

Asif Vs. State

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Court : Delhi

Decided On : May-20-2014

Judge : Indermeet Kaur

Appellant : Asif

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment reserved on :15.05.2014. Judgment delivered on :20.05.2014. CRL.A. 238/2006 ASIF Through versus Appellant Mr.Azhar Qayum, Adv. STATE Through + Respondent Mr. Navin K. Jha, APP CRL.A. 240/2006 NADEEM Through versus Appellant Mr. M.L. Yadav, Adv. STATE Through Respondent Mr. Navin K. Jha, APP CORAM: HON'BLE MS. JUSTICE INDERMEET KAUR INDERMEET KAUR, J.

1 These are two appeals directed against the impugned judgment and order of sentence dated 03.04.2006 & 07.04.2006 respectively wherein appellant Asif and appellant Nadeem have been convicted under Section 395 read with Section 397 of the IPC besides a separate conviction under Section 25 of the Arms Act. Accused Asif has been additionally convicted under Section 412 of the IPC as well. Each of the appellants has been sentenced to undergo RI for a period of 7 years for the offence under Section 395 read with Section 397 of the IPC besides a fine of Rs.2,000/- and in default of payment of fine to undergo, SI for 6 months; for the offence under Section 25 of the Arms Act, each of them has been

sentenced to undergo RI for a period of 1 year and to pay a fine of Rs.500/- and in default of payment of fine, to undergo SI for one month. For the offence under Section 412 of the IPC, the convict Asif has been sentenced to undergo RI for a period of 1 year and to pay a fine of Rs.1,000/- and in default of payment of fine, undergo SI for 3 months. 2 The version of the prosecution is that on 18.12.2001 at about 09:45 PM, Jayant Vivek (PW-4) while coming from the side of Kingsway Camp and going to his hostel room was accosted in front of the Law Faculty by some persons who were sitting in white Maruti van which was parked opposite side of the road. One boy was standing outside the van; he stopped PW-4 on the pretext of asking him way to the ISBT; meanwhile two boys alighted from maruti van; all of them snatched one rucksack bag in which he was carrying his ATM card of HDFC Bank, some books, personal notes and about Rs.3,000- 4,000/-. On the resistance of PW-4, he was attacked on both his thighs by knife blow by the person who had stopped him (later on identified as Nadeem). The accused persons managed to flee. 3 Information was given to the PCR which was recorded in DD No.68-B (Ex.PW-3/A). The statement of the victim (Ex.PW-4/A) was recorded. He was medically examined. His MLC (Ex.PW-1/A) was conducted by Dr. J.N. Chakrobarty (PW-1) noting two incised wounds of 10 cms X3cms over right thigh and 5 cm X05 cm over the left thigh. The victim was discharged on the same day; the opinion given on the injuries were simple. PW-4 has corroborated this version and the contents of his complaint on oath in Court. He has further deposed that on 18.02.2002, he had gone to Jail No.4, Tihar where he had identified Nadeem; he was the same person who had slashed the ustara for the cut marks upon him. Further deposition of PW-4 being that on 27.02.2002, he had gone to Tis Hazari Court along with his friend where outside the Court of Mr. Deepak Garg, MM, he had identified Asif as another of the co-accused who had attacked him on that day; he was however not sure about the presence of Gulam Mustafa (accordingly acquitted). Relevant would it be to state that both the accused persons Asif and Nadeem had been put to TIP through Mr. Ashwani Sarpal (PW-13). 4 Accused Asif had been arrested on 11.02.2002 by HC Yashpal (PW-10) along with SI Sunil Srivastava (PW-15) and constable Rakesh (PW-6); PW-10 had deposed that on the basis of a secret information, Asif was apprehended; he was having a NIKE made bag and was wearing a jacket. He had

disclosed that this bag related to the case property of the present FIR. From his right pant pocket, one razor was recovered. His disclosure statement (Ex.PW-6/E) was recorded and the books were taken into possession vide memo Ex.PW-6/A. It was in this disclosure statement that the role of the second accused i.e. Nadeem had surfaced. On 15.02.2002, Nadeem who had been arrested in another FIR and was in judicial custody in Tihar Jail had been seen by the complainant. On a production warrant ordered at the request of PW-15, accused Nadeem was produced in Court in muffled face. It was on this date that the TIP was conducted where he was identified by the complainant. He had given his disclosure statement (Ex.PW-10/A) and pursuant to his disclosure statement, he led the police party to his house at D-482, Buland Masjid, Shastri Park and from his house, he had produced one razor which was lying in a box. This was on 19.02.2002. This razor was taken into possession vide memo (Ex.PW-10/D). 5 The maruti vehicle number No.HR-29, 4175 had also been recovered pursuant to the number having been disclosed by Nadeem in his disclosure statement. The owner of the vehicle Islamuddin (PW-7) had come into the witness box and had disclosed that this vehicle was borrowed by the mother of Allauddin (one of the co-accused who since stood acquitted). This witness was declared hostile on the date when this vehicle had been borrowed by the mother of Allauddin; PW-7 stating that this was taken on 12-13.12.2001 and not on 18.12.2001 which is the date of the incident. 6 The TIP of the case property was conducted by PW-15; the bag and books which had been seized pursuant to the recovery from Asif had been identified by the complainant correctly in proceedings Ex.PW15/E. 7 On the basis of aforementioned evidence collected by the prosecution, the accused persons were convicted and sentenced as aforementioned. 8 On behalf of the accused persons, it has been argued that both the accused persons are innocent; they have been falsely implicated in the present case. On behalf of accused Asif, arguments have been addressed by learned amicus-curiae Mr.Azhar Qayum. It is submitted that Asif was arrested on 11.02.2002 and the bag and the books heavily relied upon by the prosecution was admittedly recovered from his personal search and not being a recovery having been effected pursuant to the disclosure statement of accused Asif, it cannot be read as evidence under Section 27 of the Indian Evidence Act. It is pointed out that Asif had refused TIP for a valid reason; all along his defence was that he had

been shown to the complainant earlier and this is the reason why he had refused TIP. No adverse inference can be drawn against him on this count. There is no evidence to connect Asif with this offence. 9 On behalf of appellant Nadeem arguments have been addressed by the learned amicus-curiae Mr. M.L. Yadav. It is pointed out that although Nadeem had been identified in the TIP proceedings yet admittedly the name of Nadeem had surfaced for the first time only in the disclosure statement of Asif and this incident was more than two months old at that point of time; it was only by incident that the complainant was able to recognize Nadeem as not only is the fact that the incident is more than two months old but the incident having occurred at 09:30-09:45 PM and in the winter December month, it is difficult to believe that there was sufficient light for the complainant to have retained in memory the features of Nadeem. Even otherwise, the identity in TIP is only a corroborative piece of evidence; it is not a substantive evidence. Further submission of the learned counsel being that the razor which is purported to have been got recovered pursuant to the disclosure statement of Nadeem is clearly falsely planted for the reason that even as per the case of the prosecution, he was in judicial custody on 18.02.2002 when his disclosure statement was recorded and it would be difficult to believe that the razor which had been used in the offence more than two months ago was still being kept in secrecy in a box of his room. Recovery is planted. Benefit of doubt has to accrue in favour of Nadeem. 10 Arguments have been refuted by the learned APP for the State. It is pointed out that on no count, does the impugned judgment call for any interference. Non-joining of TIP leads to drawing of an adverse inference against Asif. Nadeem had been correctly identified. Further submission being that the version of the complainant is also fortified by his MLC (Ex.PW-1/A). Additional submission being that the recovery of the books and bag which had been identified by PW-4 in the TIP proceedings is another circumstance against accused Asif. 11 Arguments have been heard. Record has been perused. 12 Both the accused persons have been convicted under Section 395 read with Section 397 of the IPC. For a conviction under Section 397 (which is an individual offence), the weapon must necessarily qualify as a deadly weapon. Testimony of PW-4 is relevant. He has stated that when the accused persons accosted him, one out of them had given knife blows on his thighs. This was the role attributed to Nadeem.

No role has been attributed to co-accused Asif that he had also used deadly weapon. The conviction of Asif under Section 397 is not legal. 13 Let us now examine the role of Nadeem qua the use of deadly weapon. Admittedly as per Ex.PW-1/A (the MLC of PW-4), injuries were on the thighs but they were simple injuries. Victim had been discharged on the same day. Accused Nadeem had been arrested on 18.02.2002; he was in judicial custody in Tihar in another case at that point of time. Pursuant to his disclosure statement, he had got recovered a razor which was kept in a box of his room on the ground floor of his house. This was on 19.02.2002. This recovery memo has been proved as Ex.PW-10/D. This document has been attested by HC Yashpal (PW-10). He does not whisper a word about any recovery having been got effected at the instance of Nadeem on 19.02.2002. This recovery has necessarily to be disbelieved. Moreover, the sketch of the knife (Ex.PW10/B) shows that the length of the blade was 15.5 cm; this weapon was never shown to the doctor (PW-1) for obtaining any opinion as to whether the injuries which had been suffered by the victim (PW-4) had in fact been caused by this razor. However, this Court need not go any further into this question as the recovery itself is wholly worthless as the only attesting witness (PW-10) has not whispered a word about this recovery. 14 The next question which arises for decision is as to whether in this background when both the accused persons have admittedly been arrested two months after the date of the offence, can they be connected with the crime?. Testimony of PW-4 is clear and cogent. He had no doubt suffered injuries on both of his thighs when he was accosted by some persons who had come out of a maruti van on 18.12.2001 when he was returning to his campus room. Asif had been arrested on 11.02.2002. He had refused TIP. His reason for refusal of TIP was that he had been shown to the complainant earlier. However, this version of Asif appears to be clearly incorrect and his defence which has been taken later in time as no such suggestion has been given to PW-4 by the defence counsel at the time when he was cross-examined. Version of PW-4 is also clear. It does not in any manner reflect that the complainant had ever gone to the police station prior in time in order that he could have been shown to accused Asif. This is also clear from the version of the Investigating Officer (PW-15). Thus this defence sought to be projected by Asif that he had refused TIP for a valid reason i.e. because he had been shown to the

complainant is clearly an afterthought and is a defence without any merit. Asif having refused TIP for no cogent reason, this Court is inclined to draw an adverse inference against him. The books and the bag which were found upon the person of Asif at the time of his arrest had also been correctly identified by PW4 in the TIP proceedings (Ex.PW-15/E). These books and bag which were found in the personal search (Ex.PW-6/G) of Asif, belonged to the complainant. This is an additional accentuating circumstance against Asif. 15 Nadeem was arrested pursuant to the disclosure statement of Asif. He was in custody on that date. He was arrested on 18.02.2002. It was in his disclosure statement that the vehicle No.HR-28 4175 was revealed. It belonged to Islamuddin (PW-7) which has been corroborated by the version of registration clerk who had been summoned from the transport authority Ramesh Lal (PW-9). Admittedly even as per the version of Islamuddin, this vehicle had been borrowed by the mother of Allaudin; PW-7 has also admitted that Asif and Nadeem were also living in the same locality along with Allaudin and the house of Allaudin was 15-16 houses away from his house. Police had made inquiries from him 2-3 days after the taking away of his vehicle. The recovery memo (Ex.PW7/A) bearing the signatures of PW-7 substantiate that this vehicle which has been seized had thereafter been returned to PW-7. 16 Although PW-7 is partly hostile yet from his version it is abundantly clear that this vehicle which was used in the offence i.e. HR28 4175 and which number was disclosed in the disclosure statement of accused Nadeem belonged to PW-7 and it had been borrowed sometime in the month of December by the mother of Allaudin; accused Asif and Nadeem were also living in the same locality. Nadeem had also been correctly identified by PW-4 in the TIP proceeding which were held on 18.02.2002. The complainant even in his complaint had stated that he was in a position to recognize the accused persons. Nadeem was the person who had inflicted the injuries on his thighs. Although the recovery of the razor has been disbelieved by this Court and in the absence of which conviction of Nadeem cannot be sustained under Section 397 of the IPC, yet his role is otherwise not free from guilt. 17 Section 397 postulates only the individual act of accused to be relevant to attract Section 397; this Section is not based on the principle of constructive or vicarious liability engrafted in Section 34 of the IPC. 18 The observations of the Supreme Court in AIR 2004 SC1253 Ashfaq Vs. State are relevant:

Thus, what is essential to satisfy the word Uses for the purpose of Section 397 IPC is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of the victim and not that it should be further shown to have been actually used for cutting, stabbing, shooting as the case may be.

19 The legislative mandate prescribes that to convict a person under Section 397 of the IPC, it must be established as a fact that the weapon was in fact deadly. In the absence of any such evidence, conviction of both the appellants under Section 397 of the IPC cannot be sustained. In view of the above discussion, the accused persons are acquitted of the charge under Sections 395/397 of the IPC. Both the accused persons are also acquitted of the offence under Section 25 of the Arms Act. There is however ample evidence to convict them under Section 394 of the IPC. Asif is also held guilty of Section 412 of the IPC as the books and bag belonging to the complainant and identified by him in the TIP proceedings were admittedly recovered from his person. 20 Accordingly the sentence is also modified. Both the accused persons having been convicted for the offence under Section 394 of the IPC, this Court is inclined to interfere in the sentence as the offence relates to the year 2001 i.e. more than 13 years old; the accused being on bail since the year 2007; injuries on the person of the victim being simple and he having been discharged on the same day, this Court thinks it fit to sentence both the accused persons to RI for a period of 3 years. The sentence of fine remains unaltered. Asif is additionally convicted under Section 412 of the IPC and is sentenced to undergo RI for a period of one year. Both the sentences of Asif shall run concurrently. Benefit of Section 428 of the Cr.PC be granted to him. 21 Nominal rolls of both the appellants have been requisitioned. They reflect that as on date when Asif had been granted bail, he has suffered incarceration of about 3 years & 17 days including remissions. Convict Nadeem has also suffered incarceration of more than three years on the date when he had been granted bail. Accordingly both the appellants, having undergone the period of sentence imposed upon them, their bail bonds be cancelled; sureties discharged. 22 Appeals disposed off in the above terms. INDERMEET KAUR, J MAY20 2014 A