were released on superdari vide superdarinama Ex.PW-1/G, affidavit Ex.PW-1/H and Indemnity Bond Ex.PW-1/J to superdar Poonam Ahuja.

13. After the completion of investigation, charge sheet was filed for the offences punishable under Sections 395/397/411 IPC. Charge was framed.

14. Poonam Ahuja was examined as PW-1 in Court who deposed in sync with her statement made before the police. She identified Vijay in court as the person who was having knife in his hand, threatened her and caught hold of her legs. She identified Raju as the one who also threatened her and pressed her face with both hands. She also stated that appellant Vijay had stabbed her on her head multiple times which caused her severe pain. The appellants had also taken her bangles before tying her hands. She further stated that the appellant Pushpa used to come for work at her house with her daughters (appellant Poonam and Pooja). On the day of incident, all the appellants were sitting in the park which was visible from her house. She had called appellant Pushpa inside her house for work. Appellant Poonam came inside her house for work and when she enquired as to why Pushpa was not coming inside, appellant Poonam told her that Pushpa will come within two three minutes. After some time, appellant Pushpa came inside and started talking to appellant Poonam in the kitchen, after which this incident took place.

15. Dr. Kuldeep Singh (PW-6), CMO, BSA Hospital stated that on 9th

August, 2011, at about 9:20 P.M., he had examined Poonam Ahuja (PW-1) brought to the hospital by SI Manoj Kumar with the alleged history of physical assault at 12:30 P.M. on the same day. MLC (Ex.PW-6/A) was prepared by him and he opined the nature of injuries as simple. Opinion was proved vide Ex.PW-6/B. Following injuries were mentioned in the MLC of Poonam Ahuja:

- i. *Bruises over left shoulder 2 x 1 cm app. No active bleed, no crepitus no gross deformity, shoulder movement.*
- ii. *Abrasions over left wrist 10 x 2 cm app. encircling wrist bruises, no active bleeding, no crepitus, no deformity, wrist movement.*
- iii. *Right wrist dorsal aspect 4 x 1.5 cm app. no active bleeding, no crepitus, no deformity joint movement.*
- iv. *B/C tender achilles region, pain above heels 1.5 x 1 cm app., no active bleeding, no crepitus, no deformity.*
- v. *Left little and ring finger palmar aspect proximal phalanx 1 x 0.1 cm app each, no active bleeding, no crepitus, no gross deformity.*

16. All the appellants in their statements recorded under Section 313 Cr.P.C. stated that they were innocent and falsely implicated in the present case.

17. Contention of learned counsel for the appellants that there is no evidence against Pushpa and her two daughters i.e. Poonam and Pooja except an apprehension of the complainant/Poonam Ahuja deserves to be rejected. No doubt in the FIR Poonam Ahuja expressed her apprehension against these three appellants in view of their conduct however, during the investigation Pushpa, Poonam and Pooja's association with the two other

accused was established and at their instance cash and jewellery items were recovered which jewellery items have been duly identified by the complainant in the TIP.

18. Appellants Pushpa, Poonam and Pooja have been convicted for offences punishable under Sections 394/395/412/34 IPC and appellants Raju and Vijay for offences punishable under Sections 395 read with Section 397/412 IPC. As per the case of the prosecution five persons were involved in the commission of offence and though Pushpa, Poonam and Pooja have not been attributed any overt act but they were conspirators. Thus conviction of the appellants is liable to be converted into one under Section 120B IPC. Five persons being involved, offence punishable under Section 395 IPC is made out. Even if the ingredients of Section 395 IPC do not require hurt, it does not mean that in a dacoity coupled with hurt Section 395 IPC is not made out. Since offences committed involve five or more persons Section 395 IPC is made out and not Section 394 IPC which punishes robbery. All the appellants have been found in possession of the stolen cash and jewellery. Thus conviction of appellants for offences punishable under Sections 395/412/120B IPC is upheld.

19. As regards Section 397 IPC is concerned, according to Poonam Ahuja only Vijay was armed with a deadly weapon of offence i.e. a knife, and he showed the same. Thus, only Vijay can be convicted for offence punishable under Section 397 IPC, as per the decision of the Supreme Court in AIR 1975 SC 905 Phool Kumar v. Delhi Admn., Raju is acquitted for offence punishable under Section 397 IPC.

20. In view of the discussion aforesaid conviction of appellants Pushpa, Poonam, Pooja, Raju and Vijay is modified to offences punishable under

Sections 395/412/120B IPC and conviction of Vijay for offence punishable under Section 397 IPC is also upheld. Sentences for the offences convicted as awarded by the learned Additional Sessions Judge are maintained.

21. Appeals are disposed of.
22. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record and intimation to the appellants.
23. TCR be returned.

OCTOBER 04, 2018
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(MUKTA GUPTA)
JUDGE



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