Netrapal @ Vinod Vs. Staet

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Court : Delhi

Decided On : Aug-08-2014

Judge : S. Muralidhar

Appellant : Netrapal @ Vinod

Respondent : Staet

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. 94 of 2010 SEETAL ..... Appellant Through: Ms. Suman Chauhan, Advocate. versus STATE (NCT OF DELHI) ..... Respondent Through: Mr. Rajat Katyal, APP. CRL.A. 661 of 2009 NARENDER @ LALA ..... Appellant Through: Mr. Sitab Ali Chaudhary, Advocate versus STATE (NCT OF DELHI) ..... Respondent Through: Mr. Rajat Katyal, APP. CRL.A. 717 of 2009 VEERPAL ..... Appellant Through: Mr. Sumeet Verma and Mr. Amit Kala, Advocates. versus STATE (NCT OF DELHI) ..... Respondent Through: Mr. Rajat Katyal, APP. WITH CRL.A. 916 of 2009 NETRAPAL @ VINOD ..... Appellant Through: Mr. Deepak Vohra, Advocate. versus STATE ..... Respondent Through: Mr. Rajat Katyal, APP. CORAM: JUSTICE S. MURALIDHAR

ORDER
0808.2014 1. These appeals are directed against the judgment dated 25 th March 2009 passed by the learned Additional Sessions Judge (ASJ) convicting the Appellants for the offences under Sections 395/397 of IPC and Section 27 of the Arms Act, 1959 and the order on sentence of the same date convicting each of

them to undergo rigorous imprisonment (RI) for seven years for the offences under Sections 395/397 and RI for three years along with a fine of Rs. 1,000 and in default, to undergo simple imprisonment (SI) for one month for the offence under Section 27 of the Arms Act.

2. The case of the prosecution is that Kailash Sharma (PW-1) was the owner of a factory, manufacturing aluminium wires located at Haiderpur, New Delhi. Among the labourers working for him were, Sanjay Kumar (PW-8), Tulsi Ram (PW-9), Dalip Paswan (PW-10), Manchit Paswan (PW-11) and Baba Paswan (PW-12). The said labourers used to sleep in the factory. On 23rd August 2004, Kailash Sharma along with his brother, Sunder Lal (PW-2) had gone for a surprise inspection to the factory at around 12 midnight or 12:15 am. They noticed two persons removing aluminium wires from the factory. They tried to apprehend the two persons and also raised an alarm. When questioned about the removing of aluminium wires, one of the persons ran away. When the other person was tried to be apprehended, he gave a knife blow on the nose of PW-2. The person who gave the knife blow was apprehended at the spot and with the help of public persons was also given beatings. The person who was apprehended at the spot was identified as Veerpal, accused No.4 (A-4), the Appellant in Crl. A. No.717 of 2009. Two bundles of aluminium wires sought to be taken away were recovered from the spot under seizure memo PW1/D. The police also reached there subsequently and recorded the statements of PWs 1 and 2. The knife recovered from the spot was Ex.P-8. The ladder used for climbing the wall of the factory was seized along with one lock and a pair of chappal under seizure memo (Ex.PW1/C).

3. At the instance of A-4, on 23rd August 2004, Sub Inspector Dharambir Singh (PW-14), the Investigating Officer (IO) of the case along with Constable Surender and Constable Satish (PW-13) apprehended Sheetal (A-1), the Appellant in Crl. A. No.94 of 2010, Narender (A-2), the Appellant in Crl. A. No.661 of 2009, Netrapal (A3), the Appellant in Crl. A. 916 of 2009 and Romu (A-5) from a kabari shop in Jahangirpuri, Delhi. Pursuant to the disclosure statements made by the aforesaid accused, four knives were recovered.

4. A-1, A-2, A-3 and A-5 were produced with faces muffled before the learned Metropolitan Magistrate (MM) CRL.A. Nos. 661,717,916 of 2009 & 94 of 2010 [Mukesh Vats]. (PW-7) on Page 3 of 13 8th September 2004 for the Test Identification Parade (TIP). In the TIP proceedings in respect of A-1(Ex.PW7/A) PW-1 correctly identified A-1. The other three accused, i.e., A-2, A-3 and A-5 declined to participate in the TIP on the ground that their photographs had been taken in the police station. They were, however, informed that their refusal to participate in the TIP could lead to an adverse inference being drawn against them.

5. The prosecution examined 14 witnesses. During the course of trial, A-5 expired and the case against him stood abated.

6. In their statements under Section 313 Cr.PC, the four remaining accused denied their involvement and claimed that they had been falsely implicated.

7. The learned trial Court, on an analysis of evidence, found that the prosecution had proved the case against the Appellants beyond all reasonable doubt and convicted them for the offences with which they were charged and sentenced them in the manner indicated hereinbefore.

8. At the outset, it must be mentioned that while A-2, A-3 and A-4 were on bail during the pendency of the appeals, bail was declined to A-1.

9. Learned counsel for the Appellants first submitted that in the present cases, the conviction under Section 397 IPC was unsustainable in law since the knives that were purportedly recovered one from the spot itself and the others subsequently at the instance of the accused- were not shown to be deadly weapons, and in any event, were not shown to the two eye witnesses, i.e., PWs 1 and 2.They needed to identify that those were the very knives which were used in the commission of the crime. It is pointed out that although PW-2 is stated to have been injured, he was not medically examined. There was no medical evidence presented to show that the injury was caused by any of the recovered knives. In support of the above contentions, reliance was placed on the decisions in Balik Ram v. State 1983 Crl. L.J.

1438, Madan Lal v. State 1997 (70) DLT595 Mukesh Parashar v. State 138 (2007) DLT221 Rakesh Kumar v. State 2005 (1) JCC334and Charan Singh v. State 1988 Crl. L.J.

NOC28Delhi). Reliance was also placed on the decisions in Samiuddin v. State 175 DLT27and Sunil v. State 2010(1) JCC388 10. Mr. Rajat Katyal, learned APP, on the other hand, submitted that the fact that all the accused were carrying knives had been spoken to by the labourers, i.e., PWs 8 to 12 and notwithstanding that the knives recovered may not have been shown to the witnesses, the offence under Section 397 IPC would still be attracted. He placed reliance on the two decisions of the Supreme Court in Phool Kumar v. Delhi Administration AIR1975905 and Ashfaq v. State 2004(3) SCC116and the decisions of this Court in Salim v. State 24 (1998) DLT1 Ikram Ansari v. State (decision dated 24th February 2014 in Crl. A. No.181 of 2013), Yaseen v. State (decision dated 25th February 2014 in Crl. A. No.686 of 2013) and Rajender Yadav v. State (decision dated 7th March 2013 in Crl. A. 537 of 2012).

11. The Court finds that there have been two lines of cases in the Delhi High Court as regards Section 397 IPC, which reads as under: 397. Robbery, or dacoity, with attempt to cause death or grievous hurt.If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years. 12. The words uses any deadly weapon was interpreted first by the Supreme Court in Phool Kumar. It was explained therein that the mere fact that the accused was carrying a deadly weapon open to the view of the victims sufficient to frighten or terrorize them was enough to attract Section 397 IPC. The Supreme Court observed: Any other overt act, such as, brandishing of the knife or causing of grievous hurt with it was not necessary to bring the offender within the ambit of Section 397 of the Penal Code. The Court chose to give identical meaning to the word uses in Section 397 IPC and is armed under Section 398 IPC.

13. Many years later, in Ashfaq, the question was again examined by the Supreme Court. There, one of the accused in the case of dacoity had a country-made pistol. The other accused had knives. It was argued that since only one of the accused was in possession of the country-made pistol that was used to threaten the victims, and since that was not recovered, none of the accused could be convicted even on the principle of constructive liability under Section 34 read with Section 397 IPC. Further, it was argued that the evidence did not show that the knives carried by them were actually used in the commission of the offence. The Supreme Court referred to Phool Kumar and explained as under: Thus, what is essential to satisfy the word uses for the purposes 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 victim and not that it should be further shown to have been actually used for cutting, stabbing, shooting, as the case may be. 14. Since each of the accused in Ashfaq were wielding a deadly weapon on their own, the Supreme Court held that they could be convicted individually under Section 397 IPC, even without resorting to constructive liability under Section 34 IPC.

15. The above two decisions have been followed in one line of decisions of this Court. In Salim, it was argued that since the knife purportedly used by the accused was not recovered, Section 397 was not attracted, notwithstanding that an eye witness had spoken about the accused threatening the victim with the knife while attempting the robbery. Reliance was placed by the accused on the decision in Balik Ram where it was held that whether the knife in question was a deadly weapon or not was a question of fact and that had to be proved as such by the prosecution. Likewise, reliance was also placed on Murari Lal v. State 23(1983) DLT410which held that ordinarily a knife could not be said to be a deadly weapon under Section 397 IPC.

16. In Salim, this Court distinguished both Balik Ram and Murari Lal and pointed out that We all understand what a knife means and to categorise it or to fix its size for it to be a deadly weapon may not be appropriate. A knife has also been described as a pocket knife, pen knife, table knife, kitchen knife, etc. It cannot be denied that a knife can be used as a weapon of offence. It can cut, it can pierce, it

can be deadly. To say that a knife to be a deadly weapon should be of a particular size would perhaps be not a correct statement. 17. However, what appears to have happened in this Court is that in many of the subsequent cases, no reference was made to the decision in Salim. These line of cases include Charan Singh, Madan Lal, Sunil, Rakesh Kumar and Samiuddin. What is strange still is that even in the decisions handed down in 2010, no reference was made to the decision of the Supreme Court in Ashfaq, which was delivered in 2003.

18. However, there have been recent trend of judgments of this Court which have noticed both Phool Kumar and Ashfaq. This includes Rajinder Yadav, Ikram Ansari and Yaseen.

19. The resultant position that emerges is that Section 397 would be attracted even if the accused, who possessed a knife during the robbery, does not actually use it to threaten the victim. A victim who has noticed the knife in the hand of the accused would undoubtedly feel threatened. It is possible that the victim may not have noticed what type of knife it is and whether it is capable of causing actually harm. In other words, the actual size or length of the knife would not matter. In Phool Kumar, the Supreme Court noticed the observations of the Bombay High Court in Govind Dipaji More v. State AIR1956 Bom 353 that if the knife was used for the purpose of producing such an impression upon the mind of a person that he would be compelled to part with his property, that would amount to using the weapon within the meaning of Section 397. Therefore, the fact that the knife was not recovered at all, or that the recovered weapon was not shown during the course of trial to the victim, would not matter as long as the eye witnesses to the crime are able to convincingly and consistently recount the fact that they were threatened by the sight of the accused wielding the knife into parting with their belongings.

20. In the present cases, the eye witnesses have spoken about the Appellants carrying knives and using them to threaten the labourers, and later one of them actually using it to injure PW-2. The discrepancy between PW-1 noticing two persons and PW-2 noticing four persons is not material in this regard. Both of them arrived at the spot after the labourers had already been tied up by the

accused bundles of the aluminium wires had already been made and were being carried out. PW-8 clearly stated that they were all carrying knives with them and they threatened us and tied our hands on our back, made us lying on floor. This witness also spoke about one of them being apprehended at the spot. PW-9 stated that of those who entered the factory premises, two or three were having knives. He identified A-4 as the person apprehended at the spot. He identified A-1 as being the one who put the knife on the neck. Although in his examination-in-chief he is stated to have noticed A-2 and A-3 trying to break the locks as they were exiting the factory, this has been diluted by his statement in the crossexamination where he stated that he was unable to see who was breaking the locks. However, the fact remains that he spoke about the presence of A-2 and A-3 in the factory. PW-10 was very clear that all the accused were having knives and they threatened to kill the labourers if they raised an alarm and thereafter tied their hands. PW-11 also stated that all the accused persons were having long knives in their hands. PW-12 stated that all of them were having churras.

21. As far as the law explained by the Supreme Court in Phool Kumar and later reiterated in Ashfaq is concerned, it stands proved beyond reasonable doubt that during the commission of the robbery, all the accused were armed with knives and one of the knives was used by A1to threaten one of the labourers, i.e., PW-9 and that A-4 used the knife to injure PW-2 on his nose. With the eye witnesses testimonies being clear and cogent, it does not matter that the knives that were recovered were not shown to the said witnesses in order to determine whether they were the same knives that were used or whether they were in fact deadly weapons.

22. It was next submitted that inasmuch as the bundles of aluminium wires were not carried out of the factory, it was only a case of a failed attempt at robbery. Reliance was sought to be placed on the decisions in Re Thavasi 1972 Crl. L.J.

445 and Shyam Behari v. State of Uttar Pradesh AIR 1957 SC320. The Court is not impressed with the above argument since in the present case, by the time PWs 1 and 2 arrived at the factory, the labourers had been tied up after having been threatened with knives and the bundles of aluminium wires had been lifted by

the accused and they were in the process of trying to exit the factory. Therefore, the robbery was already complete.

23. Learned counsel for the Appellants also submitted that the identification of the Appellants was at best vague. Even as regards A1, who was identified in the TIP, reliance was placed on the decision in Caetano Piedade Fernandes v. Union Territory of Goa, Daman & Diu, Panaji, Goa AIR 1977 SC135to urge that he ought to have been identified by PW-2 who had suffered the injury. Reliance was also placed on the decision in Wakil Singh v. State of Bihar AIR 1981 SC1392to urge that there was no clear identification of the accused in the Court by the witnesses.

24. The Court is unable to accept the above submission for the simple reason that there is no ambiguity about the identification of the accused in the Court by several of the witnesses. In particular, the labourers had identified the accused in Court. Although they may not have pointed individually to the four accused to say that they were the very persons, there is no doubt that they identified the four accused who were in the Court as the very persons who were involved in the robbery. Nothing has been elicited in the cross-examination of these witnesses to doubt the veracity of their testimonies. In any event, A-2,A-3 and A-4 having refused to join the TIP ran the risk of an adverse inference being drawn against them. The fact of A-1 wielding a knife is spoken to by PW-9. The fact that A-4 used the knife and was apprehended at the spot is consistently spoken to by not only PWs 1and 2 but the other witnesses who were the labourers. Consequently, on the question of identification of the accused, there is no doubt created by the evidence of any of these witnesses.

25. The submission made by some of the learned counsel for the Appellants that there were inconsistencies in the statements of witnesses that weaken the case of the prosecution is not borne out by the record. The reliance on the decision in Caetano Fernandes is misplaced as the said decision is distinguishable on facts. Likewise, the decision in Wakil Singh also turns on its facts and is of no assistance to the Appellants. Consequently, there is no scope for considering the appeals to be only under Section 392 IPC for a lesser sentence. In other words, the prosecution has been able to prove, beyond reasonable doubt, the guilt of the

Appellants for the offences under Sections 395/397 IPC as also under Section 27 of the Arms Act.

26. Consequently, the appeals are dismissed. As far as the Appellants who are out of jail are concerned, their bails bonds and surety bonds are cancelled and they are directed to surrender forthwith to serve out the remainder of their sentence.

27. A certified copy of this judgment along with the trial Court record be sent forthwith to the learned trial Court for further steps to be taken in the matter. S. MURALIDHAR, J.

AUGUST08 2014 tp