

Surinder Vs. State

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Court : Delhi

Decided On : Oct-04-2006

Reported in : 2007(98)DRJ124

Judge : S.N. Aggarwal, J.

Acts : Indian Penal Code (IPC) - Sections 34, 392, 395, 397 and 398

Appeal No. : Crl. Appeal No. 527/2002

Appellant : Surinder

Respondent : State

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

Advocate for Pet/Ap. : S.K. Sharma and; Anurag Mangla, Advs

Judgement :

S.N. Aggarwal, J.

1. Aggrieved by his conviction under Section 398 IPC vide judgment dated 27.05.2002 of the Court below, the appellant has preferred this appeal.

2. Briefly stated the facts of the case are that on 06.11.1988 at about 7:15 PM Mr. R.P. Kapoor and his wife Mrs. Neelam Kapoor were sitting in their house No. D-9, Kalindi Colony, New Delhi. Mother of Mr. Kapoor, his sister and one servant were

also in the house. A call bell was made at the door and Mrs. Neelam Kapoor went to open the door. The moment, she opened the door, 6-7 persons, who were standing at the gate, suddenly pushed her inside the house and they were all holding revolvers and knives. They all came Along with Neelam Kapoor to lobby and asked her and her family members to sit in the lobby and pointed out their knives and revolvers on them. They demanded keys from Mrs. Neelam Kapoor and threatened that if the keys of almirahs and safe were not handed over, they would kill her. She gave key bunch to them. At the time of entering the house, they had cut the telephone wire and closed the entrance gate and after taking keys, they started ransacking the house and collecting valuables. After about 10 minutes of her giving keys, one of the accused namely Hans Raj told her that keys were incomplete and demanded from her more keys and gave her a slap and asked her to give keys. On this, R.P. Kapoor got up and told him not to manhandle Mrs. Neelam Kapoor and when he raised his hands to protect her, one of the dacoits gave a knife blow to him and the knife hit him on left palm and he started bleeding. Mrs. Neelam Kapoor had been slapped so badly that she got scared and Mr. R.P. Kapoor, after receiving the knife injury, became silent. The dacoits kept on picking up and lifting things from inside the bed rooms and other rooms of their house. Throughout the period, when they were picking up things, one or two dacoits, kept all the house persons under the cover of fire arms and knife which they were holding and made them sit in the lobby throughout.

3. Dev Singh Rawat, who was servant of son of Mr. R.P. Kapoor happened to come to their house and before he could enter the house, he saw from the window the scene inside the house and he immediately rushed to the Police Post nearby and reported about armed robbers being inside the house of Mr. Kapoor. Police swung into action and police team surrounded the house of Mr. Kapoor. SHO of the area also reached there and police team after peeping from the lobby and other windows, learnt about several dacoits inside the house. One of them gave bell, one the dacoits went to open the door and when he saw police there, he cried out 'Mama aa gaye' sarcastically informing his associates about the arrival of police. When the dacoits learnt about the arrival of police, they immediately started running out of the house from different doors, after picking up whatever articles they had looted till then. While they tried to run from the spot, Police came into

action and four of them apprehended at the spot. Police had also to fire shots, one of the dacoits received bullet injury and three of them were overpowered after chase and four of them succeeded in running away by scaling the back courtyard boundry wall (which must have been left by the police unguarded). Apart from the looted articles, which were recovered from them, arms i.e. revolvers and knives were also recovered. On the complaint of Mr. R.P. Kapoor, FIR was registered and the persons, who were apprehended red handed at the spot, were formally arrested by the Police. Their interrogation led to the identification and arrest of other accused persons and recovery of looted articles was also made from them. The articles which were recovered from the accused were identified by the complainant Mr. R.P. Kapoor and his wife in TIP proceedings of the articles. Other accused persons, who were arrested later on were also offered to join TIP but they refused to do so.

4. Mr. R.P. Kapoor, who had been injured at the time of dacoity, was taken to hospital and got medically examined. After completing the investigation, challan was filed and accused persons were put to trial. The appellant Along with other accused persons were charged under Section 397 IPC. They all pleaded not guilty and claimed trial.

The learned Counsel for the appellant has taken me through the evidence of the prosecution witnesses recorded before the Court below and relying on the same, he has contended that the appellant could not have been convicted either under Section 397 IPC or under Section 398 IPC as he was not carrying any weapon with him at the time of alleged dacoity. PW-3 Mr. Neelam Kapoor; PW-4 Mr. R.P. Kapoor and PW-11 Inspector Ishwar Singh are the relevant witnesses of the prosecution in so far as the case against the present appellant is concerned.

5. As per case of the prosecution, the incident allegedly took place on 06.11.1988. The appellant was apprehended on 22.11.1988 and some recovery of looted property was made from him pursuant to his disclosure statement. The looted property recovered from his possession was identified by the complainant Mr. R.P. Kapoor and his wife Mrs. Neelam Kapoor in Test Identification Parade held for identification of the case property. PW-11 Inspector Ishwar Singh has proved

arrest of the appellant and also the recovery of looted property made from him and the same is Ex. P-1 to Ex. P-5; Ex. P-7 to Ex. P-11 and Ex. P-13 to Ex. P-15. PW-3 Mrs. Neelam Kapoor and PW-4 Mr. R.P. Kapoor have testified in their respective testimonies that at the time of dacoity in their house on 06.11.1988, accused Jagdish was wielding a dragger whereas the other three co-accused persons Vijay, Hansraj and Joginder were carrying revolvers with them. None of the witnesses examined by the prosecution has testified that the appellant was also carrying a weapon with him at the time he Along with his other co-accused persons had intruded in the house of the complainant on the date of incident. This factual position has been admitted by the learned APP for the State during the arguments of this appeal.

6. In view of the above admitted factual position, the only question now left for decision is whether the conviction of the appellant under Section 398 IPC can be legally sustained. Sections 397 & 398 IPC are relevant and the same are reproduced here-in-below:

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.

398. Attempt to commit robbery or dacoity when armed with deadly weapon.- If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

In Ashfaq v. State (Govt. of NCT of Delhi) : 2004 CriLJ936 , the Hon'ble Apex Court has held as under:

Section 397, does not create any new substantive offence as such but merely serves as complementary 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 deadly weapon, or causing of grievous hurt of 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 principle of constructive or vicarious liability engrafted in Section 34 IPC. 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 de hors any reference to Section 34 IPC.

7. In view of law laid down by the Hon'ble Apex Court, the individual role of the accused has to be considered in relation to use or carrying a weapon at the time of dacoity for attracting the provisions either of Section 397 IPC or Section 398 IPC. Since in the present case, the prosecution could not establish that the appellant was also carrying a deadly weapon with him at the time of alleged dacoity when he intruded into the house of the complainant. Along with his other co-accused persons, his conviction under Section 398 IPC can not be legally sustained. However, the prosecution has proved beyond reasonable doubt that the appellant along with other co-accused persons had intruded into the house of the complainant and had participated in committing of dacoity for which he was tried. Therefore, the appellant is liable for conviction under Section 395/34 IPC. The impugned judgment of conviction passed by the Court below against him is accordingly modified.

8. I have heard the learned Counsel for the parties on the point of sentence also. It is submitted that the appellant after his conviction by the Court below has got married 8 years back. He is a young person and is making his livelihood by vending vegetables at Azadpur Mandi. By the time, the sentence of the appellant was suspended vide order passed by this Court on 26.05.2003, he had already suffered rigorous imprisonment for about 4 years. The fine imposed on him by the Court below is stated to have already been deposited. The incident has become almost two decades old.

Having regard to the circumstances of the case, I am of the considered view that the ends of justice shall be adequately met by sentencing the appellant to the sentence already undergone by him. The impugned order on sentence also stands

modified accordingly.

9. In view of the above, this appeal is partly allowed and stands disposed of.

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