Jai Parkash Vs. the State

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Court : Delhi

Decided On : Mar-19-1981

Reported in : 19(1981)DLT437

Judge : G.B. Luthra, J.

Acts : Evidence Act, 1872 - Sections 114; Indian Penal code, 1860 - Sections 392

Appeal No. : Criminal Appeal No. 244 of 1979

Appellant : Jai Parkash

Respondent : The State

Advocate for Pet/Ap. : R.K. Watel and; R.N. Mittal, Advs

Judgement :

G.R. Luthra, J.

(1) On August 31, 1973 Shri V.S. Aggrwal, Additional Sessions Judge, Delhi convicted the present appellant Shri Jai Parkash in respect of commission of offences punishable under section 392 and 397 of the Indian Penal Code (in short I.P.G). On 3rd September 1979 said learned Additional Sessions Judge, after hearing arguments, sentenced Jai Parkash appellant to undergo R.I. For four years for the offence punishable under Section 397 I.P.G. and 3 years R.I. for offence punishable under Section 392 I.P.G.

(2) Inderjit (Public Witness 2) is sweet-meat seller. In 1978 he was carrying on that business at shop No. WZ-150-A Khanipur, Delhi. On Tuesday, February 21, 1978 at about 1 115 Pm aforesaid Inderjit was taking meals on a platform attached to his shop. Roshan Lal (Public Witness 3) who as a friend helps Inderjit in the working of the shop was also taking meals. Ghhotu alias Ram Sanehi, an employee of the shop was also there.

(3) Case of the prosecution in brief is that two persons, who were subsequently found on investigation to be present appellant Jai Parkash and one Bhagirath, came on the shop of Inderjit. They asked for 'Prasad' of the value of Rs. 1.25. Inderjit gave them Prasad which was taken by the present appellant. Thereafter both of them requested for Burfi weighing 1 kilogram duly packed. Inderjit weighed 1 kilogram Burfi, packed the same and handed over to one of them, who kept the same in a motor car parked at some distance. Thereafter one of them requested Inderjit that latter should handover Jalaibi worth 50 paisc. Inderjit acceded to their request and both of them ate those 'Jalaibics', while standing in front of the shop. Inderjit was asked by them as to what they had to pay to the former. Inderjit told the amount to be Rs. 16.75. Jai Parkash appellant, with the ostensible object of taking out money put his hand in his pockets. But instead of money he took out a pistol, threatened Inderjit and directed the latter to handover whatever he had with him at that time. Inderjit was having about Rs. 250.00 in his pocket and cheque of Rs. 40.00 in cash box. He handed over the entire amount to Jai Parkash appellant. Both appellant and his companion Bhagirath threatened Inderjit that the latter should not disclose about the occurrence, to any one. Vipin Kumar (Public Witness 4) who carries on his business in a shop just opposite shop of Inderjit was present. He was also threatened by both the appellant and his accomplice and was directed to go inside the shop. On account of that Vipin retreated to his shop.

(4) On the following day i.e. February 22, 1978 Inderjit (Public Witness 2) went to the Police Station Patel Nagar at about 12.40 Pm and handed over a written complaint in Hindi which is Ex. Public Witness PWI/A to S.I. Ramesh Kumar (PWI) who then was working as duty officer in the said Police Station. On the basis of that complaint formal F.f.R. No. 132 under Section 392 read with Section 34 I.P.G. was recorded. A copy of the F.I.R. was handed over to S.I. SohanPal Singh Public

Witness PW5 for investigation. Sohan Pal S.I. Police went to the spot and prepared site plan and also recorded statements of witnesses. He received a wireless message in the month of March 1978 from the Superintendent of Police Sonepat to the effect that one of the accused persons had been arrested. He went to Sonepat. It was Bhagirath who had been arrested. On his application to Chief Judicial Magistrate Bhagirath was transferred to Delhi Jail. He made an application to Shri I.C Tewari Metropolitan Magistrate for holding identification parade in respect of Bhagirath. That identification parade was held on 20th May 1978 and Bhagirath was correctly identified by Vipin, Inderjit and Ram Sanehi.

(5) On May 30, 1978 Bhagirath, in respect of whom remand in Police custody was obtained, on interrogation made a disclosure statement that he had concealed cash box in the bushes near a park in Naraina Industrial Area. That disclosure statement was reduced into writing and signatures of Bhagirath were obtained on the same. Thereafter Bhagirath led the Police party headed by S.I. Sohan Pal Singh and got cash box recovered.

(6) Jai Parkash appellant was arrested in the month of July 1978. He was released on bail which he jumped and absconded. He was rearrested on December 2, 1978. On an application of Sohan Pal Singh, S.I. Police a Metropolitan Magistrate I.C. Tewari fixed December 13, 1978 for holding identification parade in respect of Jai Parkash appellant. Identification. parade was held on the aforesaid date and Jai Parkash appellant was identified correctly by Inderjit while Vipin failed to identify him.

(7) On February 13, 1979 charges under Section 392 and 397 Indian Penal Code . were framed against both Bhigirath and the present appellant.

(8) After recording of the prosecution evidence statement under Section 313 of the Code of Criminal Procedure of both Bhagirath and appellant were recorded. They denied having committed any offence. Appellant stated that on December 13, 1978 at about 11 Am he was produced before Shri I.G. Tewari, Metropolitan Magistrate, that at that time investigating officer had not come, that Investigating Officer came at about 12.30 or 1 Pm accompanied by two or three persons, that thereafter he was taken to Central Jail Tihar, that when identification parade

started he realised that two or three persons accompanying investigating officer were the witnesses who were identifying him in the identification parade and that thereforee, he had been shown to the witnesses prior to the holding of the identification parade. What he meant, thereforee, to convey was that identification parade was merely a farce.

(9) Contention of Bhagirath also was that he was shown to the witnesses prior to holding of identification in respect of him in the month of May 1978.

(10) The learned Additional Sessions Judge was of the view that a doubt had arisen if Bhagirath was already shown to the witnesses and that thereforee, there was hardly, any value of witnesses identifying him in test identification parade. Evidence regarding disclosure statement of recovery of cash box at the pointing out of Bhagirath was also not relied upon by the learned Additional Sessions Judge on the ground that evidence of the prosecution was not consistent as to whether cash box at the time of recovery was lying hidden under a stone or was totally uncovered and exposed. Accordingly Bhagirath was given benefit of doubt and acquilted.

(11) Identification of Jai Parkash appellant in court coupled with and corroborated by his identification in the identification parade was accepted and he was convicted and sentenced.

(12) Appeal of Jai Parkash was received through Jail. At the time of admission following order was passed on November 2,1979 by R.N. Aggarwal, J. :-

'THE appellant has been found guilty of offence under Section 397 of the Indian Penal Code. The sentence awarded is 4 years rigorous imprisonment. For an offence under Section 397 Indian Penal Code . the minimum sentence provided is imprisonment for 7 years. Notice shall also go to the appellant to show cause why the sentence be not enhanced.'

In view of that order a notice was sent to the appellant for showing cause as to why his sentence be not enhanced. That notice has already been served. Shri R.K. Wattal, Advocate was appointed as Amices-curiae for appellant and I have

beared arguments of Shri R.K. Wattal as well as Shri R.N. Mittal Advocate for the State in respect of both the appeal as well as matter of enhancement of sentence.

(13) The learned counsel for the appellant contended that guilt of the appellant did not stand established beyond reasonable doubt. Briefly following are the arguments advanced by him in support of that contention :-

I)Case of the prosecution stood shattered or in any case received big dent on account of the fact that Bhagirath was held to be not guilty was acquitted by the learned Additional Sessions Judge. When participation of Bhagirath in the crime was doubtful how it could be said that the present appellant was accompanying Bhagirath when the crime was committed.

II)Occurrence took place near about 11.15 P.M. as per report Ex. Public Witness PW1/A lodged by Inderjit. The time of occurrence, as stated by Inderjit-as prosecution witness was about 10.30 or 10.45 PM. It is after lapse of more than 12 hours at 12.40 P.M. (time of 1240 P.M. is disclosed by S.I. Ramesh Kumar PW1) that Inderjit reached P.S. Patel Nagar for lodging of F.I.R. So much delay is fatal to the case of the prosecution or in any case creates a doubt about the correctness of the said case.

III)According to the prosecution Chhotu alias Ram Sanehi, an employee of Inderjit was present at the time of occurrence. His non-production gives rise to a presumption that occurrence did not take place and that none of Bhagirath and the present appellant were culprits.

IV)Roshan Lal appeared as an eye witness and the present appellant in court, yet he was not produced as a witness for identification of the appellant at the identification parade held on December 13, 1978. thereforee, statement of Roshan Lal about identification of appellant in court has no evidentiary value.

V)Vipin Kumar (Public Witness 4) an eye witness according to prosecution could not identify the appellant at the identification parade held on December 13, 1978. Failure to identify appellant at that time not only takes away entire probative value of his evidence regarding identification in court but also throws grave doubt on the

identification of appellant by Inderjit in court as well as at the time of identification parade.

(14) Acquittal of one of the co-accused does not necessarily show that case against the other does not stand established beyond doubt. In the present case some circumstances appearing on record made plea of Bhagirath to the effect that he was shown to the witnesses prior to the holding of identification parade plausible. Learned Additional Sessions Judge specifically gave a finding to that effect and it was on that basis that it was held that evidence of the witnesses identifying Bhagirath as culprit in court was held to be insufficient for basing conviction. The remaining evidence to the effect that Bhagirath made a disclosure statement, led the Police party to bushes near park in Naraina Industrial Area and got recovered robbed cash box of Inderjit, was found to be inconsistent and discrepant. Testimony of Inderjit was that when the cash box was recovered it was uncovered while case of the prosecution was that at that time it was bidden under stones. Further, it was hesitatingly that Inderjit supported making of the disclosure statement by Bhagirath. In fact, on account of aforesaid hesitation, with the leave of the court, Public Prosecutor had to ask such question from him as can be asked in cross-examination.

(15) As far as appellant is concerned evidence of Inderjit is definite and categorical that the former was one of the robbers and was holding a pistol. He has deposed about the occurrence in detail and also identified appellant as one of the culprits. Identification of the appellant by him in court stands corroborated from identification in the identification parade. Further as far as factum of occurrence is concerned there is ample corroboration in the statements of Roshan Lal (Public Witness 3) as well as Vipin (Public Witness 4). In fact Vipin Kumar even identified the appellant in court but no probable value was attached to the same by the learned Additional Sessions Judge because he had failed to identify appellant during identification parade. There is no reason to disbelieve evidence of Inderjit Along with corroboration mentioned above.

(16) It is true that there was delay in the lodging of the F.I.R. but that delay itself is never fatal. Prompt reporting to the Police is desirable lest there are concoctions,

improvements and embellishments in the version of the prosecution. In the present case name of the culprit was not known. Culprits were not arrested or a van known near about lodging of the F.I.R. It was later about a month or so that Bhagirath was arrested and it was after about five months or so that the present appellant was arrested for the first time. thereforee, there could not be any chance of concoction or improvement in the prosecution version by mentioning name of any of the culprits.

(17) Further as far as occurrence is concerned there is ample reliable evidence in the shape of the statement of Roshan Lal and Vipin Kumar that the same did take place in the manner as described by the prosecution. There could not be any motive on the part of Inderjit to have given wrong picture of the occurrence. Rather Inderjit is very truthful witness. He did not Fully support prosecution story as far as disclosure statement and recovery of cash box at the instance of Bhagirath is concerned. In fact it was on account of his hesitation to support prosecution version in respect of that disclosure statement and recovery that the public prosecutor with the permission of the court put him such questions as can be asked in cross- examination. That clearly indicates that he was not ready to support any portion of the prosecution version which was not true and he was sticking to the truth. Hence delay in lodging of F.I.R. did not in any way damage prosecution case.

(18) Here non-production of Chhotu alias Ram Sanehi could not be fatal to the prosecution case. That is more so when it has been found that evidence produced on record is very reliable and worthy of belief and credence.

(19) It was proper for the prosecution to see that Roshan Lal also took part in the identification parade but that by itself does not damage prosecution case. Even the testimony of Roshan Lal cannot be discarded on that ground. Only effect is that no conviction can be based on his statement alone.

(20) Failure of Vipin Kumar to identify appellant at the time of identification parade renders his testimony of the same value as that of Roshan Lal and nothing further. In fact there could be reasons for Vipin Kumar having not been able to identify the appellant. He had merely a glimpse of the appellant at the time of occurrence and

his impressions were likely to become blurred on account of passage of time because it may be recalled that it was after about ten months of the occurrence that Identification parade took place. Learned Additional Sessions Judge has rightly mentioned that had the plea of the appellant that he had been shown to the witnesses prior to identification parade been correct, Vipin Kumar would have also identified the appellant.

(21) thereforee, it stands established beyond all reasonable doubt that the appellant had committed offence of robbery punishable under Section 392 I.P.G. and as such he had been rightly convicted. However, it is to be seen if he is liable to minimum punishment of 7 years as provided under Section 397 Indian Penal Code . Before I proposed to determine that question I may make it clear that Section 397 I.P.G. does not make any act an offence. It only provides minimum punishment for some offences under certain circumstances i.e. when deadly weapon is used or grevious hurt is caused or attempt to cause death or grevious hurt is made. The learned Additional Sessions Judge was under a wrong impression that Section 397 independently makes any act an offence. Substantive offence for which Section 397 provides minimum punishment are robbery and dacoity when deadly weapon is used or grevious hurt is caused etc. thereforee, there was no necessity of framing of two charges one punishable under Section I.P.G. 392 and the other punishable under Section 397 Indian Penal Code .Charge should have been in respect of offences punishable under Section 392 read with Section 397 and 34 Indian Penal Code

(22) Section 397 Indian Penal Code reads as under :-

'IF,at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grevious hurt to any person or attempts to cause death or grevious hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.'

(23) The word 'uses' was interpreted by Supreme Court in Phool Kumar v. Delhi Administration : [1975]3SCR917 . It is laid down that it is not necessary that deadly weapon must be actually used by the culprit in the robbery or decoity by way of causing hurt or brandishing the same and that it is 'used' within the meaning of

Section 397 if the deadly weapon is merely held out for terrorising or frightening a victim to obtain property. In the present case threatening by the appellant with a pistol was sufficient to constitute use of the same.

(24) The learned counsel for the appellant does not dispute the use of pistol. His contention is that although pistol is a deadly weapon, yet, it was not proved by the prosecution that the pistol which was used at the time of crime was real one and was not merely a toy and that thereforee, it was not proved that the appellant was carrying or used a deadly weapon. He explained that the only way to prove that the pistol was real one, was recovery of the same, which never took place. The learned counsel for the State argued that although it stood established that the pistol was real one, but even if it was supposed for the sake of argument that the nature of the pistol did not stand proved article in the hand of the appellant was used as a deadly weapon because it had created terror in the mind of Inderjit.

(25) Without expressing any opinion as to whether frightening with a toy pistol and committing of robbery can mean use of deadly weapon or not I am of the view that in the present case it stands proved that the pistol was real one. Not even an iota of doubt about the real nature of the weapon can be gauged from the testimonies of the eye witnesses. Rather the fact that pistol was real one finds support from their conduct of fright and being terror stricken. Aforesaid circumstances assume great importance when the nature of the pistol was not questioned during cross-examination of any of the witnesses and not even a single question was put if any one of them was sure that the pistol was real or not.

(26) Under the above circumstances appellant was liable to be given minimum sentence of 7 years as provided by Section 397 Indian Penal Code .

(27) Hence I dismiss the appeal in respect of conviction under Section 392 Indian Penal Code . There could not be any conviction under section 397 Indian Penal Code . but minimum punishment provided under that provision had to be awarded. I, thereforee, in exercise of revisional powers enhance sentence to seven years. The net result is that the appellant stands convicted for commission of an offence punishable under Section 392 read with Section 397 Indian Penal Code . and sentenced to undergo rigorous imprisonment for seven years. A copy of this

judgment be sent to the Jail authorities as well as learned Additional Sessions Judge concerned.