

(2009) 03 DEL CK 0248

Delhi High Court

Case No: Criminal Appeal No. 503 of 1999

Rajinder Kumar and
Anil

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision: March 19, 2009

Acts Referred:

Arms Act, 1959 " Section 27#Criminal Procedure Code, 1973 (CrPC) " Section 313#Penal Code, 1860 (IPC) " Section 34, 342, 393, 394, 397

Citation: (2009) 03 DEL CK 0248

Hon'ble Judges: Sunil Gaur, J

Bench: Single Bench

Advocate: K.B. Andley and M.L. Yadav, in Criminal Appeal No. 503/1999 and T.N. Tripathi, in Criminal Appeal No. 589/1999, for the Appellant; Amit Sharma, Additional Public Prosecutor for State, for the Respondent

Final Decision: Dismissed

Judgement

Sunil Gaur, J.

The above titled two appeals arise out of common impugned order/judgment of 13th September, 1999, whereby these three

appellants have been convicted and sentenced to undergo RI for three years each and to pay a fine of Rupees one thousand each for the offence

u/s 393/34 of the IPC and in default of payment of fine, they have been ordered to further undergo RI for nine months each. They have also been

ordered to undergo RI for seven years each for the offence u/s 398 of the IPC. However, both these substantive sentences have been ordered to

run concurrently.

2. Since both these appeals arise out of common impugned judgment and order, therefore, they have been heard together and are being disposed

of together by this common judgment.

3. The foundational facts of this case, emerging from the record, are as follows:

Smt. Ratan Devi, r/o House No. X/3301, Gali No. 2, Raghubar Pura No. 2, Gandhi Nagar, Delhi, lodged a complaint in Police Station Gandhi

Nagar, Delhi, that on 2.6.1990, at about 4:25 p.m., when she was at her house along with her grand-daughter-Anju, the door bell rang and on

opening the door, she found that four persons were standing there and on query, one of them told that they were electricians and had come to

check the electric meter. Three persons entered the house, while one of them kept standing at the door and that while she, along with her grand-

daughter, started moving inside the house, two of them caught hold of her and the third one caught hold of Anju. One of them, the tallest one, gave

a fist blow over her face and gagged her mouth and then he took out a knife and stabbed her on her buttocks. The third one, having a pistol in his

hand, intimidated Anju, threatening her of dire consequences, in case she raised any alarm. They took Anju inside the room and tied her legs and

hands with string and on the point of gun, they asked her to tell where the money was kept and started searching the house. However, these three

persons forgot to bolt the door of the room where Anju was tied and in the meanwhile, she managed to make her hands free by untying the string

and ran outside the house. She bolted the door from outside and raised alarm for help. Many people from the locality gathered. However, the

assailants broke the net of the ventilator and tried to escape. They were chased, but one of them, tall-thin man, escaped while another one, who

was having pistol in his hand, while trying to jump on the roof of the other house, was caught hold by Raman Tomar (PW-1) and Nasir Khan. The

apprehended person told his name as Mohd. Nabi and he revealed the names of other persons as ""Rajinder and Anil"".

On the complaint of Complainant-Ratan Devi, an FIR No. 107 of 1990, under Sections 393/394/398/342 of the IPC and u/s 27 of the Arms Act,

at Police Station Gandhi Nagar, Delhi, was got registered. Complainant-Ratan Devi was sent to the hospital for medical examination, while police

arrested the accused persons and got recovered a country made pistol and a cartridge from the possession of accused Mohd. Nabi.

4. Police filed the charge sheet against accused Rajinder and Mohd. Nabi in the court and the trial court, framed charges against both the accused

persons, under Sections 393/394/398/342 of the IPC and u/s 27 of the Arms Act and since these accused persons pleaded not guilty to the

charges framed against them, they were put to trial.

5. At trial, prosecution got examined Raman Kumar (PW-1) a neighbour and an eye witness, Sh. Pawan Kumar (PW-2), Sub Judge, Delhi,

injured Anju (PW-3), Dr. A.K. Wahal (PW-4), HC Ramesh (PW-5) and Dheer Singh (PW-6). SI Gyan Singh (PW-7) is the Investigating Officer

of this case. Complainant Ratan Devi died before trial could begin and so she could not be examined at trial.

6. After completion of prosecution evidence, statement of both the appellant/Accused persons, u/s 313 of the Cr.P.C. was recorded. However,

both the appellants/accused did not lead any evidence in their defence before the trial court.

7. On conclusion of trial, the trial Court convicted and sentenced the three appellants/accused, as noted in the opening paragraph of this order.

8. In this appeal, both the sides have been heard and the evidence on record has been perused.

9. Learned senior counsel for Appellants -Rajinder and Anil contends that Test Identification Parade (hereinafter referred to as TIP) refusal by

these two Appellants was justified as they were produced before the court concerned for TIP in un-muffled face on 7th June 1990. It is pointed

out that the star witness (PW-3) in her evidence has stated that she had come to know the name of Appellant/accused Anil, when he was arrested

after two days of this incident when he was brought to the spot. As regards appellant-Rajinder, this witness (PW-3) had stated that she cannot say

where she had seen Appellant/accused Rajinder in the first instance. Reliance has been placed upon the decision of the Apex Court reported in

Kanan and Others Vs. State of Kerala, and on the extract of Punjab Police Rules, 1934, regarding identification of suspects, to contend that the

suspects have to be informed that they have to keep their faces muffled till the identification parade is held. It is urged that in case no TIP is held,

then it is wholly unsafe to rely upon the testimony of witness regarding identification of the accused for the first time in the court.

10. It has been contended on behalf of Appellant/accused -Rajender and Anil that the sole testimony of Anju (PW-3) is not at all reliable and in

fact, her version stands contradicted by the evidence of neighbour (PW-1). It is pointed out that Anju (PW-3) has stated in her evidence that

Appellant/accused Anil had given knife injuries to her grandmother-Rattan Devi, who is Complainant of this case, whereas, it is the prosecution

case that the knife injury was inflicted upon the Complainant by Appellant/accused Rajinder. Another contradiction pointed out in the prosecution

case is that Anju (PW-3) has stated in her evidence that all the three assailants had taken out the knife and had pushed her and her grandmother

inside the room, whereas, it is the prosecution case that Appellant/accused Mohd. Nabi was armed with a country made pistol. It is further

contended that the solitary witness (PW-3) is silent about the role of the fourth assailant and all this renders her testimony unreliable and the trial

court has gravely erred in relying upon it to convict these two Appellants/accused and therefore, they deserve to be acquitted.

11. On behalf of Appellant/accused Mohd. Nabi, it is contended that the main witness (PW-3) in her evidence has stated that this

Appellant/accused was armed with the knife, whereas, as per the prosecution case, he was armed with country made pistol and this contradiction

alone is sufficient to entitle him to acquittal for the offence punishable u/s 398 of the Indian Penal Code and for the offence u/s 393 of the Indian

Penal Code, he has already undergone sentence of six years, two months and twenty one days. Reliance has been placed upon a decision of the

Apex Court, reported in *Dhanai Mahto and Another Vs. State of Bihar*, , to contend that despite a minimum sentence of seven years for the

offence punishable u/s 397 of the Indian Penal Code, the sentence of four years of imprisonment was held to be sufficient to meet the ends of

justice and in the present case, the sentence of seven years imposed upon the Appellant deserves to be reduced to the period already undergone

by him. Nothing else has been urged on behalf of the Appellants.

12. On behalf of the Respondent-State, it is submitted that at the time of refusal of Test Identification Parade, by Appellant/accused-Rajinder and

Anil, they had not stated that they had been already shown to the Complainant/injured witnesses of this case and therefore, Test Identification

Parade refusal by them is not at all justified. It is urged that the evidence of the solitary witness (PW-3) has to be read as a whole and upon doing

so, it becomes apparent that her testimony has got a ring of truth in it and it inspires confidence and the same has been rightly relied upon by the

trial court to convict the Appellants/accused. Lastly, it is submitted that the decisions relied upon on behalf of Appellants/accused have no

application to the facts of this case and there is no merit in these two appeals.

13. I have thoughtfully deliberated upon the submissions advanced and have carefully scanned through the evidence on record. Upon doing so, I

find that this incident is of 2nd June 1990, and the evidence of the star witness (PW-3) had been recorded by the trial court in July, 1994, i.e., after

a gap of about four years. She has not stated in so many words that she had seen Appellant/accused Anil with the police at the spot after two days

of this incident. What she had stated is that she had come to know about the name of this Appellant/accused. Since this witness (PW-3) was not

cross-examined on behalf of Appellant/accused-Rajinder in July, 1994, therefore, this witness was again re-called and was cross examined on

behalf of this Appellant/accused in January, 1999, and she had stated that she cannot say where she had first seen Appellant/accused Rajinder. To

say the least, it would be highly unfair to give undue benefit of the aforesaid non-committal statement made by this witness (PW-3) after more than

eight years of this incident. It is so said because in normal course of events, had Appellant/accused Rajinder and Anil, been shown to the

Complainant/injured witnesses, the same should have found mention in the TIP refusal memo, Ex.PW-2/A on 7th June 1990 itself. What is stated

on behalf of Appellant/accused Rajinder and Anil in document Ex.PW2/A, deserves notice and it reads as under:

Both the accused have been produced in court from JC in unmuffled face, when they were sent on their surrender. Both the accused refused to

join TIP on the ground that they have been produced in the court in unmuffled face.

Sd/-

MM

7th June 1990.

14. One fails to understand, as to what had stopped Appellants/accused Rajinder and Anil from disclosing to the Metropolitan Magistrate

concerned, before whom, they were produced that they have already been shown to the witnesses of this case. Having not done that,

Appellants/accused Rajinder and Anil cannot be heard to say now that they were already shown to the witnesses. Therefore, the extract of Punjab

Police Rules and decision of the Apex Court in case of Kanan and Others Vs. State of Kerala, , relied upon by these two Appellants is of no avail

to them.

15. The star witness (PW-3) has categorically stated in her evidence that these three Appellants/accused are the one who had entered the house

and had shown knife to her and her grandmother and thereafter, knife injury was given to the grandmother of this witness and this witness was tried

with a cord and when Anju (PW-3) had refused to disclose as to where the keys of almirah were, she was threatened that she would be killed by

these Appellants/accused. However, she managed to free herself somehow and the robbery bid was foiled.

16. It is true that Anju (PW-3) is silent in her evidence about the fourth assailant, but no benefit on this account accrues to the Appellants/accused

because she has not been cross-examined on this aspect. Whether the stabbing was by Appellant/accused Anil or Rajinder, the benefit of the same

has been already given by the trial court by returning a finding of acquittal for the offence punishable u/s 394 of the Indian Penal Code. It is true

that Anju (PW-3) in her evidence had stated that these three Appellants/accused were armed with knives and in fact, it was found that one of

them, i.e. Appellant/accused Mohd. Nabi was armed with a country made pistol and not with a knife. The requirement of Section 398 of the

Indian Penal Code is that the accused would come within the range of this offence, if he is armed with a deadly weapon. Since the evidence of

material witness (PW-3) was recorded after a lapse of about four years of this incident, therefore, the inadvertent lapse of attributing knife instead

of a pistol to Appellant/accused Mohd. Nabi is quite natural and the same can be ignored and benefit on this account, does not accrue to

Appellant/accused Mohd. Nabi. It would not make much difference as to whether the offender is armed with knife or a pistol, as in both cases, the

offence committed would still come within the ambit of Section 398 of the Indian Penal Code.

17. In my considered view, the evidence of the injured witness Anju (PW-3) regarding the identity of these three Appellants/accused is clinching

one and the trial court has rightly relied upon it.

18. I do not find any illegality or infirmity in the evidence of this star witness Anju (PW-3) regarding the identity of the Appellants/accused. There is

no plausible reason as to why she would falsely implicate the Appellants/accused in this case. It is pertinent to note that the stand of these three

Appellants/accused before the trial court was of bald denial of the prosecution case and of false implication. These Appellants/accused do not state

as to why they have been falsely implicated in this case and they had not led any evidence in their defence before the trial court.

19. In the decision of the Apex Court in the case of M/s. Iqbal Singh Vs. State of Haryana, , the weapon of offence used was bamboo sticks and

lathies and it was said that the said weapons were not lethal or deadly and in the peculiar facts of the said case, the sentence was reduced to

rigorous imprisonment for a period of four years.

20. Aforesaid decision has no application to the facts of this case and Appellant/accused Mohd. Nabi cannot derive any advantage because he

was armed with a country made pistol and was apprehended at the spot.

21. In view of the aforesaid narration, I find that there is no merit in these two appeals as the impugned judgment and the sentence is perfectly legal

and justified in the facts of this case. Thus, the impugned conviction and sentence imposed upon these three Appellants is hereby upheld. The three

Appellants/accused are on bail. Their bail bonds and surety bonds are cancelled. They are directed to surrender forthwith, failing with, trial court is

directed to ensure that they are taken into custody to serve out the remainder of the sentence as awarded by the trial court.

22. With the aforesaid directions, these two appeals are dismissed.