Rajiv Vs. State

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Court : Delhi

Decided On : Mar-10-2014

Judge : V. K. Jain

Appellant : Rajiv

Respondent : State

Advocate for Def. : Mr. Feroz Khan Ghazi

Advocate for Pet/Ap. : Mr. Mohit Mathur, Mr. Shishir Mathur, Mr. Pankaj Verma

Judgement :

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

21. 02.2014 Date of Decision:

10. 03.2014 % + CRL.A. 219 of 2010 RAJIV Through: ..... Appellant Mr. Mohit Mathur, Mr. Shishir Mathur & Mr. Pankaj Verma, Advs. versus STATE Through: ..... Respondent Mr. Feroz Khan Ghazi, APP. CORAM: HONBLE MR. JUSTICE V.K.JAIN JUDGEMENT V.K.JAIN, J.

On 26.4.1999, on receipt of copy of DD No.25, S.I. Manoj Kumar of Police Station Saraswati Vihar reached F-304, Rashmi Apartment where the statement of the complainant Sushil Agarwal was recorded by him. The complainant told him that on the aforesaid date at about 11:15 a.m., he withdrew Rs.9.55 lakh from Bank of

Punjab, Sector-8, Rohini. Out of the aforesaid amount of Rs.9.55 lakh, Rs.65,000/- were paid by him to one Naresh Jain and out of the remaining amount Rs.8.00 lakh were kept by him in a parachute bag of yellow colour which he handed over to his employee Babu Lal. The balance amount of Rs.90,000/- were kept by him in a canvas bag, which he hung on the handle of his scooter. Thereafter both of them were going on the scooter being driven by him. On the Outer Ring Road in front of Section 8, Rohini, on crossing half of the road, he had to stop his scooter, as traffic was coming on the road from the other side. In the meanwhile, a white colour Maruti car bearing No.DL1C D1652came from behind and two boys got out of the said car. One of the boys was tall and slim, whereas the other boy was rather short and well-built. The slim boy put a country made pistol on his neck, whereas the other boy started snatching bag from Babu Lal. When he resisted, that boy put a country made pistol on the temple of Babu Lal. Both the bags were snatched from them and thereafter they boarded the vehicle from which they had got down and sped towards Peera Garhi Chowk. He further stated that the aforesaid car was already in start position and he could feel that one or two other boys were sitting in it though he could not see properly on account of the glasses of the car being dark. He claimed that he could identify the boys if brought before him. He further stated that being scared, they went home and since his mother was not well, he did not share the incident in the house. In the evening, on the advise of the persons known to him he thought of reporting the incident and accordingly his brother Sunil informed Police Control Room in this regard. An FIR under Section 392/34 of IPC was registered on the aforesaid statement of Shri Sushil Agarwal.

2. On receipt of information regarding recovery of car No.DL1C D1652 inquiry with respect to the owner of the aforesaid car was made and his statement was recorded. During investigation, the Investigating Officer (for short IO) received information about the arrest of the appellant Rajiv under Section 41.1 of the Code of Criminal Procedure, 1908. After obtaining his production warrant, he was formally arrested in this case and attempt was made to get him identified in a TIP. The appellant Rajiv, however, refused to join TIP whereafter his police remand was obtained. This is also the case of the prosecution that the appellant Rajiv got recovered a country made pistol while in police custody.

3. As many as four persons were chargesheeted after completion of investigation. They were charged under Sections 392/397/34 of IPC. The appellant Rajiv was also charged under Section 25 of the Arms Act. The accused persons having pleaded not guilty, twenty-three (23) witnesses were examined by the prosecution. Three (3) witnesses were examined in defence.

4. The complainant Shri Sushil Kumar Agarwal came in the witness box as PW20 and inter alia stated that on 26.4.1999, he withdrew Rs.9.55 lakh from Bank of Punjab, Sector-8, Rohini, out of which Rs.65,000/- were paid by him to Mr. Naresh Jain, whom he had called at the bank and out of the remaining amount, Rs.8.00 lakh were kept in a polythene bag, whereas the balance amount of Rs.90,000/- was kept in a canvas bag. He further stated that when they were going on Outer Ring Road on the scooter being driven by him and Babu Lal, the pillion rider carrying Rs.8.00 lakh with him in a bag and Rs.90,000/- in the bag hung on the handle of the scooter, he had to stop the scooter due to parking of a truck on the road side. Immediately one Maruti car came over there and was stopped aside their scooter. Two persons, one of whom was a thin built person put a country made pistol on his parietal region, whereas the other person who was healthy and fat pointed a country made pistol/katta on the head of Babu Lal and they snatched both the bags, and they ran away in the car towards Peera Garhi Chowk. He along with Babu Lal chased them but could not follow, they being at high speed. Thereafter they became perplexed and came to his house. Since his mother was serious they could not disclose the incident to the family members. He, however, informed his younger brother Sunil Agarwal in this regard who immediately came to the house and informed the police. The witness identified the appellant Rajiv as the boy who had come to him. He also pointed out the other boy who had pointed country made pistol on the parietal region of Babu Lal.

5. Babu Lal came in the witness box as PW13 and corroborated the deposition of the complainant with respect to withdrawing money from the bank, keeping Rs.8.00 lakh in one bag and Rs.90,000/- in the other bag. However, regarding the other bag, he stated that it had been kept on the foot of the scooter near its dicky. He further stated that they stopped the scooter at the red light as the vehicles were coming on the road from the other side. A car came from their behind, two (2)

persons got out of the car and put country made pistols on them. Those persons snatched their bags and sped away in the Maruti car No.DL1C D1652 He inter alia identified the appellant Rajiv as the person who had put country made pistol on Sushil. According to him the accused Ashwani was the other boy who, along with Rajiv, had snatched their bags. He also identified another accused Harvinder as the person who was sitting on the backseat of the car and accused Sajan as the person who was driving the aforesaid Maruti car.

6. PW2, Sunil Kumar Agarwal is the brother of the complainant. He stated that on 26.4.1999, his brother told him that two boys had robbed them of Rs.8.90 lakh at gun point. On coming to know of it he made a telephone call to the police. In the cross-examination he stated that his brother had returned home at about 12:00 noon and the police was informed by him at about 8:00 p.m. He denied the suggestion of the accused persons including the appellant Rajiv that no incident of robbery had taken place and his brother has embezzled the amount in question after withdrawing it from the bank.

7. PW4 Naresh Arya is the owner of the aforesaid car. He stated that the aforesaid car was stolen on 25.4.1999, from a Banquet Hall on Delhi Road, Rohtak and an FIR in this regard was lodged by him with the Police Station Civil Lines, Rohtak. PW8 Head Constable Satish Kumar inter alia stated that on 25.6.1999, the appellant Rajiv had got recovered a country made pistol from a park between A & B Block of Saraswati Vihar after removing the earth. He claimed that one live cartridge was found in the chamber of the pistol. He identified the pistol Ex.P2 as well as the cartridge Ex.P3. PW7 Constable Harvinder Kumar stated that on 26.4.1999, Maruti car No.No.DL1C D1612was found parked abandoned and was seized. PW9 Constable Rampal stated that on 26.6.1999, the appellant Rajiv got recovered a country made pistol from C Block park, which was seized vide memo Ex.PW8/C. PW11 Constable Mahender stated that on 20.6.1999, they came to the court with the accused Rajiv for his TIP and when he was produced before a Magistrate, he refused to join the TIP. PW19 Shri P.D. Gupta stated that on 26.6.1999 when he was working as Metropolitan Magistrate, the application for TIP of the appellant Rajiv was assigned to him. He (Rajiv), however, refused to participate in the TIP vide proceedings Ex.PW19/G. PW22 S.I. Manoj Kumar is the

IO of the case. He inter alia stated that on 20.6.1999, on receipt of information about arrest of the appellant Rajiv under Section 41.1 of Cr.P.C. he collected the copy of the disclosure statement made by him and after interrogating him he was formally arrested and produced before the Magistrate in muffled face. He further stated that on 24.6.1999, the appellant Rajiv refused to join Tip before a Metropolitan Magistrate.

8. In his statement under Section 313 Cr.P.C., the appellant denied the allegations against him and claimed that he had been kept in the illegal custody by Crime Cell, Sonepat since 28.4.1999.

9. DW1 Sukhbir is the father of the appellant Rajiv. He inter alia stated that on 29.4.1999, a police party headed by ASI Satbir Singh of Crime Branch, Sonepat and including four (4) officials from Delhi Police came to his house and took Rajiv as well as other accused Harvinder with them on the ground that they were required in a case registered in Police Station Jahangirpuri, Delhi. He further stated that both of them were kept confined in Sonepat Crime Branch for about one (1) week. DW2 Raj Singh stated that on 29.4.1999, some police officials from Delhi and some police officials from Sonepat came to their village and took Rajiv and Harvinder with them.

10. Vide impugned judgement dated 27.11.1999, the appellant Rajiv as well as his co-accused Ashwani were convicted under Sections 392/397/34 of IPC whereas another accused was convicted under Section 392/34 of the Indian Penal Code. Vide Order on Sentence dated 30.11.2009, the appellant Rajiv was sentenced to undergo RI for eight (8) years and to pay fine of Rs.10,000/- or to undergo SI for six (6) months in default. Being aggrieved from his conviction and sentence awarded to him, the appellant is before this Court by way of this appeal.

11. The impugned judgement has been assailed by the learned counsel for the appellant primarily on the following grounds: a. No witness from the bank was examined to prove the alleged withdrawal of Rs.9.55 lakh. b. The appellant was acquitted of the charge under Section 25 of the Arms Act. c. The appellant was shown to the witnesses while in police custody. d. There is unexplained delay of more than eight (8) hours in lodging the FIR.

12. The learned counsel for the appellant has filed a copy of the judgment dated 25.03.2009, whereby the appellant and his co-accused Ashwani and Harvinder were acquitted of the charge under Section 379 of IPC for committing theft of car No.DL1CD-1652, in which the robbers are alleged to have fled away after commission of robbery. A perusal of the said judgment would show that neither the complainant Shri Sushil Agarwal nor the eye-witness Babu Lal Sharma were produced in the aforesaid case. The case of the prosecution was based on the recovery of the car and the disclosure statements alleged to have been made by the accused persons. The car had already been recovered lying abundant before the accused in the aforesaid case were arrested. It was, therefore, held by the Trial Court that there was no evidence of the accused having committed theft of the said vehicle or having received or retained it knowing or having reason to believe the same to be stolen property. Since neither the complainant nor Babu Lal Sharma were produced as eye-witnesses in the aforesaid case, the Trial Court had no occasion to consider their deposition and then take a view on the charge of theft of the vehicle. In the case before this Court, the appellant have been convicted for committing robbery in Delhi, and not for committing theft of the vehicle from Haryana, which is a distinct offence. The robbery committed in this case was not a part of the same transaction in which the vehicle was stolen from Haryana. Therefore, acquittal of the appellant on the charge of theft of the vehicle would have no bearing on his conviction for committing robbery.

13. The learned counsel for the appellant has relied upon Balak Ram vs. State 24 (1983) DLT142 The said judgment, however, would have no application in the case before this Court since the appellants were armed with country-made pistol and not with knives. A perusal of the said judgment would show that one of the issues which arose before the Court in the aforesaid case was whether the knife alleged to have been used in that case was a deadly weapon. It was observed that what would make a knife deadly is its design or the manner of its use such as is calculated to or is likely to produce death and, therefore, it is a question of fact to be proved by the prosecution that the knife used by the accused was a deadly one. Noticing that the knife alleged to have been recovered from the accused had neither been shown to the victim when he came to depose nor had he given any description of the knife, it was observed that the accused could legitimately claim

that the weapon used by him had not been proved to be a deadly one. However, the said judgment would not apply in the present case since the weapon alleged to have been used by the appellants were country-made pistols and this is nobodys case that country-made pistols are not deadly weapons.

14. The learned counsel for the appellant contended that since despite having been charged, the appellant was not convicted under Section 25 of Arms Act, that amounts to his acquittal in respect of the said charge which, in turn, would falsify the case of the prosecution that fire arms were used during commission of robbery. In support of his contention, the learned counsel for the appellant has relied upon Diwan Vs. Raja Ram & Ors. AIR1941 Oudh 575. In Diwan (supra), the trial court had convicted seventeen (17) persons under Section 323, 147 & 426 of IPC. It appeared from the order sheet that one Raja Ram who was also one of the accused was acquitted though there was no mention whatever in the judgement passed by the trial court. The appeals filed by the convicted persons were dismissed. While dismissing the appeals, the learned Additional Sessions Judge noted that the trial court had sentenced only sixteen (16) accused though one Bhagwan Baksh had also been convicted and had appealed against his conviction. The appeal filed by Bhagwan Baksh was also dismissed. He also noted that there was no order of acquittal of Raja Ram but in the order sheet it had been mentioned that he had been acquitted, which in the opinion of the learned Additional Sessions Judge amounted to an irregularity and not an illegality. He also noted that the conviction was under Section 323 and not under Section 325 of IPC though the complainant Diwan had received grievous injury. The accused persons filed a criminal revision in the High Court. On the application filed by the injured Diwan a reference was made by the learned Sessions Judge to the High Court for enhancement of sentence. Remading the matter back to the trial court for a fresh trial after framing proper charges, the High Court inter alia observed that there was disregard of Sections 258 & 367 of the Code of Criminal Procedure since it is imperative for the Court to record an order of acquittal in case the trial court finds the accused not guilty. It was further observed that under Section 367(2), the judgement is to specify the offences of which and the Sections of the Penal Code or other law under which the accused is convicted but despite that there was no order of conviction or acquittal in the judgement as far as Bhagwan

Baksh was concerned. It was also observed that though the accused had not been convicted under Sections 325/149 of IPC despite having been charged under the said Sections, this could be regard as their implied acquittal of the said offences. I fail to appreciate how this judgement would apply to the facts of the present case. It is true that the appellant was charged under Section 25 of the Arms Act and the impugned judgement contains no order either of acquittal or of conviction in respect of the said charge, but that would have no bearing on the charge of robbery, since there is no finding rendered by the trial court that the appellant had not participated in the incident or that he was not armed at that time. The appellant, of course, gets a benefit of the said lapse on the part of the learned trial Judge since he has not been convicted and sentenced under the Arms Act.

15. The learned counsel for the appellant points out that according to the complainant, on reaching home he did not share the incident with his family members since his mother was not well whereas according to PW13 Babu Lal, the information with respect to the incident was shared with mother and sister of the complainant. The said contradiction, to my mind, cannot be said to be material, since it has no bearing on the incident of robbery. The only advantage which the appellant gets, even if the deposition of Babu Lal is preferred over the deposition of the complainant in this regard is that the reason given by the complainant for the delay in reporting the matter to the police would be taken as incorrect. The main reason why the courts insist on prompt registration of FIR is that sometimes delay in lodging of FIR may result in manipulations and false implications. However, a delayed FIR is not per se illegal and the case of the prosecution, if otherwise proved cannot be rejected merely on account of a few hours delay in reporting the matter to the police. The Honble Supreme Court noted in Ravinder Kumar Vs. State of Punjab 2001 VII AD (SC) 2009, that the law has not fixed any time limit for lodging FIR and delayed FIR is not illegal. Though prompt lodging of FIR is ideal, that by itself does not guarantee the genuineness of the version given in it. Whenever there is delay in lodging FIR, the Court ought to look for reasons, if any. But, delay by itself cannot be the sole ground to doubt and discard the entire case of the prosecution though it does put the Court, on guard, to look for explanation, if any. The court needs to appreciate that the complainant underwent a harrowing experience when he was robbed of a huge amount at the point of a

gun. A person who experiences an incident of this nature is bound to get scared and lose his nerves for quite some time. It is a natural course of human conduct in such circumstances to go home and control nerves, before the matter is reported to the police. This is also a natural conduct of the victim of such a crime to consult his family members before reporting the incident to the police and that precisely appears to be the reason why the complainant called his brother Sunil Agarwal to the house and then shared the incident with him. Since no names were given in the FIR, it cannot be said that the delay was actuated by intent to implicate some innocent person. It is also not uncommon not to report such incidents to the police and to accept the financial loss, instead of taking the hassles of going to the police station, answering the queries of police officers and then visiting the court repeatedly in case the culprits are caught and are subjected to trial. That appears to be the reason why the complainant consulted his brother and there was delay of a few hours in reporting the incident to the police.

16. It was pointed out by the learned counsel for the appellant that according to PW13 Babu Lal they had withdrawn Rs.9.56 lakh from the bank whereas according to the complainant, the amount withdrawn by him was Rs.9.55 lakh. It appears to me that there was a typographical error in the deposition of Babu Lal in this regard. If the figures of Rs.90,000/-, Rs.65,000/- & Rs.8.00 lakh are added, the total amount comes to Rs.9.55 lakh and not to Rs.9.56 lakh.

17. As regards, the alleged failure of the prosecution to examine the bank official to prove the withdrawal of Rs.9.55 lakh, no doubt, the Investigating Officer ought to have examined the bank official since the name of the bank had been given to him by the complainant. However, the benefit of defect of investigation does not automatically accrue to the accused. The court, in such circumstances is required to evaluate the evidence produced by the prosecution de hors the defect in investigation and find out whether the said evidence is credible and trustworthy so that conviction can be safely based on it. As held by the Honble Suprme Court in Karnel Singh vs. State of M.P. JT1995(6) SC437 it is not proper to acquit the person due to defective investigation, if the case otherwise stands established, since doing so would be falling in to the hands of the erring Investigating Officer. The Apex Court in Dhanaj Singh @ Shera & Ors. v. State of Punjab (2004) 3

SCC654 held, in the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.

The Apex Court in the case of Paras Yadav v. State of Bihar AIR 1999 SC644 enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party. Having examined the deposition of the complainant, which finds corroboration not only from Shri Babu Lal but also from his brother Shri Sunil Agarwal, I see no reason to disbelieve the deposition of the witnesses in this regard. It would be appropriate to note here that neither the complainant nor other witnesses had anything to gain by cooking up a false story of robbery. The car, number of which was provided to the police, was later found abandoned and it was also discovered that it was a stolen car. This is yet another circumstance which corroborates the deposition of the complainant and Babu Lal in this Regard.

18. The deposition of Shri Sushil Agarwal and PW13 Babu Lal shows that it was the appellant Rajiv who armed with a country made pistol, along with his associate, snatched two bags - one containing Rs.8.00 lakh and the other containing Rs.90,000/-. He was also the person who had put country made pistol on the complainant Sushil Agarwal PW20. In the FIR the person who intimidated the complainant with a country made pistol was described as a thin, tall boy. During trial, the complainant referred to the appellant Rajiv as the thin boy. This was not the case of the appellant during cross-examination of the complainant or Babu Lal that he was not tall or slim. Thus, he did not dispute the description given by the witnesses. The appellant Rajiv refused to join TIP on the ground that he had been shown to the witnesses. However, there is absolutely no evidence which

would show that he was shown either to the complainant or to PW13 Babu Lal at any time before he refused to join TIP. In fact, there is no evidence of either of these two witnesses even having met the Investigating Officer, after arrest of the appellant Rajiv and before his refusing to join the TIP. Therefore, the appellant has failed to show existence of the circumstance from which the court may infer that he was shown to either of the eye-witnesses, while in police custody and before he refused to join TIP. I, therefore, conclude that the appellant Rajiv refused to join TIP without any justification. Hence, an adverse inference can be drawn that had he joined the TIP he would have been identified by the witnesses and that was the reason he refused to participate in the said proceedings.

19. Since the appellant put a country made pistol on the parietal region of the complainant, before he and his associates snatched the bags containing cash, he used the country made pistol, which is a deadly weapon, during commission of the robbery, the obvious purpose being to scare and intimidate the complainant and his companion so that they do not resist the snatching of the bags containing cash from them. The appellant Rajiv, therefore, has rightly been convicted under Section 392 of IPC read with Section 397 thereof. Therefore, his conviction under the aforesaid Sections is affirmed. However, in the facts & circumstances of the case, the substantive sentence awarded to the appellant is reduced to seven (7) years and it is also directed that in the event of failure to pay fine he would undergo SI for fifteen (15) days. The appeal stands disposed of accordingly. One copy of this order be sent to the concerned Jail Superintendent for information & necessary action. LCR be sent back along with a copy of this order. MARCH10 2014 bnesh/BG V.K. JAIN, J.