Murlidhar vs.state

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Court : Delhi

Decided On : Jun-01-2018

Appellant : Murlidhar

Respondent : State

Judgement :

$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on :26th May,, 2018 Date of decision :

1. t June, 2018 + CRL.A. 279/2002 MURLIDHAR ..... Appellant Through Mr. M. L. Yadav, Adv along with appellant in person. STATE versus ..... Respondent Through Ms. Rajni Gupta, APP for the State with SI Sachin Dahiya, PS Subhash Place. CORAM: JUSTICE PRATHIBA M. SINGH Prathiba M. Singh, J.

JUDGMENT1 The present appeal arises out of judgement dated 9th November 2001 passed by the Additional Sessions Judge, Delhi by which the Appellant has been convicted under Section 392 of the Indian Penal Code, 1860 (hereinafter referred as IPC) and Section 397 IPC and sentenced on 19th November 2001 to rigorous imprisonment for five years and rigorous imprisonment for seven years, both sentences to run concurrently.

2. The incident dates back to 31st May, 1999 when Mrs. Kamlesh was present in her house along with her daughter Miss. Jyoti and son, Master. Kartik. Her husband was not at home. Her daughter saw three persons entering the house.

Two of them were armed with knives and one with a pistol. They threatened them and took away gold bangles and the mangalsutra. Mrs. Kamlesh was also threatened and made to open the door of the Almirah. The three persons removed jewellery, and cash worth CRL.A.279/2002 Page 1 of 15 Rs.30,000/- from the Almirah and they locked Mrs. Kamlesh, Miss. Jyoti and Master Kartik in the store room. The victims were finally able to come out only when Mrs. Kamleshs elder son Master Deepak came from tuition and opened the lock from outside. On coming out, they also noticed that the Philips T.V. and Tape recorder was also missing. On the next day, a complaint was lodged with the PS, Saraswati Vihar which was registered as FIR No.372/99. A few months later, the Accused was spotted by Mrs. Kamlesh in the neighbourhood. Information was given to the police who apprehended and arrested the accused. Another accomplice was also taken into custody but Mrs. Kamlesh could not identify him and was hence let off. The third accomplice was not traced.

3. The accused were charged under Sections
IPC. In the Trial Court, the Prosecution produced the following witnesses: PW-1 - Mrs. Kamlesh PW-2 - Ms. Joyti PW-3 - H.C. Brijpal Singh PW-4 - Const. Kailash Kumar PW-5 - Const. Ashok Kumar PW-6 - Const. Pardeep PW-7 - Mr. Subhash Chander PW-8 - S.I. Rajesh Sharma PW-9 - Const. Vasudev The statement of the Accused under Section 313 of the Code of Criminal Procedure, 1973. was also recorded, in which apart from pleading Not Guilty the accused did not effectively answer any of the questions or suggestions. CRL.A.279/2002 Page 2 of 15 4. Mrs. Kamlesh deposed as PW-1. She deposed that she was at home on 31st May, 1999 with her daughter Jyoti and her son Kartik. At about 5:10 pm, her daughter informed her that three boys had entered the house, out of which two were armed with knives and one had a pistol. They threatened them and asked Mrs. Kamlesh to give the four gold bangles, one Mangalsutra of gold and four rings which she was wearing. Thereafter they demanded that they give the other gold articles and made her open the almirah. Jewellery of gold and silver along with cash of Rs. 30,000/- was taken away. They also removed the money lying in the childrens piggy bank (Gulak) and the money in her purse. They were then locked in the store room from outside. Her elder son Deepak returned from tuition and then opened the store room. They then found that the Philips TV and tape recorder,

which were lying in the bedroom and drawing room, were also found missing. She then called the PCR and got her statement recorded. Thereafter, after 6 months, when she visited Rani Bagh for her check up with her doctor she spotted the accused. PW-1- Mrs. Kamlesh identified him, and her husband informed the police officials. He was then apprehended by the police.

5. Mrs. Kamleshs daughter Jyoti appeared as PW-2. She confirmed the sequence of events described by her mother PW-1. She was however more specific that one of the intruders kept the knife on her and the other kept the knife on her mother. She also said that when her mother was made to open the almirah, the accused themselves removed the jewellery and other articles from the almirah. She stated Murlidhar is present in the Court. He was having knife which he had shown to my mother.

6. The roznamcha has been produced by PW-9 Constable Mr. Vasudev CRL.A.279/2002 Page 3 of 15 and is exhibited as Ex. PW9A. PW-8, SI Rajesh Sharma, deposed that on 16th December, 1999, the Accused was interrogated and thereafter he took them to his house at Plot-9, Gali No.3, Siri Nagar, Shakoor Basti. From there, according to PW-8, the complainant and her husband indentified the Mangalsutra and the Philips T.V. belonging to them and a pair of tops was also recovered. Based upon the statement of the Accused, another person Mr. Ajay was also arrested from Railway Colony on the same day i.e. 15th December, 1999.

7. On the basis of the statements of PW-1 and PW-2, as also the recovery that was made from the house of the Accused, the Appellant was convicted under Section 392 IPC and 397 IPC. PW-1 did not identify the person named Mr. Ajay and the third accused i.e. Mr. Om Prakash was never apprehended. Since, Ajay was not identified, he was acquitted by giving him the benefit of doubt.

8. Learned counsel Mr. Yadav, engaged by Legal Aid Services Committee appearing for the Accused submits that since there was no recovery of knife, there is no way of establishing as to what kind of weapon it was. In view of the non-recovery of knife, the conviction under Section 397 IPC ought to be set aside. He relies upon Ghanshyam @ Bablu Vs. State1 and Jitender @ Jitu Vs. State (NCT of

Delhi)2.

9. He also submits that the accused, as per the nominal roll, has already undergone almost four years imprisonment and for this reason, the sentence was also suspended on 17th August, 2004. Thus, in view of the non-recovery of weapon, the conviction under Section 397 IPC deserves to be set aside 1 2010 [1]. JCC2402 2015 (2) JCC 1018 CRL.A.279/2002 Page 4 of 15 and insofar as the conviction under Section 392 IPC is concerned, since the Accused has two children and is now living a decent living without any other allegation against him, the sentence may be modified to the period already undergone.

10. On the other hand, Ms. Rajni Gupta, APP for the State submits that the line of cases relied upon by the Appellant are contrary to the judgment of Supreme Court in Ashfaq v. State (Govt. of NCT of Delhi)3. The recovery of the weapon is not a necessary ingredient under Section 397 IPC but what is required under the Section is the use of a deadly weapon. She also submits that in this case, the Trial Court has rightly convicted the accused under Section 392 IPC and 397 IPC as, by using a knife, the accused had clearly terrorized the family of three which included the mother, daughter and a small child and had taken away gold articles, cash and other valuables. The fact that some of the articles were recovered from his house proved beyond any doubt that he had terrorized the family by using the deadly weapon. The testimony of PW-1 is clear and categorical to the extent of the incident that had taken place on 31st May, 1999 and also the fact that she identified the accused in Rani Bagh and informed the Police. Analysis and Findings 11. A perusal of the evidence on record shows that PW-8, S.I. Rajesh Sharma clearly deposed that both Mrs Kamlesh and her husband had accompanied him to the house of accused when the recovery of a pair of tops, Philips TV and mangalsutra were recovered. This recovery along with the testimony of PW-1 and PW-2 is sufficient to convict the accused. However, PW-1 in her evidence stated that she had not accompanied her CRL.A.279/2002 Page 5 of 15 husband to the house of the Accused when the recovery of the stolen articles took place. This, according to the Ld. Counsel for the Appellant lends credence to the fact that the goods that were recovered were actually planted. The allegation of planting of the goods is bereft of merit because the nature of the

goods i.e., tops and mangalsutra. They are of several designs and makes and PW-1 has clearly identified them as being hers. Planting of such goods is not a probability.

12. There is yet another contradiction in the evidence according to the Ld. Counsel for the Appellant i.e. PW-1 deposed that the Accused had kept the knife on her daughter whereas Miss Jyoti PW-2 stated that the knife was shown by the Accused to her mother.

13. Relevant extract from deposition of PW-1 reads: My husband had accompanied the police for recovery but I had not joined the investigation for the recovery I had not joined the investigation for the recovery of our stolen articles. Out of the two present in the court, only accused Murli Dhar had entered in our house and had kept knife on my daughter Joti and removed jewellery and other articles from the Almirah. Murli Dhar was having a knife with him. 14. The relevant portion of PW-2s evidence reads: Out of the three intruders who entered in our house and robbed us, one accused Murli Dhar is present in the court. He was having knife which he had shown to my mother and removed the jewellery and cash from our Almirah from the store room. 15. A perusal of the above two statements shows that the contradiction in 3 (2004) 3 SSC166CRL.A.279/2002 Page 6 of 15 the testimony is not to such an extent that it can result in acquittal. The Accused was accompanied by two other accomplices. All three of them clearly threatened and terrorised the victims. They also stole a large number of valuables. In such a position when a victim is threatened, it is possible that the exact recollection may not be there but the use of the weapon is definitely there. Two of the intruders carried knives and one carried a pistol. There is no doubt that the Accused carried and used the knife but he may have threatened the mother and the daughter at different points in time.

16. Insofar as the conviction under Section 392 IPC is concerned, both counsels do not seriously contest the same. Moreover, from the facts the offence under Section 392 IPC is clearly made out and the impugned judgement is sustained on this aspect. Coming to the conviction under Section 397 IPC, the knife has admittedly not been recovered. There is also no doubt that no physical hurt was

caused to any of the persons present. The question that arises is whether the Accused can be convicted under Section 397 IPC. Recovery of weapon - Whether essential for conviction under Section 397 of the IPC?.

17. The issue raised in the present case, both by the Counsel for the Accused and the Prosecution, is about the sustainability of the conviction under Section 397 IPC in view of the weapon not being recovered. Ld. Counsel for the Accused submits that going by the judgments of various Ld. Single Judges of the Delhi High Court in Ghanshyam @ Bablu, Jitender @ Jitu and recently in Dig Bahadur v. State4, all of which hold that if there is 4 2018(1)JCC9 CRL.A.279/2002 Page 7 of 15 no recovery of the deadly weapon, the conviction under Section 397 IPC cannot be sustained.

18. However, the Prosecution relies on the decision of the Supreme Court in Ashfaq and another judgement by a Ld. Single Judge of this Court in Seetal v. State (NCT of Delhi)5.

19. A perusal of all the judgements cited and also further case law reveals in the case of Phool Kumar Vs. Delhi Administration6, the Supreme Court drew a distinction between the expressions used in Section 397 IPC and Section 398 IPC. In Section 398 IPC the use of the word "armed" is used whereas in Section 397 IPC the term is "uses". In this case the Supreme Court held that merely being armed at the time of attempting a robbery does not constitute Use.

20. Subsequently, in Ashfaq, following Phool Kumar the Supreme Court held that for a conviction under Section 397 IPC what is relevant is the use of the weapon and not the recovery thereof. In Ashfaq, the weapons used were a country-made pistol and knives. The weapons used by the accused were not recovered. The Supreme Court then observed: therefor, the necessary it proceeds, So far as the contention urged as to the 7. applicability of Section 397 IPC and the alleged lack of ingredients proof of is concerned in our view, upon a misconception that unless the deadly weapon has been actually used to inflict any injury in the commission of the offence as such, the essential ingredient to attract the said provision could not be held to have been proved and substantiated. We are of the view that the said claim on behalf of the appellants proceeds upon a too narrow a construction of the

provision and 5 (2014) 215 DLT606 (1975 (1) SCC797 CRL.A.279/2002 Page 8 of 15 meaning of the words "uses" found in Section 397 IPC. As a matter of fact, this Court had an occasion to deal with the question in the decision reported in Phool Kumar v. Delhi Admin. and it was observed as follows: (SCC p.800, para

6) punishment under Section 397 if it attracts in committing 6.Section 398 uses the expression armed with any deadly weapon and the minimum punishment provided therein is also 7 years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. This has created an anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed the minimum punishment of 7 years under Section 398, if he is merely armed with any deadly weapon, while an offender so armed will not incur the liability of the minimum he succeeded in committing the robbery. But then, what was the purport behind the use of the different words by the Legislature in the two sections, viz. uses in Section 397 and is armed in Section 398. In our judgment the anomaly is resolved if the two terms are given the identical meaning. There seems to be a reasonable explanation for the use of the two different expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to any fruitful use because it would have been of use only when the offender succeeded in committing the robbery."

8. 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 CRL.A.279/2002 Page 9 of 15 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.

9. The further plea that one accused alone, was in any event in possession of the country-made pistol and the others could not have been vicariously held liable

under Section 397 IPC with the assistance of Section 34 IPC overlooks the other vital facts on record found by the Courts below that the others were also armed with and used their knives and that knife is equally a deadly weapon, for purposes of Section 397 IPC. The decision of the Division Bench of the Bombay High Court relied upon turned on the peculiar facts found as to the nature of the weapon held by the accused therein and the nature of injuries caused and the same does not support the stand taken on behalf of the appellants in this case. The provisions of Section 397, do not create any new substantive offence as such but merely serves to Sections 392 and 395 by regulating the punishment already provided for dacoity by fixing a minimum term of imprisonment when the dacoity committed was found attendant upon certain aggravating circumstances viz., use of a deadly weapon, or causing of grievous hurt or attempting to cause death or grievous hurt. For that reason, no doubt the provision postulates only the individual act of the accused to be relevant to attract Section 397 IPC and thereby inevitably negates the use of the principle of constructive or vicarious liability engrafted in Section 34 IPC. Consequently, the challenge made to conviction under Section 397 even after excluding the applicability of Section 34 IPC does not merit countenance, for the reason that each one of the accused in this case were said to have been wielding a deadly weapon of their own, and thereby squarely fulfilled the ingredients of Section 397 IPC, complementary as being CRL.A.279/2002 Page 10 of 15 de hors any reference to Section 34 IPC. Thus the Supreme Court, despite the non-recovery of the weapons, upheld the conviction under Section 397 IPC.

21. Insofar as this Court is concerned, there are two lines of cases. One line of cases trace back to Charan Singh v. State7, wherein a Ld. Single Judge observed: At the time of committing dacoity one of the offenders caused injury by knife on the hand of the victim but the said knife was not recovered. In order to bring home a charge under S.397 the prosecution must produce convincing evidence that the knife used by the accused was a deadly weapon. What would make knife deadly is its design or the method of its use such as is calculated to or is likely to produce death. It is, therefore, a question of fact to be proved by the prosecution that the knife used by the accused was a deadly weapon. In the absence of such an evidence and particularly, the non-recovery of the weapon would certainly bring the case out of the ambit of S.397. The accused could be convicted under S.392.

This was followed by other decisions in Ghanshyam; Samiuddin Vs. State8; Jitender; Dig Bahadur and very recently on 19th May, 2018 in Rajender @ Raju Vs. State9. In all these decisions, Ld. Single Judges have taken the view that since the weapon was not recovered, conviction under Section 397 IPC is not tenable.

22. However, in Seetal a Ld. Single Judge of this Court discusses the legal position and observes that there are two lines of decisions in the Delhi High court on the issue of recovery of weapon under Section 397 IPC. In 7 1988 Crl.L.J.

NOC28(Del) 8 175 (2010) DLT27CRL.A.279/2002 Page 11 of 15 one line of decisions for eg., in Salim Vs. State10 it was held, following the decisions of Phool Kumar and Ashfaq of the Supreme Court, that it would not be correct to categorise different kinds of weapons. So long as a knife is used as a weapon of offence it would be incorrect to not call it a deadly weapon. The Ld. Single Judge observes that in the second line of decisions Charan Singh, Madan Lal v. State11, Rakesh Kumar v. State12 and Samiuddin, there is no reference to the decision of the Supreme Court in Ashfaq. In all these cases the accused were acquitted on the ground that the weapon was not recovered. The Ld. Single Judge then goes on to hold in Seetal as under: 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 observations of the Bombay High Court in Govind Dipaji More v. State, MANU/MH/0204/19

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 the Supreme Court noticed 9 CRL.A. 616/2003, CRL.A.

82/2004 decided on 19th May 2018 10 24 (1998) DLT111 70(1997) DLT59512 2005 (1) JCC334CRL.A.279/2002 Page 12 of 15 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. Thus, as per the above decision in Seetal, recovery of the weapon is irrelevant so long as there is evidence to show that the same was used to threaten or terrorise the victims. In Imran v. State13, another Ld. Single Judge of this Court has held, following Ashfaq that "merely because weapon of offence could not be recovered, it cannot be said the offence under Section 397 is not made out."

23. This court is of the opinion that the decision of the Supreme Court in Ashfaq is clear and categorical that recovery of the weapon is not a necessary ingredient for a conviction under Section 397 IPC. The `Use of the same to threaten is sufficient. The Accused in the present case clearly USED the knife. The same was within the vision of both the victims as per their testimony. They were terrorised and threatened due to the use of the same. They were made to part with valuables, some of which were even recovered from the house of the accused. This Court is inclined to follow the binding precedents of the Supreme Court in Phool Kumar and Ashfaq, as also followed by Ld. Single Judges of this Court in Seetal and Imran to hold that recovery of the weapon is not needed for a conviction under Section 397 IPC.

24. The decisions relied upon by the accused, all follow the line of judgements following Charan Singh. In Dig Bahadur the Ld. Single Judge observes that the knife was not used - hence it is distinguishable from the 13 CRL.A. 1351/2013 decided on 22nd April, 2015 CRL.A.279/2002 Page 13 of 15 facts of the present case. Samiuddin, Jitender and Ghanshyam follow the judgement in Charan Singh which was prior to the decision of the Supreme Court in Ashfaq. As per Ashfaq there is no doubt that the recovery of the weapon is not essential for a conviction under Section 397 IPC. This Court is bound by the same.

25. In the present case, the recovery of the objects from the house of the accused is clearly proved from Ex. PW1/D. It is also proved in the testimony of PW-8 SI Rajesh Sharma. Thus, though the knife itself was not recovered, the conviction

under Section 397 IPC deserves to be upheld as the same was used to threaten and make the victims part with their valuables.

26. In so far as the identification of the accused after a lapse of time is concerned the prosecution relies upon Pargan Singh v. State of Punjab14 to argue that the lapse of time does not matter if the accused is clearly identifiable. The observations of the Supreme Court are as under; 16. While discussing the present case, it is to be borne in mind that the manner in which the incident occurred and description thereof as narrated by PW-2, has not been questioned on the ground that narration should not be believed because of lapse of time. Instead, the appellants have joined issue on a very limited aspects viz. their identification on the ground that faces of the culprits could not have been remembered after 7 years of the occurrence as memory fades by that time.

17. We are of the opinion that under the given circumstances and keeping in view the nature of incident, 90 seconds was too long a period which could enable the eye-witness (PW-2) to watch the accused persons and such a horrible experience would not be easily forgotten. Death of a friend and near death 14 2014 (0) AIJEL-SC55669CRL.A.279/2002 Page 14 of 15 experience by the witness himself would be etched in the memory for long. Therefore, faces of accused persons would not have been forgotten even after 7 years. 27. This court agrees with the prosecution that since PW-1 had clearly identified the accused, the lapse of time would not by itself have a bearing inasmuch as the accused has spent enough time in the house for PW-1 to remember him vividly. When PW-1 could not identify Mr. Ajay she candidly said so. Thus, there is a credibility to her testimony. The conviction under Section 392 IPC is thus liable to be upheld.

28. The ingredients required for conviction under Section 392 IPC and 397 IPC are accordingly satisfied. Section 397 IPC provides for a minimum sentence of seven years. The Appeal is dismissed. The sentences under Sections 392 IPC and 397 IPC were to run concurrently. The Appellant has served 3 years 10 months and 8 days. The bail bond and surety bond is cancelled and he is directed to surrender forthwith to serve the remainder of the sentence. Copy of this order be sent to the jail authorities in Tihar Jail. JUNE01 2018 Rahul/Pallavi JUDGE PRATHIBA M.