

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

Reserved on : 19.12.2019
% **Pronounced on : 27.05.2020**

+ **CRL.A. 580/2019 & CRL.M.B. 795/2019**

PAWAN Appellant

Through: Ms. Anu Narula (DHCLSC) and Mr.
Lakshay Joshi, Advocates.

versus

STATE Respondent

Through: Mr. M.S.Oberoi, APP for the State
with ASI Krishan Pal, PS:Seelampur.

CORAM:
HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

JUDGMENT

1. This appeal is directed against the judgment dated 04th July, 2018 passed by the District & Sessions Judge, North East District, Karkardooma Courts, Delhi whereby the appellant alongwith co-accused Pappu has been convicted under Section 394/34 IPC and the appellant has been additionally convicted U/s 397 IPC. The appellant is sentenced to undergo rigorous imprisonment for a period of 2 years with fine of Rs. 2000/- for the offence under Section 394/34 IPC and in default of payment of fine to undergo simple imprisonment for three months. The appellant is further sentenced to undergo rigorous imprisonment for a period of 7 years for the offence under Section 397 IPC. Both the sentences have been directed to run concurrently.

2. In brief, the facts of the case are that on the intervening night of 27/28 September, 2013 at around 12 midnight, present appellant alongwith his co-accused Pappu and another unknown co-accused committed robbery of Rs. 14,700/- from complainant Sheoraj who was present at bus stand Welcome. According to the prosecution, the appellant has caused knife injury to Sheoraj and one Harbir, when they tried to nab the accused persons when they were trying to flee from the spot after committing dacoity.

3. During the course of investigation, appellant and his co-accused Pappu were arrested and after the completion of investigation, charge sheet was filed against the appellant and his co-accused Pappu. In the instant case, the appellant and his co-accused Pappu have been charged U/s 394/34 IPC and the appellant has also been charged U/s 397 IPC and U/s 25/27 of the Arms Act.

4. It is submitted by the Ld. APP for the state that there is no infirmity in the impugned judgment dated 04-07-2018. It is further submitted by the Ld. APP that the appellant was apprehended at the spot and has been duly identified by the complainant PW 1. He further submitted that PW 1 and PW 2 have corroborated the testimony of each other with regard to the incident. He further submitted that the knife was recovered from the possession of the appellant at the spot. It is further submitted that minor discrepancies in the testimonies of PW 1 and PW 2 are immaterial. It is further submitted by the Ld. APP that PW 3, PW 6 and PW 8 who have reached the spot have also stated about the recovery of knife from the appellant and their presence.

5. On the other hand, it is submitted by the Ld. counsel for the appellant that the appellant has been falsely implicated and there are inconsistencies in the testimonies of the witnesses. He further submitted that the recovery has been planted and the recovery memo placed on record was later on prepared and filed after a long time by way of a supplementary charge sheet. It is further submitted that PW 1 in his cross examination has stated that both the accused persons i.e. the present appellant and Pappu were having knife but the knife which was allegedly used by co-accused Pappu could not be recovered which is enough to disbelieve the version of the prosecution. He further urged that the appellant has come to meet his sister and has been implicated on the basis of false identity. He further urged that the blood stained clothes have not been seized by the police which creates doubt in the prosecution's story.

6. The material witnesses in this case are public witnesses Sheoraj and Harbir who have been examined as PW 1 and PW 2 respectively and official witnesses PW 3 SI Brijvir Singh, PW 6 SI Rizwan and PW 8 Constable Rajesh who have reached the spot and are witness to arrest and recovery.

7. PW 1 in his examination-in-chief has deposed that on 28.09.2013 at around 12 midnight, he was present at bus stand Welcome for going to Anand Vihar. He further deposed that the appellant suddenly caught him from his backside by putting his hand against his neck and pulled his neck by pressing his hand and by putting his other hand at his back side, he made him bend backward. He further deposed that co-accused Pappu took out a knife and aimed the same towards him and their associate took out a

sum of Rs. 14,700/- from the lower pocket of his kurta. He further deposed that accused persons tried to run away and they ran towards Welcome Double Storey. He started chasing them by raising hue and cry. He deposed that his co-brother Harbir who is also resident of Double Storey Welcome came out of his house and they both started chasing the accused persons. The iron gate in the gali in which accused were running to escape was found shut and all the three accused found themselves unable to escape any further.

8. He further deposed that he caught hold of accused Pappu who caused injury by knife on his left side above hip. He further deposed that in the grappling, he felled accused Pappu on the ground, who then took out a chilli powder packet from his pocket, cut the same by his teeth and threw that chilli powder towards his face. He further deposed that he immediately shut his eyes and the powder fell on his face but he kept his physical hold of accused Pappu and in the meanwhile, many public persons gathered there.

9. He further deposed that Harbir caught the other accused whose name was revealed as Pawan but their third associate somehow managed to escape. He further deposed that Harbir made a call at No. 100 and in about 10-15 minutes police reached at the spot and the accused persons were taken into custody. He further deposed that during the search of accused Pappu knife and 3 intact packets of chilli powder and one open chilli powder packet was recovered and seized. This witness proved on record sketch of the knife as Ex. PW 1/A, his statement given to the police as Ex. PW 1/B and he identified the knife which accused Pappu was holding during the incident and chilli powder packets collectively as Ex. P-2. He has further

deposed that appellant Pawan was also holding knife during this incident which PW 1 identified as Ex. P-1 which was recovered by the police which the appellant was holding but the knife held by accused Pappu could not be recovered.

10. This witness was cross examined and in his cross examination he stated that when he had physically captured the accused, he was still dragged for about 15-20 paces. He denied the suggestion that appellant has been arrested on account of some mistaken identity. In his further cross examination he stated that many public persons had gathered at the spot. He has further stated in his cross examination that accused Pappu had taken out knife and put it against his body. He further stated in his cross examination that accused Pawan had also a knife in his possession during the incident which had been recovered but the knife in possession of accused Pappu could not be recovered.

11. Another material witness is PW 2 Harbir. He deposed that on 28.09.2013, he was present in his house and at about midnight he heard the noise "*paise chheen liye*" and he came out of his house. His co-brother PW 1 Sheoraj was chasing three boys who were running in order to escape. He deposed that he also joined Sheoraj and suddenly those three boys found themselves in a situation that iron gate of that gali was shut and therefore, he and Sheoraj captured two of those boys and the third managed to escape.

12. He further deposed that he had captured one boy whose name was lateron revealed as Pawan and Sheoraj had captured other accused whose name was known as Pappu. He further deposed that accused Pappu when

captured by Sheoraj had caused a knife injury on Sheoraj and had also used chilli powder. He further deposed that later on knife and those chilli powder packets were recovered from him after the police had arrived at the spot. He further deposed that the knife was in possession of accused Pawan and it was recovered from him and chilli packets were with Pappu. He further deposed that when he was trying to capture accused Pawan, accused Pawan inflicted injury on his right side front below shoulder. He identified knife as Ex. P-1 and chilli powder packets as Ex. P-2.

13. In his cross examination he stated that blood had fallen on his clothes but his blood stained clothes were not seized by the police. He further stated that the blood had also fallen on the clothes of Sheoraj Singh but his blood stained clothes were also not seized by the police.

14. The other relevant witnesses are PW 3 SI Brijvir Singh, PW 6 SI Rizwan and PW 8 Constable Rajesh who had reached the spot on receiving the information about the incident.

15. PW 3 SI Brijvir Singh on 28-09-2013, was posted as SI at PS Seelampur. On receipt of DD No 3 A, he alongwith Ct. Rajesh reached the spot, where complainant Sheoraj and witness Harbir and some other public persons alongwith accused Pawan and accused Pappu were present. He identified them in the Court. According to him accused persons were given beatings by public persons. He has deposed that one Chhura was recovered from the pocket of accused Pawan and from the formal search of accused Pappu 3 packets of chilli powder were recovered. He proved the sketch of

chhura recovered from accused Pawan as Ex. PW 1/A and identified his signature at point A. He identified the recovered Chhura as Ex. P-1.

16. PW 6 is SI Rizwan. He deposed that on 28.09.2013 while he was posted at PS Seelampur, he was handed over a copy of FIR and ruqqa by constable Rajesh. Thereafter he proceeded to the spot where he met SI Brijveer, complainant Sheoraj and witness Harbir. SI Brijveer was also present there and he handed over to him one long knife and three packets of chilli powder. He prepared the sketch of knife Ex. PW 1/A and identified the knife as Ex. P-1.

17. PW 8 is Constable Rajesh, he also on 28.09.2013 alongwith SI Brijveer reached the spot. He identified accused Pappu and Pawan and deposed that accused Pawan was found in possession of one knife and accused Pappu was found in possession of three packets of chilli powder. He deposed that SI Rijwan prepared the sketch of knife which is Ex. PW 1/A having his signature at point X. He identified the knife as Ex. P-1.

18. **Analysis of Evidence**

(A) **Identification of accused persons** : According to the prosecution the appellant alongwith his co-accused Pappu was nabbed by PW 1 Sheoraj and PW 2 Harbir when they were trying to escape after committing robbery. PW 1 and PW 2 have stated in unison that on the date of the incident after committing robbery, the appellant and co-accused Pappu tried to escape when they both were chased and nabbed by PW 1 and PW 2. They both i.e. PW 1 and PW 2 have correctly identified the appellant and co-accused

Pappu. Their version in this regard is also supported by PW 3 SI Brijveer, PW 6 SI Rizwan and PW 8 Ct. Rajesh. According to these witnesses on receiving the call they have reached at the spot where they met PW 1 Sheoraj and PW 2 Harbir alongwith the appellant and co-accused Pappu. These three witnesses have also identified the appellant.

19. There is nothing in the cross examination of these witnesses to discredit or disbelieve their testimonies. Although during the course of the arguments it was vehemently argued by the counsel for the appellant that there are material contradiction between the testimonies of PW 1 and PW 2 because according to PW 1 Sheoraj co-accused Pappu had also used a knife but only one knife was recovered at the spot which according to the prosecution has been allegedly used by the appellant. In my opinion, this contradiction cannot be said to be such so as to discredit the entire case of the prosecution, keeping in view the fact that both the accused persons i.e. the appellant and co-accused Pappu were apprehended at the spot and knife was recovered from the appellant. Even the presence of the appellant and co-accused Pappu at the spot has not been denied by the defence itself, and the stand taken is that they had been caught under some mistaken identity and the actual culprits fled away from the spot. So a mere averment of PW 1 that co-accused Pappu was also having a knife is neither here nor there and does not in any manner destroy the fabric of the case of the prosecution.

20. (B) **Recovery and identification of the weapon of offence** : According to the prosecution, the knife was used by the appellant while committing the offence and he was the person who was holding the knife

during the incident but PW 1 has initially stated that the knife was used by co-accused Pappu in his examination in chief but he corrected himself and deposed that the appellant was also holding a knife. The prosecution has not been able to recover the knife which was held by co-accused Pappu but 3 chilli powder packets were recovered from co-accused Pappu. PW 2 Harbir has also stated about the knife which has been recovered from the appellant. Knife has been identified as Ex. P-1 by PW 1 and PW 2. Even the police officials i.e. PW 3, PW 6 and PW 8 who had reached the spot have also stated that one knife was recovered from the appellant and they also identified the same as PW 1. So all the 5 witnesses who were present at the spot alongwith the appellant have corroborated each other and there is no reason to disbelieve them and as such nothing has come out in the cross examination of these witnesses so as to discredit their testimonies.

21. The prosecution has been able to establish the identity of the appellant. It has also been established on record that the appellant was having a knife which was seized from him vide seizure memo Ex. PW 6/A and the same has been identified as Ex. P-1. The contention that PW 1 has also spoken about the knife having been used by co-accused Pappu has been rectified during the course of his examination and he has deposed that the knife was used by the appellant. Even otherwise, there is no concrete examination on this point from the side of the defence except some suggestions. Moreover, as stated hereinabove, all the 5 witnesses i.e. two public witnesses and 3 official witnesses who were present at the spot have categorically identified the appellant and his co-accused Pappu and deposed

that the knife was used by the appellant and was recovered from his possession.

22. The defence taken by the appellant is that he is a resident of Hapur and he had gone to his sister's house in Durgapuri and was walking towards Shahdara for taking a passenger train and under a mistaken identity he was caught but it is pertinent to mention here that no defence evidence has been produced and the appellant has not even suggested the name and address of his sister to the witnesses during their cross examination.

23. (C) **Medical Evidence** : PW 7 is Dr. Yogesh Kumar Gupta, Casualty Medical Officer of Jag Pravesh Chand Hospital who has proved the MLC of PW 1 as Ex. PW 7/A and that of PW 2 as Ex. PW 7/B. He has deposed about the injuries received by PW 1 and PW 2 and has also deposed that PW 2 received an incised superficial wound over his chest which is below the right nipple. This witness has not been cross examined and his testimony has gone unrebutted and unchallenged.

24. The Ld. Trial Court in paragraph No. 36, 37, 38 & 39 of the impugned judgment has observed as follows :

“36. Initially, PW 1 Sheoraj has stated that accused Pappu had caused injury to him by knife but the aforesaid allegation is not at all proved by medical evidence which clearly shows that Sheoraj had only two abrasions. One on the back and one on the middle finger of the hand which in fact prove the fact that injuries were not caused by knife.

37. Having said that PW 2 Harbir in his statement has clearly stated that when he was trying to capture accused Pawan, accused

Pawan had caused knife injury to him which is clearly supported and corroborated by his MLC Ex. PW 7/B which shows that there was incised superficial wound on the chest just below the right nipple of Harbir. There is absolutely no reason to believe if the injury caused on the person of Harbir is a self inflicted injury in order to falsely implicate accused Pawan.

38. The aforesaid facts clearly show that it was accused Pawan, who had caused hurt on the person of Harbir. Thus, both the accused persons had committed the crime on the complainant Sheoraj.

39. At this stage, let us have a look at Section 394 IPC and Section 397 IPC.

The essential ingredients of the offence under Section 394 IPC are as follows:

- (1) Accused committed or attempted to commit robbery;
- (2) He and anyone else jointly concerned in committing or attempting to commit robbery caused hurt;
- (3) Hurt was caused voluntarily.

The essential ingredients of the offence under Section 397 IPC are as follows :

- (1) Accused committed robbery or dacoity;
- (2) While committing such robbery or dacoity the accused-
 - (a) used a deadly weapon;
 - (b) caused grievous hurt to any person;
 - (c) attempted to cause death or grievous hurt to any person.”

25. From the evidence on record, it transpires that the appellant alongwith co-accused Pappu and one more person committed robbery on the person of PW 1 Sheoraj and robbed him of Rs. 14700/-. By virtue of evidence it has

been established that it was the appellant who has caused hurt on the person of PW 2 by giving a knife injury. The knife in the instant case is Ex. P-1 and sketch of the knife is Ex.PW 1/A.

26. In order to bring home the charge U/s 397 IPC, the prosecution must prove by convincing evidence that the knife used by the accused was a deadly weapon. In *Salim Vs. State (Delhi Administration)*, 1988 (14) DRJ 85 this Court held as under :

“9.....We all understand what a knife means and to categorise it or to fix its size for it to be a deadly weapon may not be appropriate. A knife has also been described as a pocket knife, pen knife, table knife, kitchen knife, etc. It cannot be denied that a knife can be used as a weapon of offence. It can cut, it can pierce, it can be deadly. To say that a knife to be a deadly weapon should be of a particular size would perhaps be not a correct statement. In the present case, the evidence shows that the injury was caused to Singh Ram witness by a sharp-edged weapon and there is a statement that the accused Salim was carrying a knife and it was with that knife that the injury was caused to the witness. It would not be necessary for the witness to further state as to that was the size of the knife to attract the provisions of [Section 397](#) Indian Penal Code as was contended by Mrs. Ahlawat. This contention that case under [Section 397](#) Indian Penal Code is not made out fails.”

27. In the instant case, the sketch of the knife recovered is Ex. PW 1/A and the knife which has been recovered from the appellant is Ex. P-1 which has been identified by all the 5 witnesses i.e. 2 public witnesses and 3 police officials who have reached the spot. In the aforementioned judgment, it has been observed that a knife is a knife and it is not appropriate to characterize it or to fix its size for the purposes of it to be a deadly weapon. In the instant

case, the total length of the knife recovered from the appellant is 37 Cm., out of which the length of its blade is 27 Cm. and the length of its handle is 10 Cm., so definitely without any doubt it is a deadly weapon as envisaged in section 397 IPC.

28. It was also argued that the police has not seized the blood stained clothes of PW 1 and PW 2. No doubt, the IO has failed to seize the blood stained clothes of the injured witnesses but at the most it can be said to be a fault on the part of the IO and only because of this no advantage can be given to the appellant even otherwise, PW 7 has narrated about the injuries received by PW 1 and PW 2 to which there is no cross examination. So, in my opinion, the said lapse on the part of the IO is not sufficient to disbelieve the case of the prosecution in its entirety. It is settled principle of law that defective investigation cannot be made base of acquitting the accused. In this regard reliance can be placed on a Judgment in case titled as ***State of West Bengal Vs. Meer Mohd. Omar and Ors. reported as JT 2000 (9) SC 467.*** It is also well settled that if the witnesses appear in the court for deposition then, obviously some contradictions and improvements are bound to occur. This may be due to lapse of time and memory of human being. In Criminal Trial Court, the duty of the courts is not to let off the criminals on petty discrepancies and minor contradictions. Ground realities must be appreciated. Accused be not allowed the benefit of defective investigation. Prosecution lapses cannot be allowed to escape route of criminals and prosecution has to prove its case by broader probabilities as so observed in case ***Vishveswaran Vs. State 2003 RLR 350 (SC).***

29. Therefore, in view of the discussions, mentioned hereinabove, I find no infirmity in the impugned judgment dated 04th July, 2018 and the order CRL.A. 580/2019

on sentence dated 05th July, 2018, the same are therefore upheld. Consequently, the appeal is dismissed. Since the appeal has been dismissed, no order is required to be passed on the Crl. M.B. 795/2019 as the same has become infructuous. Therefore, the same is dismissed being infructuous.

RAJNISH BHATNAGAR, J

MAY 27, 2020

Sumant

