

Bijender @ Naushad Vs. State

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Court : Delhi

Decided On : Feb-13-2014

Judge : V. K. Jain

Appellant : Bijender @ Naushad

Respondent : State

Advocate for Def. : Mr. Feroz Khan Ghazi

Advocate for Pet/Ap. : Ms. Nandita Rao

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

07. 02.2014 Date of Decision:

13. 02.2014 % + CRL.A. 414/2013 BIJENDER @ NAUSHAD Through:
Appellant Ms Nandita Rao, Adv. versus STATE Through: Respondent Mr.
Feroz Khan Ghazi, APP. CORAM: HONBLE MR. JUSTICE V.K.JAIN
JUDGEMENT V.K.JAIN, J.

On 18.04.2008, an intimation was received by Police Control Room that two boys had come near Babu Ram School to commit dacoity, one of them had managed to escape firing a shot, whereas the other had been apprehended. On receipt of the said information, SI Rajpal Sharma of Police Station Farsh Bazar reached the

House No.449/1, Gali No.3, Bhola Nath Nagar, Shahdara and found crowd gathered there. The complainant Shweta who was present on the spot, met him there and her statement Ex. PW-5/A was recorded by the police officer. In her statement Shweta stated that she was living in House No.449/1, Gali No.3, Bhola Nath Nagar Shweta along with her younger sister Alka and her brother Lalit, her mother having gone to Shimla, where her father was posted at that time. Her elder brother Lalit at that time had gone to his house. At about 4.30 PM, she along with her younger sister Alka went to Teliwada for shopping, after locking the door of the house and taking keys with her. When they returned at about 5.15 PM, she found the door open and one person with white spots on his face standing outside the house. At that very time, another person came out of the house. When she enquired from them as to who they were, the person with white spots threatened her with an iron rod which he was carrying. The said iron rod was sharp on both its ends. On the complainant receiving alarm, both the persons started running. The complainant, her cousin Pawan and some neighbours however chased them. The man with white spots fell down and was apprehended, whereas the other person managed to escape, firing a shot in the air. On returning to the house and checking, the complainant found some articles of jewellery, detailed in the complaint missing from their house. The appellant before this Court is the person who was handed over to the police officer when he reached the spot.

2. Vide the impugned judgment dated 17.12.2012, the appellant was convicted under Section 454 of IPC read with Section 34 thereof as well as under Section 392 of the said Code read with Section 397 thereof. The appellant was also convicted under Section 174A of IPC. The appellant was sentenced to undergo RI for five years and to pay a fine of Rs.5,000/- or to undergo RI for a period of six months in default under Section 454/34 of IPC; RI for seven years and to pay a fine of Rs.5,000/- or to undergo RI for six months under Section 392/397 of the IPC; and RI for two years under Section 174A of IPC. Being aggrieved from his conviction and sentence awarded to him, the appellant is before this Court.

3. The complainant came in the witness box as PW-5 and stated that on 18.04.2008, when she returned from the market along with her younger sister, she found the lock on the door missing and the door was lying opened. A person with

whitish spots on his face was standing outside the house with an iron rod in his hand. The iron rod had pointed ends on both the ends. She noticed another person coming out from the house and when she asked the person having whitish marks on his face about his identity, he asked her to keep quiet and pushed her. Her sister Alka raised alarm, whereupon both of them started running away. Her cousin Pawan, uncle Rajender Kumar and some neighbours chased those persons. The person with whitish marks on the face fell down and was over-powered and beaten, whereas the other person managed to run away, while firing in the air. The person who was over-powered and apprehended on the spot was handed over to the police. On checking, the almirah it was found that the jewellery of her mother comprising gold necklace, four gold bangles, two big gold karas, one Mangalsutra, four gold rings, three pair of gold tops of her mother, one pair of gold tops belonging to her, silver bichuas and four pair of silver pajabs were missing. Initially, she stated that she cannot identify the person who was apprehended on the spot, but when she was cross-examined by the learned APP, she identified the appellant, who was present in the Court, as the person who was standing outside her house, had threatened her and was later over-powered.

4. PW-6 Alka is the younger sister of the complainant. She corroborated her deposition and also identified the appellant in her examination-in-chief itself as the person who was standing outside the door of their house with an iron rod in his hand. She also stated that when Shweta asked the appellant as to who he was, he asked her to remain quiet, pointing out the rod at her. She further stated that when she raised alarm, one more person came out of the house and on hearing her noise, her cousin Pawan and uncle Rajender as well as some neighbours chased the accused persons. She also corroborated the deposition of the complainant with respect to the appellant being chased, falling down, being over-powered and handed over to the police. She also corroborated the deposition of her sister with respect to the theft of articles of jewellery from their house.

5. PW-7 Pawan is the cousin of PW-5 Shweta and PW-6 Alka. He stated that on 18.04.2008, he came out in the street on hearing the noise of chor chor and saw her cousins Shweta and Alka shouting. He also saw two persons running towards the side of Shalimar Bagh and chased them along with his uncle and 3-4 other

persons. He identified the appellant who at that time was present in the Court as the person who lost his balance and fell down while running away. According to him, while his uncle and other people apprehended the appellant, he kept chasing the other person, but he managed to run away, after firing in the air. He also stated that the boys in the street gave beating to the appellant as a result of which he sustained injuries. He also deposed with respect to the recovery of a sharp edged iron rod from the appellant.

6. PW-8 SI Rajpal Sharma stated that on 18.04.2008, when he reached the spot on getting copy of the DD No.14A, he found a crowd gathered on the spot and the appellant was produced before him in an unconscious condition along with an iron rod having sharp edges on both the sides. PW-1 Constable Sahansar Pal has corroborated the deposition of SI Rajpal Sharma with respect to their visiting the spot and the appellant being handed over to them in unconscious state along with the iron rod.

7. In his statement under Section 313 Cr.P.C., the appellant denied the allegations against him and stated that on the date of this incident, he was standing near Atta Chakki under the influence of drugs, he being a drug addict. He further stated that he fell down from the platform in front of Atta Chakki and received some injuries.

8. I see no reason to disbelieve the complainant and her sister with respect to the theft of various articles of jewellery from their house. The incident was reported to the police immediately after the complainant noticed one person standing outside her house with a iron rod in his hand, another person coming out of the house, both of them being chased and one of them being overpowered and apprehended. The complainant had nothing to gain by reporting a false complaint of theft in her house.

9. The next question which arises for consideration is as to whether the theft in this case amounts to robbery or not. Section 390 of IPC which defines Robbery inter alia provides that when theft is robbery if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away the property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of

instant death or of instant hurt, or of instant wrongful restraint. The robbery attracts enhanced punishment under Section 397 of IPC if the offender inter alia uses any deadly weapon, at the time of committing robbery.

10. It has come in the deposition of the complainant Shweta that when she asked the person with white spots on his face, who was standing outside the house with an iron rod having pointed ends on both the sides, about his identity, he asked her to remain quiet and pushed her. It is, thus, evident that the aforesaid person caused hurt to the complainant in committing the theft and/or carrying away the stolen articles by pushing her. The theft committed in this case, therefore, amounted to robbery as defined in Section 390 of IPC.

11. The next question which comes up for consideration is as to whether the appellant before this Court was the person who was standing outside the house of the complainant with an iron rod in his hand, who had run away after pushing the complainant and who was later chased, overpowered and beaten. The appellant has been identified not only by the complainant but also by her sister Alka and their cousin Pawan. The complainant and her sister, saw the appellant standing outside their house in broad day light and also had some conversation with him when they inquired about his identity and he asked the complainant to keep quiet. Therefore, they had ample opportunity to look at the person standing outside their house and were in a position to identify him during trial. Moreover, the complainant as well as his sister and their cousin clearly stated in their statements to the police that the person who was standing outside the house of the complainant with an iron rod in his hand had whitish spots on his face. Admittedly, the appellant before this Court has whitish spots on his face. Therefore, neither the complainant nor her sister could have committed any mistake in identifying the appellant.

12. It has come in the deposition of the witnesses that the person standing outside the house of the complainant was chased and overpowered and thereafter he was beaten by the members of the public. The person who was apprehended near the flour mill, which is nearby the house of the complainant, was thereafter handed over the police. There is no dispute that it is the appellant Bijender, who was handed over to the police on the aforesaid date, time and place. The case of the

appellant in this regard is that he is a drug addict and though he was present outside the flour chakki on the aforesaid date and time, he was not involved in the commission of robbery. The plea taken by the appellant is that he had fallen from the platform in front of the flour chakki and had received some injuries on account of the said fall. However, there is no material on record, which would substantiate the plea taken by the appellant in his statement under Section 313 of Cr.P.C. PW7 Pawan was very emphatic in his deposition that the appellant before this Court was the person who had lost his balance and had fallen down while running. He was thereafter apprehended and beaten by the members of the public. I see no reason to disbelieve the deposition of PW7 Pawan in this regard. He had nothing to gain by implicating the appellant in a false case of robbery. Moreover, as noted earlier, the person who was present outside the house of the complainant with an iron rod in his hand had white spots on his face. Therefore, no mistake could have been committed by PW7 in identifying him during the course of trial.

13. A perusal of application dated 25.4.2008 filed by the appellant under Section 439 Cr.P.C. for grant of bail would show that in para 2 of the application he alleged that on 18.4.2008 he was assaulted by the public when he was passing near the spot. Thus, the plea taken by the appellant in his statement under Section 313 Cr.P.C. is contrary to the plea taken by him in the bail application. In fact, the beatings given to him by the public had been expressly admitted by the appellant in his bail application. A perusal of MLC of the appellant Ex.PW9/A would show that he was examined in the hospital, history of being beaten by public was given. Had the appellant not been beaten by the public as is now claimed by him, it would not have been so recorded in his MLC. Moreover, when he was taken to the hospital, the appellant did not claim that he had sustained injuries on account of his falling from the platform near the flour mill. In these circumstances, the plea taken by the appellant does not inspire confidence and, therefore, cannot be accepted.

14. In my view, the prosecution has established beyond reasonable doubt that it was the appellant Bijender @ Naushad who was present outside the house of the complainant along with an iron rod in his hand and, therefore, the robbery of jewellery from the house of the complainant was committed pursuant to a common

intention which the appellant shared with the other person involved in the robbery. The other question which comes up for consideration before this Court is as to whether the appellant had used the iron rod in terms of Section 397 of IPC and whether the said iron rod can be said to be a deadly weapon. The contention of the learned counsel for the appellant is that neither an iron rod is a deadly weapon nor did the appellant use the said rod in terms of Section 397 of the Code. In support of her contention, the learned counsel for the appellant has relied upon *Md. Aslam Vs. State of Bihar* 1985 CrL.L.J.

1760 and *Adesh Kumar Vs. State & connected matter* 28 (1995) DLT126 15. In *Phool Kumar Vs. Delhi Administration* AIR 1975 SC905 the accused was carrying a knife in his hand at the time the robbery was committed. It was held by the Honble Supreme Court that he was carrying a deadly weapon. The proposition of law which emerges from the said decision is that merely carrying a weapon in the hand, if it is visible to the victim, would amount to its use at the time of committing robbery, the purpose being to intimidate the victim on account of the weapon being carried by him. In the case before this Court, the appellant had an iron rod in his hand when a theft of jewellery was being committed by his accomplices inside the house. Therefore, he did use the iron rod, at the time of commission of robbery.

16. In *Adesh Kumar* (supra), the charge against the appellant was that he had used a knife for committing robbery. The witness did not tell the court as to what kind of knife was used by the appellant nor did he depose with respect to the size of its blade. In the circumstances it was held that the weapon used by the appellant could not be said to be a deadly weapon. This judgement, in my view, would be per incuriam since the attention of the court was not drawn to the binding decision of the Honble Supreme Court in *Phool Kumar* (supra). Moreover, in a subsequent decision in *Salim Vs. State* 1987 (3) Crimes 794, this Court held that to categorise knife or to fix its size for it to be a deadly weapon may not be appropriate. It was further held that to say that a knife, to be a deadly weapon should be of a particular size would not be a correct statement. Similar view was taken in *State of Maharashtra Vs. Vinayak* 1997 CrL.L.J.

3988 where also the High Court held that irrespective of its size any knife is a deadly weapon. In *Md. Aslam (supra)*, the Court took the view that in order to bring a case under Section 397 of IPC it has to be shown that the accused had used the weapon in respect of achieving the object and mere being found in possession of a deadly weapon is not enough to convict him under the said Section. However, in the present case, the iron rod which the appellant was having in his hand was clearly visible to the complainant and her sister. Moreover, at the time the iron rod was visible to the complainant and her sister, the appellant also asked them to keep quiet and pushed the complainant while fleeing from the spot. In my view, when a weapon in the hands of a person carrying it is visible to the victim of the crime, it does have the intended effect of intimidating the victim and such an act also contain an implicit threat to use the weapon against the victim in case he resists the offender from executing his plan. Therefore, carrying a deadly weapon which is visible to the victim at the time of commission of robbery amounts to its use within the meaning of Section 397 of IPC. In any case, the view taken by the Apex Court in *Phool Kumar (supra)* does not permit taking a contrary view in this regard.

17. Coming to the question as to whether the iron rod can be said to be a deadly weapon or not, admittedly, the expression deadly weapon has not been defined anywhere in the Code. The natural and grammatical meaning of deadly weapon would be a weapon which can cause death of a human being. It has come in the evidence that the iron rod which the appellant was having in his hand had pointed ends on both sides. The length of the iron rod was 53 cms. as noted in the seizure memo Ex.PW2/A. In my view, though every iron rod may not qualify as a deadly weapon, an iron rod which is 53 cms long and has pointed ends on both sides can certainly cause death of a human being, if it is used as a weapon of offence at a vital part of the body such as head of a human being. In *Saligram Vs. State of M.P.* 1990 Supp(1) SCC60 one of the appellants before the Apex Court was carrying an iron rod whereas the other one was armed with a sword. The Honble Apex Court inter alia observed that they were armed with deadly weapons, the implication of the judgement being that iron rod could also be a deadly weapon. In *Thoti Manohar Vs. State of Andhra Pradesh* (2012) 7 SCC723 two of the appellants were armed with iron rods whereas one was armed with a billhook

when they trespassed into the house of the deceased. It was observed that the weapons they carried were lethal in nature. Therefore, the appellant who used the aforesaid iron rod at the time of commission of robbery has rightly been convicted under Section 397 of the Code.

18. It has come in the deposition of the complainant that she had locked the house before she went to the market along with her sister. The lock on the door was found missing and the door was open when she returned from the market. It is, therefore, obvious that the person who committed robbery had entered their house by breaking open the lock which they had put on the door while going to the market. The expression house-breaking is defined in Section 445 of IPC. A person is said to commit "house- breaking" if he commits house- trespass by effecting his entrance into the house or any part of it by opening any lock in order to commit house trespass or in order to quit the house after house trespass. Therefore, the entry in the house of the complainant for the purpose of committing theft amounted to house breaking punishable under Section 454 of the Act. Therefore, no fault can be found with the conviction of the appellant under Section 454 of IPC.

19. The appellant was released on bail during investigation of the case. On filing charge sheet against him summons were issued to him by the trial court. The summons, however, could not be served upon him and thereafter warrant of his arrest was issued, which remained unexecuted. Process under Section 82 of Cr.P.C. was then issued against him and ultimately he was declared a Proclaimed Offender on 28.9.2011. This led to filing of a supplementary charge sheet against him under Section 174A of the Act. PW10 who executed the process issued under Section 82 of Cr.P.C. stated that he visited the given address of the appellant his father met him and stated that he had no relations with the appellant. A copy of the process was, therefore, pasted at the given address as well as on the notice board of the court. In terms of proclamation, the appellant was required to appear before the trial court on 28.3.2011. He, however, did not appear on the said date. Though later he was arrested in some other case, admittedly he was not in jail on 28.3.2011, he having been admitted to bail only on 1.5.2011, as stated by PW7, an official from jail No.8/9, Tihar Jail, Delhi. The learned trial Judge, therefore, convicted the appellant under Section 174A of IPC on account of his failure to

appear on 28.3.2011, despite publication of proclamation under Section 82 of the Cr.P.C. This is not the case of the appellant that he was not aware of the proclamation issued against him. This is also not his case that the police official had not gone to his house and had not met his father. The plea taken by him in his statement under Section 313 Cr.P.C. was that he being in judicial custody in some other case, could not appear before the concerned court. Since there is no material on record to show that the appellant was in custody on 28.3.2011, the plea taken by him is patently false. Therefore, the appellant has rightly been convicted under Section 174A of IPC.

20. For the reasons stated hereinabove, I find no good ground to interfere with the conviction of the appellant. The sentence awarded to him under Section 392/397 of IPC being the minimum sentence prescribed in the Code, there is no scope for reduction of the substantive sentence awarded for the said offences. The appellant has been sentenced to imprisonment for two (2) years under Section 174A of IPC. The sentence awarded to the appellant for the said offence cannot be said to be excessive or on the higher side and, therefore, there is no scope for its reduction. The maximum sentence which could be awarded to the appellant, under Section 454 of IPC is ten (10) years. He having been awarded substantive sentence of imprisonment for a period of five years, there is no ground for reducing the said sentence. Since the fine imposed upon the appellant being quite modest, there is no scope for its reduction. However, in the facts & circumstances of the case, it is directed that in the event of failure of payment of fine imposed under Section 454 and 392/397 of IPC, the appellant shall undergo RI for fifteen (15) days each instead of six (6) months each awarded by the trial court. The appeal stands disposed of accordingly. One copy of this order be sent to the concerned Jail Superintended for information & necessary action. LCR be sent back along with a copy of this order. FEBRUARY13 2014 BG/rd Crl. A. No.414/2013