

**Behari Lal Vs. the State**

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**Court :** Delhi

**Decided On :** May-22-1985

**Reported in :** 1985CriLJ1507

**Judge :** H.C. Goel, J.

**Appellant :** Behari Lal

**Respondent :** The State

**Judgement :**

**H.C. Goel, J.**

1. These are three appeals arising out of two cases. Cr. A. 200/76 by . Behari Lal and Cr. A. 2-46/76 by Om Prakash arise out of one and the same case. Cr. A. 247/76 by Om Prakash appellant arises out of another case under the Arms Act. The prosecution case in the main case being FIR No. 212 dt. April 21, 1975 of Police Station Mandir Marg briefly stated is that on April 21, 1975 at about 5.00 PM Praveen Kumar (PW 1) was studying on the lawns of Ravindra Rangshala. He is a student and was preparing for his examinations there. Vijay Kumar (PW 3), another student was also studying at some distance from Praveen Kumar. The three accused namely, Behari Lal, Om Prakash, appellants, and their co-accused Kishan Lal approached Praveen Kumar. Om Prakash asked Praveen Kumar as to what was the time by his watch. This was only a pretext on the part of the accused persons. Immediately thereafter Om Prakash showed a knife to Praveen Kumar

and took him to the nearby bushes. All the three accused went at that point. Om Prakash put a knife on the abdomen of Praveen Kumar. Kishan Lal co-accused then removed a sum of Rs. 14/- from the pocket of Praveen Kumar and Om Prakash appellant removed the wrist watch from the person of Praveen Kumar. All the three accused then ran away from there. Praveen Kumar raised an alarm. Praveen Kumar and Vijay Kumar both then started chasing the three accused persons. After they had been chasing them Om Prakash again showed a knife to Praveen Kumar and Vijay Kumar and told them not to chase them. Praveen Kumar and Vijay Kumar were, however, able to apprehend Behari Lal appellant and his co-accused Kishan Lal. Om Prakash, however, managed to escape. Praveen Kumar and Vijay Kumar were bringing Behari Lal and Kishan Lal to the police station when ASI ML L. Chopra of Police Station Mandir Marg met them. These two accused persons were then taken to the police station. The case was registered on the statement of Praveen Kumar. Praveen Kumar was taken to the police hospital. He was examined there and given medical aid. He was, however, discharged from the hospital on the same day. All the three accused persons were challaned under Section 394/397 read with Section 34 IPC. During the investigation of the case Om Prakash appellant is alleged to have made a disclosure statement in pursuance of which one spring actuated knife was recovered which was seized by the police in the presence of one Ashok Kumar. Om Prakash appellant was arrested in this case on April 25, 1975. He was separately challaned under Section 25 of the Arms Act for his being in possession of that knife. In the main case the wrist watch (Ex. P.6) is alleged to have been recovered in pursuance of his disclosure statement made on April 25, 1975 itself, i.e. on the date of his arrest from one attache case lying at the house of Om Prakash appellant. This wrist watch was identified by Praveen Kumar in the Court as the wrist watch that he was robbed off by the accused persons. A test identification parade for getting Om Prakash appellant identified from Praveen Kumar and Vijay Kumar PWs was also arranged at the (Central Jail, Tihar on April 30, 1975. Om Prakash, however, declined to join the same. Praveen Kumar and Vijay Kumar PWs supported the prosecution version. Behari Lal and Om Prakash appellants in their statements under Section 313, Cr. P.C. denied the occurrence and stated that they had been falsely implicated in the case. Behari Lal and Om

Prakash appellants also led some defense evidence to the effect that they were picked up from their houses by the police and were falsely implicated in the case.

2. Om Prakash appellant was convicted under Section 394/397, IPC. The other two accused, namely, Behari Lal and Kishan Lal were convicted under Section 394 read with Section 34 IPC by Shri G. R. Luthra, Additional Sessions Judge, as his Lordship then was, by his impugned order dt. May 25, 1976. Om Prakash appellant was sentenced to undergo RI for seven years. The other two accused were sentenced to undergo RI for three years each. In the case under the Arms Act Om Prakash appellant was separately convicted under Section 25 of the Arms Act by his impugned judgment dt. May 25, 1976 and he was sentenced to RI for one year. The sentence under the Arms Act was made to run concurrently with the sentence as awarded to the appellant in the main case under Section 394/397 read with Section 34, IPC.

3. I have heard Mr. D. C. Mathur, learned Counsel for the appellant, and Mr. D. R. Sethi, learned Standing Counsel for the State, and was taken through the record of the case. I shall dispose of all these three appeals by this consolidated judgment.

4. Taking the appeal of Behari Lal first it was submitted by Mr. Mathur that assuming the prosecution case to have been proved from the prosecution evidence on record the learned trial Court was in error in coming to the conclusion that the provisions of Section 34, IPC were attracted to the case of Behari Lal? ' \* It was submitted that from the material ah adduced on the record no hand of Behari Lal could be spelt out in the robbery that was committed. I do not find any force in this contention. From the facts of the case of the prosecution which stood proved on the record as I will discuss hereafter the provisions of Section 34 were clearly attracted to the case of Behari Lal. To recapitulate the facts all the three accused persons had gone near Praveen Kumar (PW 1) together. Om Prakash showed a knife to Praveen Kumar in the presence of Behari Lal on the pretext of asking of time from Praveen Kumar and all the three accused made Praveen Kumar to walk from there to nearby bushes and then Praveen Kumar was robbed off a sum of Rs. 14/- by Kishan Lal and of the wrist watch by the other accused

Om Prakash in the presence of their co-accused Behari Lal. All the three accused persons then started running away from the spot. Om Prakash only was able to make good his escape whereas Behari Lal and his co-accused Kishan Lal were apprehended by PW 1 and PW 3 at some distance from the place of commission of robbery. From these facts it is clear that Behari Lal shared the common intention of his co-accused Om Prakash and Kishan Lal in their robbing Praveen Kumar off the sum of Rs. 147- and the wrist watch.

4A. Now as regards the appeal of Om Prakash in the main case the trial Court has relied on the statements of Praveen Kumar (PW 1) and Vijay Kumar (PW 3); the factum of the recovery of the wrist watch (Ex.P6) from the possession of Om Prakash appellant in pursuance of his disclosure statement and further the circumstance of Om Prakash having declined to join the test identification parade held on April 30,1975. As regards the drawing , of adverse inference against Om Prakash appellant on the fact of his having declined to' join the test identification parade my attention was drawn by Mr. Mathur to the statement of Praveen Kumar (PW 1). Towards the end of his cross-examination by Shri R. S. Kwatra, counsel for Kishan Lal accused, he stated that on April 30, 1975 he was shown Om Prakash appellant from the window of the Jail and that he (Praveen Kumar) had told the police that he (Om Prakash)was the person who was the accused. He further stated that at that time Vijay Kumar and the Magistrate and ASIM. L Chopra were present. Reference to the statement of Vijay Kumar (PW 3) in his cross-examination was also made wherein he stated that on April 30,1975 it was at about 2.00 PM that he and Praveen Kumar had reached at the gate of the Central Jail, Tihar. Omi accused was shown to Praveen Kumar and to him when Omi was still inside the jail and he was shown by the Police Sub Inspector Shri Chopra while standing inside jail. According to the statement of Shri Manphool Singh (DW 7), an employee of the Central Jail, Tihar, as per the register of Central Jail, Tihar dt. April 30, 1975 Mr. A. K. Srivastava, Magistrate came to the Central Jail on April 30, 1975 at about 2.50 PM and he left the jail premises at 3.11 PM. On the basis of this material it was submitted that from this it would appear that Om Prakash appellant was shown to Praveen Kumar and Vijay Kumar PWs at .the Central Jail, Tihar and it was quite likely that Om Prakash appellant might have been shown to these witnesses prior to asking Om Prakash as to whether he was

willing to join the test identification parade and that in such a situation Om Prakash appellant was justified in declining to join the test identification parade. Consequently, the learned trial Court was in error in drawing an adverse inference against Om Prakash for his having declined to join the test identification parade. I do not find any merit in this contention. So far as Praveen Kumar (PW 1) is concerned, he was not asked as to at what point of time he was shown Om Prakash appellant at the Central Jail, Tihar. Vijay Kumar (PW 3) in his examination-in-chief clearly stated that they were shown Om Prakash appellant from the window when the Magistrate and the Thanedar had already gone inside the jail premises and Om Prakash refused to join the identification parade. In view of this categorical statement of Vijay Kumar his aforesaid statement in the cross-examination could not be construed to mean that as per this witness Om Prakash was shown to him and to Vijay Kumar prior to the Magistrate and the police officer having gone inside the jail premises and prior to Om Prakash appellant having declined to join the test identification parade. Vijay Kumar in his cross-examination gave the time of 2.00 PM only by approximation and he stated so there as well. The learned trial Court was thus right in coming to the conclusion that Om Prakash had declined to join the test identification parade without any justification.

5. It was next submitted by Mr. Mathur, learned Counsel for the appellants, that the learned trial Court was in error in coming to the conclusion that the wrist watch Ex.P6 which was recovered from the house of the appellant Om Prakash in pursuance of his disclosure statement was the same which was the subject matter of the robbery. It was submitted that the wrist watch Ex.P6 was not converted into a sealed packet and under the circumstances the wrist watch Ex.P6 could be shown to Ashok Kumar, PW2, who identified the wrist watch Ex.P6 as the same which was recovered from the house of Om Prakash appellant in his presence. There is no merit in this submission. Praveen Kumar PW 1 has stated on oath that the watch Ex.P6 is the same watch he was robbed off. The prosecution got proved the receipt Ex.PC also vide which Praveen Kumar purchased the wrist watch. There does not appear to be any reason as to why PW 1 and PW 2 would state falsely that the watch Ex.P 6 was the same that was recovered from the possession of the appellant Om Prakash. The Supreme Court in State of Uttar Pradesh v. Jageshwar : 1983 CriLJ686 observed that the testimony of a lady

witness identifying the stolen property, such as ornaments and silk sarees at the trial without prior test identification parade is not inadmissible in evidence, for want of proper test identification\* It was observed that it is a matter of common knowledge that ladies have an uncanny sense of identifying their own belongings, particularly articles of personal use in the family. A person who wears a wrist watch also, in my view, is certainly in a position to identify the wrist watch as worn by him for some period.

6. Mr. Mathur lastly submitted that the trial Court was in error in holding that the offence punishable under Section 394 IPC was made out against the appellants Behari Lal and Om Prakash. It was contended that on the facts as proved on the record only a case punishable under Section 392 IPC could be held as made out. I find force in this contention. The case of the prosecution is that simple hurts i.e. two abrasions as found by Dr. R. P. Saraswat, PW 9, on the person of Praveen Kumar were caused with knife by Om Prakash. This version of the prosecution does not find support from the evidence as adduced on the record. Dr. R. P. Saraswat, PW 9, has stated that the two abrasions i.e. one over the left hypochondrium and the other over epigastria region were caused by blunt object. In his cross-examination he has stated that knife comes in the category of sharp-edged weapon. No attempt was made on behalf of the prosecution to get it clarified from Dr. Saraswat that the two abrasions could be caused on the person of Praveen Kumar by a knife in any manner. Thus the medical evidence was opposed to the said case of the prosecution. The learned trial Court also did not agree with the case of the prosecution that the abrasions were caused to Praveen Kumar by any knife. The trial Court has observed that the abrasions might have been caused to Praveen Kumar when Praveen Kumar was pushed in the bushes. In my opinion such a conclusion could not be reasonably drawn in favor of the prosecution when that was not the case of the prosecution itself. I accordingly hold that the learned trial Court was in error in holding that Om Prakash appellant had voluntarily caused hurt to Praveen Kumar in the commission of the robbery. In conclusion, I convert the conviction of the appellants Om Prakash and Behari Lal from the one under Section 394 read with Section 34 IPC to the one under Section 392 read with Section 34 IPC. The conviction of Om Prakash appellant under Section 397 IPC is maintained.

7. As regards the sentence of two years' RI as awarded to the appellant Behari Lal, the age of Behari Lal as recorded while framing charge against him is 18 years. The offence under Section 392 IPC is not punishable with imprisonment for life. Under the circumstances Behari Lal appellant would normally be entitled to the benefit of probation under Section 6 of the Probation of Offenders Act, 1958. A report from the Probation Officer be accordingly sent for in relation to the case.

8. Regarding the sentence as awarded to the appellant Om Prakash it was submitted by Mr. Mathur that his conviction now having been converted into the one under Section 392 IPC from the one under Section 394 IPC, besides under Section 397 IPC, he may be given the benefit of probation under Section 4, Probation of Offenders Act, 1958. He is also stated to be below 21 years of age. Under the circumstances it is expedient to get the report of the Probation Officer in the matter. That be sent for.

9. As regards the appeal of Om Prakash against his conviction under the Arms Act, Mr. Mathur submitted that no witness of the prosecution except PW 8, ASI Narain Lal Chopra, Investigating Officer of the case, even stated that the knife that was recovered from the possession of the appellant Om Prakash was a buttoned (spring actuated knife). It was then pointed out that Om Prakash in his statement under Section 313, Cr. P.C. stated that the knife Ex.P7 was not a buttoned knife. The contention is that under these circumstances it was the duty of the prosecution to prove beyond a reasonable doubt that the knife Ex.P 7 which was recovered from the possession of Om Prakash was a buttoned knife but for which the knife Ex.P 7 did not fall within the category of prohibited arm but that there was no such proof on the record. I do not agree with this submission. Praveen Kumar PW 1 in his statement in the Court stated that the knife of the same type as the knife Ex.P 7 was recovered from the possession of Om Prakash. Ashok Kumar PW 2, stated that knife Ex.P 7 was the same that was recovered from the possession of Om Prakash appellant. ASI, Narain Lal Chopra, PW 8, the Investigating Officer of the case, in his examination-in-chief stated that the knife Ex.P 7 was recovered from the possession of Om Prakash. He also stated that this knife is a spring actuated knife. No question was put to this witness in his cross-examination challenging him in that regard. The knife Ex.P 7 is also shown

to be a spring actuated knife and is so described in the sketch Ex.PX of the knife as prepared by PW 8 which was duly proved on record. In the seizure memo Ex.PY also the knife has been described as a buttoned knife. From this material, I am of the view that the trial Court was justified in coming to the conclusion that the knife Ex.P 7 was recovered from the possession of the appellant Om Prakash and that was a buttoned knife. The mere fact that the appellant in his statement under Section 313 Cr. P.C. after the conclusion of the prosecution evidence stated that the knife was not spring actuated knife because its spring was not working did not have any evidentiary value and did not mean that any higher burden was cast on the prosecution in view of that statement of the appellant to convince the Court that the spring actuated knife was in, working order. I hold that the learned trial Court was right in coming to the conclusion that the appellant Om Prakash was found in possession of a spring actuated knife (in order). The appeal of the appellant Om Prakash being Cr. A. 247/76 is dismissed.

At the time of the pronouncement of judgment it was submitted by Mr. Mathur that the question of releasing the appellant Om Prakash on probation in the case under the Arms Act be also taken into consideration and that he deserves to be released on probation in that case also. Let a report of the Probation Officer in this case against Om Prakash appellant be also sent for and the question of sentence as awarded to the appellant Om Prakash in the case under the Arms Act shall then be decided. Be put up on July 24, 1985 for awaiting the report of the Probation Officer.

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