Ramesh @ Tillu Vs. State

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Court : Delhi

Decided On : Nov-28-2003

Reported in : 109(2004)DLT107; 2004(72)DRJ299

Judge : O.P. Dwivedi, J.

Acts : Indian Penal Code (IPC) - Sections 392, 394, 397 and 411; Code of Criminal Procedure (CrPC) - Sections 311 and 313

Appeal No. : Crl Appeal 91/2003

Appellant : Ramesh @ Tillu

Respondent : State

Advocate for Def. : Sunil K. Kapoor, Adv.

Advocate for Pet/Ap. : Suman Chauhan, Adv

Disposition : Appeal dismissed

Judgement :

Crl Appeal 91/2003

1. This appeal is directed against the judgment dated 27.7.2002 and order of sentence dated 6.8.2002 passed by the learned Additional Sessions Judge whereby the appellant was held guilty of the offence under Section 392 read with

Section 397 IPC and sentenced to undergo RI for seven years.

2. Briefly stated, the prosecution case is that on 17.9.1997 at about 1.45 P.M complainant Smt. Miti Jain came back to her Flat No. 46, Sector A, Pocket C, Vasant Kunj. At about 2.15 P.M when she was alone in the flat, door bell rang. She opened the door. She found one boy aged about 20-22 years standing on the door. He told her that her cable was out of order and he has come to rectify the cable. She allowed the entry to the boy who remained busy in repairing work for about half an hour. The complainant got busy in conversation with her mother on telephone. After some time, the boy asked her to bring a glass of water. She went to the kitchen. In the meantime boy closed the main door, whipped out a knife from his pocket and asked her to hand over the money to him. She then grappled with the boy. She sustained injury with the knife on her right hand thumb. She raised alarm and cried for help as a result of which the boy fled away after opening the door. Some neighbours rushed to her residence and removed her to Gitanjali Nursing Home where she was medically examined by Dr. Pramod Kohli who noticed a deep lacerated wound (bone deep) on the level of proximal joint in left thumb. He opined that the nature of injury was grievous. Police was informed. SI Padam Singh along with Constable Makanlal went to the place of occurrence i.e. Flat No. 46, Sector-A, Pocket-C, Vasant Kunj where they came to know that injured/ complainant has been taken to hospital. Then they rushed to the hospital and found PW-3/complainant admitted there. SI Padam Singh recorded her statement (Ex PW-3/1) and made his endorsement thereon and sent the rukka to the police station for registration of the case whereupon FIR No 490 dated 17.9.1997 under Section 394/34 IPC was registered. SI Padam Singh went to the spot, prepared a rough site plan and supplementary statement of the complainant was also recorded wherein she stated that when she came back from the hospital, she noticed that her purse which was lying on the table of the drawing room containing some money and her driving license was missing. Further investigation in this case was conducted by SI Balram Singh who, on the basis of the secret information, apprehended the accused/Ramesh on 18.11.1997. He was found at the residence of one Shri Ram Kumar where the accused was staying with his brother-in-law at Brijvasan. On interrogation, accused made a disclosure statement regarding his involvement in this case. Ladies purse belonging to the

complainant was recovered from his house in Village Masoodpur. On his pointing out, co-accused Anil Kumar was also arrested. Driving license of the complainant was recovered from co-accused Anil Kumar. After completing the investigations, police filed a challan against both the accused persons under Sections 394/397/411/34 IPC. On 27.8.1998, learned ASJ framed charges under Sections 394 and 397 IPC against the accused Ramesh/appellant. Separate charges under Section 411 IPC was framed against the co-accused Anil Kumar who is now a proclaimed offender.

3. In proof of its case, prosecution examined eight witnesses namely Dr. Pramod Kohli, PW-1, Smt. Kamal Rana, PW-2, Smt. Miti Jain, complainant, PW-3, Head Constable Subhash, PW-4, Shri Jai Prakash Narain, Metropolitan Magistrate, PW-5, Constable Joginder Singh, PW-6, SI Balram Singh, PW-7 and SI Padam Singh, PW-8. In his statement under Section 313 Cr.P.C., the appellant denied his involvement in the alleged offence as also the recovery of ladies purse at his instance. He stated that he has been falsely implicated.

4. After considering the material on the record, learned ASJ held the appellant guilty under Section 392 read with Section 397 IPC and sentenced him to undergo RI for seven years. It may be pointed out here that material witnesses namely complainant Smt.Miti Jain, PW-3, Constable Joginder Singh, PW-6, SI Balram Singh, PW-7 and SI Padam Singh, PW-8 were not cross-examined as the counsel for the appellant was not available on any of the dates on which their statements were recorded. Examination-in-chief of the complainant was recorded on 3.5.1999. At the request of learned counsel for the appellant, her cross-examination was deferred as the counsel was reported to be ill. However, counsel did not turn up on subsequent dates also. When the case was taken up on 19.2.2000 for cross-examination of the PW-3, there was a request for short adjournment on behalf of the defense's counsel Shri Rakesh Ssehrawat, Advocate as he was reported to be busy in another Court. This request of the counsel for the accused was declined and PW-3 was discharged on 19.2.2000. Similarly on 16.8.2001 statements of PW-6, PW-7 and PW-8 were recorded. Shri Parvinder Pal Singh, Advocate requested for short adjournment as his senior counsel had not come due to illness of his mother-in-law. But his request was declined. PW-6, PW-7 and PW-8 were

discharged after recording their examination-in-chief. Since all the statement of the material witnesses have gone unchallenged and uncross-examined, learned ASJ accepted the same as truthful and returned the verdict of guilty against the appellant. At this stage, it may be pointed out that an application under Section 311 Cr.P.C for recalling the witnesses for cross-examination was moved by the appellant but it was rejected by the learned ASJ vide a detailed order dated 14,9.2001 Revision filed by the appellant before this Court against the said order was also dismissed.

5. One of the grounds on which the conviction has been challenged by learned counsel for the appellant is that appellant was not given free legal assistance as a result of which all the material witnesses remained uncross-examined and this, according to learned counsel for the appellant, is in violation of law laid down by Hon'ble Supreme Court in the case of Suk Das and Another vs . Union Territory of Arunachal Pradesh : 1986 CriLJ1084 . In that case, the appellants were not represented by counsel during the trial because of their poverty. Trial court never told the appellants that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. The Apex Court referred to earlier decisions on the point in the case of Hussainara Khatoon vs . State : 1979 CriLJ1045 , Khatri vs . State of Bihar : 1981 CriLJ597 and held that the right to free legal service is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held to be implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. Learned counsel for the appellant has specifically referred to observations made by the Apex Court in the case of Khatri v. State of Bihar (supra) to the effect that Magistrate or Sessions Judge before whom an accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. In the instant case, it does not appear

that the accused was not able to engage the services of a lawyer on account of poverty or indigence. A perusal of the order sheets of the trial court reveals that he has always been represented by one Advocate or the other. On 12.10.1998 when PW-1 and PW-2 were examined, the appellant was represented by Shri B.K. Singh and Mr. Rakesh Sehrawat, Advocate. Thereafter on 3.5.1999 when the statement of complainant Mrs. Miti Jain was recorded, a request for short adjournment was made on behalf of the appellant as his counsel was ill so case was adjourned to 24.7.1999 and then to 23.10.1999. On both these dates, learned Presiding Officer was on leave so case was adjourned to 19.2.2000 for further cross-examination of PW-3. On 19.2.2000 when the case was taken up, again a request for short adjournment was made by Clerk of the counsel namely Shri Rakesh Sehrawat, Advocate on the ground that counsel is busy in Tis Hazari Court Learned ASJ declined his request and discharged the witness. On 16.8.2001 when the statements of PW-6, PW-7 and PW-8 were recorded, Shri Parwinder Pal Singh, Advocate appeared on behalf of the appellant and requested for short adjournment as senior counsel has not come. Again request for adjournment was declined. Clearly it is not a case of inability of the accused to engage a counsel because of poverty and indigence. Rather it reflects on the indifferent attitude of the counsel towards the case. An application under Section 311 Cr.PC dated 29.8.2001 was also filed by the appellant for recalling the witnesses for cross-examination. This application was rejected by the learned ASJ by a detailed order dated 14.9.2001 against which the appellant preferred a revision before this Court which was dismissed vide order dated 17.1.2002. In these circumstances, the dictum laid down by the Apex Court in the case of Suk Das (Supra) will not apply to this case because the prosecution witnesses have gone uncross-examined not because of poverty or indigence of appellant but because of negligence on the part of the appellant/accused or his counsel. A perusal of the order sheet dated 26.5.1998 shows that when the case was taken up in the court of learned ASJ after assignment, learned ASJ enquired from the accused/appellant as to whether he has engaged his counsel. Thereupon the accused told the Court that he had engaged Shri Rakesh Sehrawat, Advocate as his defense counsel. In fact Shri Rakesh Sehrawat, Advocate has been appearing for the appellant on many dates. There was thus no occasion for the learned ASJ

to provide any counsel to conduct his case at State expense as he was already represented by the counsel. thereforee, observations made by Supreme Court in the case of Suk Das (supra) will not apply to the present case.

6. Learned counsel for the appellant next contended that in this case the accused and the complainant were not known to each other before the incident and the complainant had not seen the accused after the incident except in the Court room on 3.5.1999 when PW-3 was examined. Under these circumstances, identification of the appellant by the complainant for the first time in the court is of no value because in this case no test identification parade was held. In the present case, IO SI Balram Singh, PW-7 fell into error in not arranging the TIP. But in the circumstances of the case, I think such lapse on the part of the IO will not be sufficient to reject the testimony of the complainant/PW-3 who identified the appellant as the culprit in her statement before the court on 3.5.1999.

7. Evidence of identification furnished by holding TIP is primarily meant for the satisfaction of investigating officer as to identity of the culprit, particularly when the offence is committed under conditions of poor visibility. It cannot be made the sole basis for conviction because the evidence of identification provided by the TIP is per-se not a substantive piece of evidence. It can be used only for the purpose of corroboration of evidence regarding identification produced in the Court during the trial. The purpose of holding Test Identification Parade is only to test the capacity of a witness of his keen observation with a view to fix identity of culprit whom she/he had never seen before the incident particularly when the offence is committed in conditions of poor visibility where the victim could have only a fleeting glance of the culprit. But in cases where offence is committed in broad day light and witness had ample opportunity to see the salient features of the culprit for sufficiently long duration, the ground for holding of TIP disappears. In the present case, offence was committed at 2.15 P.M when the appellant had gone to the complaint's house on the pretext of repairing the cable. He remained busy for about least half an hour on the pretext of doing the repair work. Then he asked the complainant to bring a glass of water. When the complainant proceeded towards her kitchen, he whips out the knife and asked the complainant to hand over the money. Complainant grabbed the knife & raised alarm for help. Thereupon, the

appellant ran away. Thus, the complainant had ample opportunity to talk, observe & converse with the appellant in day light leaving clear impressions of the appellants' features on the mind of the complainant. In the complaint lodged with the police, she has given the detailed description about the height/complexion/feature of the accused. Under these circumstances I think non-holding of TIP will not be sufficient ground to disbelieve the testimony of the complainant. Learned ASJ has considered this aspect of the matter in detail with reference to several authorities and I find no reason to take a different view in the matter.

8. Learned counsel for the appellant referred to a decision in the case of Munna vs. State (NCT of Delhi) V (2003) SLT 461. In that case, the accused had declined to take part in the TIP. The Court accepted prosecution evidence regarding identification. Dealing with the objection that no TIP was held, the Apex Court after considering various earlier decisions including recent decision in the case of Malkhansingh & Ors. Vs . State of Madhya Pradesh, : 2003 CriLJ3535 , observed as under :-

'It is true to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, thereforee, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating

agency to hold or confers a right upon the accused to claim, a test identification parade. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact.

It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in Court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in Court.

The substantive evidence is the evidence of identification in Court and the test identification parade provides corroboration to the identification of the witness in Court, if required. However, what weight must be attached to the evidence of identification in Court, which is not preceded by a test identification parade, is a matter for the courts to examine.'

9. It will not be correct to say that failure to hold a test identification parade would per se be fatal to the prosecution case and render the evidence regarding identification in the court unworthy of any credit. Rather the evidence of identification in the Court is the only substantive evidence but the weight to be attached to such evidence of identification in the Court is to be assessed by the Court as a matter of fact in the light of facts and circumstances of each case. If an offence is committed during night and the witness had only a fleeting glance of the culprits, identification of culprits would obviously be very difficult. In such situations, the purpose of holding TIP is to test the power of the observation and recollection of the witness to ascertain whether he can correctly identify the culprits. But in cases like the present one where the offence has been committed in broad day light & the witness had sufficient time to talk or interact with the offender, the holding of TIP would appear to be superfluous. In the present case, the complainant had the opportunity to see, talk and watch the accused closely for about half an hour in day time. Complainant is educated lady. It thereforee, cannot be said that her power of observation and recollection must have been put to test by holding TIP. In the circumstances of the present case I think the complainants'

testimony regarding the identity of the offender cannot be impeached for some lapse on the part of the I.O.

10. Learned counsel for the appellant next contended that the evidence regarding recovery of lady's purse at the instance of the appellant consists of the testimony of the police officials only namely PW-6-Constable Joginder Singh, PW-7 SI Balram Singh and PW-8 SI Padam Singh. The IO did not enjoin any public witness at the time of search. Thus according to learned counsel for the appellant, search was conducted in violation of the provisions under Section 100(4) Cr.PC and thereforee, recovery becomes doubtful. Reference in this connection was made to the decision in the case of Jagvir Singh (in Jail) vs . State (Delhi Admn.) : 57(1995)DLT479 and Chander Pal and etc. vs . The State : 75(1998)DLT461 . In the present case, police did not conduct any raid or search on any secret information. Rather, it is the appellant who himself made a disclosure statement that he had kept the purse in his house and then led the police party to his house and got the purse recovered. Recovery was not effected in pursuance of any raid or search conducted by the police. So strictly speaking the provisions of Section 100(4) Cr.PC will not apply. Besides, in the present case, these witnesses have gone uncross-examined. Their testimony remains unchallenged. Not even a suggestion to the contrary was put to them. thereforee, there could possibly be no reason for the court to disbelieve the testimony of these witnesses.

11. It was lastly contended by learned counsel for the appellant that the weapon of offence namely Knife has not been recovered. thereforee, in view of the observation made by this Court in the case of Balak Ram vs. The State 1983 Crimes 1037 and Shri Bishan vs. The State 1984 (1) Crimes 883 (Delhi), it cannot be said with certainty that knife allegedly used by the appellant was a deadly weapon, hence, the offence under Section 397 IPC is not made out. In the said two cases, this Court has observed as under :

'Knives are weapons available in various sizes and may just cause little hurt or may be the deadliest. They are not deadly weapons per se such as would ordinarily result in death by their use. What would make a knife deadly is its design or the manner of its use such as is calculated to or is likely to produce death. It is,

thereforee, a question of fact to be proved and prosecution should prove that the knife used by the accused was a deadly one.'

12. I think it is needless to enter into this controversy in the present case because complainant Miti Jain sustained injury which has been opined to be grievous by Dr. Pramod Kohli, Orthopedic Deptt. PW-1 Dr. Kohli was not at all cross-examined by the appellant on this point. Section 397 IPC can be invoked in either of the following situations namely when at the time of committing robbery or dacoity, the offender (i) uses any deadly weapon, or (ii)causes grievous hurt to any person, or (iii) attempts to cause death or (iv) grievous hurt to any person. In either of these situations, Section 397 IPC is attracted and the imprisonment with which such offender shall be punished shall not be less than seven years RI. In the present case, the complainant suffered grievous injury on the left thumb, thereforee Section 397 IPC is made out irrespective of the fact whether knife used by the appellant was a deadly weapon or not.

13. Some controversy was raised regarding sight of injury. According to Dr. Kohli, PW-1 injury was noticed on the left hand thumb of Miti Join/complainant but complainant stated in her statement before the police (Ex.PW-3/1) that injury was caused on the right hand thumb. I think, not much capital can be made out of it. This appears to be obviously a mistake made by the complainant or the police while recording the statement out of nerves ness or inadvertance. Had the injury been caused on the right thumb, she could not have put her signature on her statement PW-3/1.

14. Having considered the submission of the learned counsel for the appellant and the learned counsel for the State in the light in the material on record, I find no reason to interfere with the impugned orders. Accordingly this appeal fails and is hereby dismissed.