



2024:DHC:8740



* IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Reserved on: 11th September, 2024
Pronounced on: 11th November, 2024

+

CRL.A. 360/2009

AKASH
S/O SALLI
R/O: H.No. 13/93
KALYANPURI
DELHI-91
(Presently confined in,
Central Jail No. 2, Tihar
New Delhi).

.....Appellant

Through: Mr. Archit Upadhayay and Mr. Ayush
Kumar, Advs.

versus

STATE (N.C.T) Of Delhi

.....Respondent

Through: Mr. Satish Kumar, APP for the State
along with SI Mayank Istwal.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. The Appeal under Section 374(2) of the *Code of Criminal Procedure, 1973* ('Cr.PC' hereinafter) has been filed on behalf of the Appellant against the Judgment dated 22.08.2008 and Order on Sentence dated 26.08.2008 arising out of FIR No. 159/2003 u/s 307/394/397/34 of the *Indian Penal Code, 1860* ('IPC' hereinafter) sentencing the Appellant to 07 Years of Rigorous Imprisonment under Section 397/34 of IPC and fine of Rs. 5,000/- in default Simple Imprisonment for 01 year.



2. The Appellant has assailed his conviction on the ground that there is no quality evidence led by the prosecution support of its case. The story is that the prosecution case rests essentially on the disclosure statement, which is not admissible in evidence. Though, the prosecution has claimed that the Appellant was apprehended from the public park on secret information, but no independent witness had been joined by the Investigating Officer, at the time of his arrest despite several persons having gathered on the spot. There are material contradictions in the testimony of the witnesses especially the Complainant PW-2, Mr. Bahadur and the injured PW-1, Mr. Rajesh. PW-1 pertinently was declared hostile by the prosecution as he resiled from his previous statement. He admitted in his cross-examination that he could not tell the correct place of alleged incident as to whether he took place in Block No. 1 or Block No. 2 of Khichripur. Furthermore, he admitted that there was no light at the place of alleged incident, which shows that he had not seen the accused persons. He also admitted that the police had arrived at the spot after about 45 minutes and took him to the hospital. However, in his examination-in-chief, he had deposed that he became unconscious after injuries were inflicted on his person by the accused persons and he met the Police in GTB Hospital from where he shifted to LBS Hospital. There are material contradictions in the testimony of PW-1, Mr. Rajesh and certain pertinent admissions were made, which have been overlooked.

3. It is further claimed in the grounds of Appeal that PW-2, Mr. Bahadur admitted that he was the person, who first lifted the injured with his both hands and his clothes got stained with blood but surprisingly, the Police did not seize his blood stained clothes, in order to establish his credibility as an eye witness. He, in his testimony, deposed that the injured was put in the van



by the policeman, while the injured PW-1, Mr. Rajesh in his testimony stated that he met the police in the hospital. Furthermore, PW-2, Mr. Bahadur admitted that the police had taken his signatures on the documents in the Police Station on the next day of incident at about 2:00 P.M. Also, at that time, his employer had accompanied him but surprisingly the Police did not record the statement of the employer, which creates a serious doubt about the prosecution story.

4. Furthermore, there was a considerable and unexplained delay in conducting the TIP of the Appellant, which has not been explained by the Police. He refused to participate in the TIP proceedings because he was shown to the witnesses in the Police Station. Furthermore, in the Site Plan prepared by the Investigating Officer, there is no mention of the signatures of independent witnesses, which creates a serious doubt about the authenticity of the Site Plan. It is, therefore, argued that the Judgment dated 22.08.2008 and the Order on Sentence dated 26.08.2008, is liable to be set-aside.

5. *Ld. Counsel on behalf of the Appellant* has argued that in light of the material contradictions in the testimony of the witness and the poor investigation conducted by the Police, the learned Trial Court wrongly concluded that the Prosecution has been able to prove his case beyond reasonable doubt. The conviction and the Order on Sentence is, therefore, liable to be set-aside.

6. *The Ld. Additional Public Prosecutor*, however, has argued that the overwhelming evidence by way of testimony of the Injured and the Eye witness cannot be disregarded merely on account of minor contradictions.



The Ld. Sessions Judge has rightly appreciated the evidence to convict the Appellant. There is no merit in the Appeal which is liable to be dismissed.

7. Submissions heard and the record along with the evidence perused.

8. The case of the prosecution is that on the night of 24-25/04/2003, information was received in the Police Station Kalyanpuri from Police Control Room(PCR) that three assailants have stabbed a person near DSIDC Complex, Kalyanpuri Bus Stand, which was recorded vide DD No. 37A which was marked to SI Janki Prasad who along with Constable Veersain reached the spot for investigations. The PCR had already taken the injured to the hospital from where he had been referred to LBS Hospital.

9. The Investigating Officer met with one Mr. Bahadur in the hospital, who described the entire incident. According to him, the injured, Mr. Rajesh Sharma and he, were employed in Jyoti Generator Hiring Company. He was going towards Kalyanpuri, Block No. 2, at about 11:15 p.m., he reached near House No. 2/148-149, Khandelwal Automobiles Khichripur, his colleague, Mr. Rajesh (injured) over took him on the bicycle, which touched one of the three boys who were walking on the road. Mr. Rajesh fell on the road. All the three persons gave him beatings and stabbed him with a knife. He and the injured raised an alarm '*Bachao-Bachao*'. A large crowd gathered and a PCR was called which took him to the hospital.

10. FIR No. 159/2003 under Section 307/394/397/34 of IPC was registered. During the investigations, all the three accused, namely, Akash (Appellant) and the two co-accused, Ajay @ Pummy (declared Proclaimed Offender during trial) and Ajit Singh were apprehended. The investigations were carried out and the Charge-Sheet was accordingly filed.



11. The Charges under U/s 392/397/34 IPC were framed against Akash and Ajit Singh, to which they pleaded not guilty. The third accused, namely, Ajay @ Pummy was declared a proclaimed offender, after the filing of the Charge Sheet.

12. The prosecution examined 16 witnesses in all. The most material witness was the *Complainant PW-2/Bahadur*, who proved his Complaint Ex.PW-2/A. *PW-1 Mr. Rajesh Sharma*, the injured narrated about the manner in which the incident took place. *PW-9 Head Constable, Mr. Tej Prakash*, the Duty Officer proved the DD No. 37A as Ex.PW-9/A. The PCR Call received in the night of the incident i.e. 24-25/04/2003, which has been proved by *PW-11, ASI Mr. Jagbir Singh (Retd.)*, who was posted in PCR. He deposed that on receiving information about the incident, he immediately rushed to Block No. 2, Khichripur where they found the injured Mr. Rajesh, who was taken to LBS Hospital.

13. *PW-14, SI Janki Prasad, IO who was accompanied by PW-5, Constable Manish Kumar*, has given details about the investigations carried out by him. Since no eye witness was found available in the hospital, he returned to the spot where he met one Mr. Bahadur, who gave his statement, Ex-PW-2/A, on which FIR No. 159/2003 under Section 307/394/397/34 of IPC, was registered. During the investigations, he prepared a Site Plan, Ex.PW-14/B and procured photographs of the scene through the Constable Mr. Satya Prakash. The cycle which was found lying on the spot which was seized by a Memo, Ex.PW-2/B.

14. *PW-5, Constable Manish Kumar* also explained that on the basis of secret information, the accused persons were arrested from the Park. They were identified by the Complainant, Mr. Bahadur.



15. The investigations were thereafter taken over by **PW-13, ASI Mohd. Aftab**, who recorded the statement of the injured on 07.05.2003. He also got the TIP of the accused persons conducted before the learned Metropolitan Magistrate on 11.05.2003, though the accused refused to participate in TIP.

16. **PW-15, Dr. Parmesh Sharma** identified the signatures of Dr. Sunil Rattan on the MLC of injured Mr. Rajesh, Ex.PW-15/A. **PW-3, Dr. Rajpal** had examined the x-ray plates of the injured, Mr. Rajesh but had found no bony injury on the person of the injured.

17. *Learned ASJ* considered the testimony of PW-2, Mr. Bahadur, the Complainant, as well as of the PW-1, injured Mr. Rajesh and concluded that their testimony coupled with the medical record and MLCs proved that the injured had suffered three incised wounds on the left thigh, left elbow, and left side of the chest. It was further observed that what has been termed as material contradictions in the testimony of PW-1 and PW-2, were in fact a minor contradictions, which did not shake the credibility and reliability of these witnesses. Reference was also made on Bhim Rao Anna Ingawle vs. State of Maharashtra, AIR 1980 SC 1322 wherein it was noted that it is not uncommon that there are improvements in the earlier version made during the trial in the order to give a boost to the prosecution case *albeit* foolishly, but that does not mean that falsity of testimony in one material particular would ruin it from beginning to end.

18. It was thus, concluded in the impugned judgement of Conviction, that the testimony of the Complainant and the injured, which was supported by the medical record, sufficiently proved that the two accused, who are facing trial, had committed robbery while snatching Rs.600/- from the injured and had in the process inflicted the stab injuries with a knife. They were thus,



held guilty of the offences under Section 394 and 397 of IPC. However, both were acquitted under Section 307 of IPC by observing that they neither had been intention nor knowledge that the injuries were resulted in death in the ordinary course of nature.

19. The learned ASJ sentenced both the accused with seven years Rigorous Imprisonment and fine of Rs. 5,000/- each for the offence punishable under Section 397 IPC. It was observed that no separate sentence was liable to be awarded under Section 394 of IPC.

20. *The primary witness of the prosecution* was PW-1, Mr. Rajesh Sharma, injured. He had narrated the entire incident, which happened with him on 24.04.2003. He had deposed that on the said day at about 11:15 p.m he was returning to his house in Khichripur, on his cycle after finishing his job. When he reached near Block No. 1, Khichripur, and his cycle hit the shoulder of some persons who were walking on the road. He was beaten up by them and one of the persons, took out Rs.600/- from his pocket. Also, while the other two associates of that person held him from the back, the third assailant inflicted injuries with the knife on the back portion of his thigh and back. He fell unconscious on the spot.

21. The witness was cross-examined by the State on the limited aspects. In his cross-examination by the APP, wherein he admitted that when he reached near Khandelwal Automobiles, he had met with his friend, Mr. Bahadur, who works with him in the same factory as a driver and he had talked to him and in the meantime, three persons aged about 20-22 years, came and intentionally touched his cycle. The person, who touched his cycle, then threatened him and put out a knife and took Rs.600/- from the back pocket of his pant and thereafter, started giving him beatings. He also



stabbed him on his back side and the chest. The other two associates gave him leg and fist blows. He and his friend, Mr. Bahadur, both started shouting “*Bachao-Bachao*” on which three assailants fled them on the spot.

22. Mr. Bahadur rushed to the factory owner, to report about the incident. Many people collected on the spot. The Police was informed and he was taken to LBS Hospital from where he was shifted to GTB Hospital. On the suggestion given by the prosecutor, he admitted that it was Ajay, who had intentionally struck against his cycle and snatched his money and inflicted knife injuries. The other accused Akash(Appellant) and Ajit, had given him leg and fist blows.

23. In his cross-examination by the learned counsel for the accused persons, PW-2 clarified that he and Mr. Bahadur, who works in the same factory, had left the factory together. He had talked to Mr. Bahadur, about ten minutes prior to the incident. Mr. Bahadur was on his own cycle at that time and was going back to his house. After talking to him, Mr. Bahadur had gone towards his house. He met him in the hospital on the same day after about half an hour. The employer was also present in the hospital, who was called by Mr. Bahadur or the Police from the factory.

24. The injured in his cross-examination, further explained that one Chowkidar, Mr. Jogi, had accompanied him to the hospital in a semi-conscious state. He was told by the employer that the police had called him on the phone after the incident. He further clarified that it is possible that Mr. Bahadur may have informed the employer and called him to the hospital.

25. The *second material witness* was PW-2, Mr. Bahadur, who corroborated the testimony of the injured in stating that he and the injured,



Mr. Rajesh, who worked at the same Company, were returning to their respective home, after duty hours. When he reached near the Khandelwal Automobiles, at about 11:30 pm, he asked the injured, Mr. Rajesh to go Block No. 2 while he himself took a turn towards Block-1. When he came back to the point, he found the crowd had gathered and all the three accused, whom he identified in the Court, were grappling with Mr. Rajesh. He raised an alarm and requested one person from the crowd which had gathered, to call the Police. The Police arrived at the spot and took the injured to the LBS Hospital while he went to the house to inform the employer and thereafter, went to the hospital. The Police had reached the spot within 15-20 minutes. He thereafter, along with the employer went to the hospital and reached there at about 12:00 a.m. midnight. He stayed in the hospital till about 1:00 am and was dropped to his house by his employer at about 1:30 a.m. PW-2 Mr. Bahadur, further explained that he had given a statement to the Police, which is Ex.PW-2/A.

26. This witness was cross-examined at length. He explained that he and Mr. Rajesh, were on cycle, which were being driven by him. He was pushed by the accused persons, while cycling. He had lifted the injured in his arms and his clothes got blood stained, though his blood stained clothes, were not seized by the Police. PW-2 did not receive any visible injury but felt the pain and was medically examined.

27. Ld. Counsel on behalf of the Appellant, had argued that it was unnatural for PW-2 to rush to call his employer rather than to accompany the injured to the Hospital. However, the crowd had gathered and the PCR had arrived which took the injured to the hospital. It cannot be termed unnatural for PW-2 to rush to call the employer for support. The presence of the



employer is not only corroborated by PW-1 injured, who also deposed that he found his employer and PW-2 in the hospital when he gained consciousness. Also, ASI Jagbir Singh IO had deposed similarly about the presence of the employer in the hospital. The argument of the Ld. Counsel about non-seizure of the blood stained clothes of PW-2 Bahadur, is insignificant once his presence on the spot is fully established.

28. His testimony was tried to be shaken by suggesting that he had not specifically stated that while he had seen three persons grappling with one person, he had not stated that it was Rajesh, who was being beaten by the three assailants. Furthermore, he had not stated in his statement that from the hospital, he had gone back to his residence. Ld. counsel on behalf of the Appellant had projected these aspects as put in cross-examination to be major contradictions, but the testimony of PW-2 has been consistent about the manner in which the incident took place and no material contradiction *per se* could be brought forth.

29. PW-2 Bahadur further deposed that on 28.04.2003 i.e. after about four days, the accused persons, namely, Ajit, Akash and Ajay, were arrested *vide* Memo Ex.2/D to F. The Appellant had also claimed that it was only when he was arrested after four days, his TIP was sought to be conducted, highly belatedly. He refused to participate as he had already been shown to the eye witness.

30. It was argued that there is no cogent evidence to prove the identity of the three accused persons especially when the incident had happened at around midnight and admittedly, it was dark. It was not possible for the injured or the eye witness to have identified the Appellant/accused person.



31. The Appellant may have tried to create a doubt as to his identification, but the testimony of PW-1 and 2 is consistent and is supported by the independent witness. PW-5, Constable Manish Kumar had corroborated the testimony of PW-14, SI Janki Prasad, the Investigating Officer and had deposed that on the basis of secret information, a raiding party was constituted and the accused persons were apprehended from a park of Block No. 15, where they were sitting. After their arrest, the TIP was sought to be conducted though, refused by the Appellant and the co-accused. The accused were rightly identified by the injured in the witness-box. There was no material contradiction or doubt created in the testimony of the Police witnesses.

32. The prosecution had successfully proved not only the identity of the accused persons as assailants but also that they had committed robbery by snatching Rs.600/- and stabbed injuries had also been inflicted on the person of the injured, Mr. Rajesh.

33. Having concluded that the entire prosecution had successfully proved the entire incident beyond reasonable doubt, the next question which arises is the offences for which the Appellant was liable to be convicted. Pertinently, PW-1, the injured had explained that the stab injuries had been caused by Ajay @ Pummy (who was declared as a proclaimed offender) while the other co-accused, namely, Akash, the Appellant and the co-accused, Ajit Singh, had given him fist and leg blows. It is proved from the testimony of PW-1, Rajesh that the robbery was committed by the Appellant along with the co-accused in furtherance of common intention and in the process, injury had been inflicted and thus, the Appellant was liable to be convicted under Section 394 read with Section 34 of the IPC. It is further



2024:DHC:8740



established that he was not the person, who had given the stab injuries and therefore, could not have been convicted under Section 397 IPC. The conviction is, therefore, modified to be under Section 394 and not under Section 397 IPC.

34. The Appellant has been sentenced to seven years Rigorous Imprisonment and fine of Rs. 5,000/- in default one year Simple Imprisonment for the offence punishable under Section 397 IPC. In the light of the aforesaid discussion whereby the Appellant is held convicted under Section 394 IPC, the Order on Sentence is hereby modified to five years Rigorous Imprisonment and fine of Rs.5,000/- in default two month Simple Imprisonment. The benefit of Section 428 of the *Code of Criminal Procedure, 1908* be given to the Appellant. The conviction and sentence is accordingly modified and the Appeal is disposed of.

35. The copy of the Judgment be provided to the Appellant and be also forwarded to the Jail Superintendent for compliance.

36. The Appeal is disposed of accordingly.

**(NEENA BANSAL KRISHNA)
JUDGE**

NOVEMBER 11, 2024/RS