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Raju Vs. State

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Court : Delhi

Decided On : Dec-15-2010

Judge : V.K. Jain, J.

Acts : Indian Penal Code (IPC) - Section 392; Code of Criminal Procedure (CrPC) (Cr.P.C.) - Section 313

Appeal No. : CRL.A. 96/2009

Appellant : Raju

Respondent : State

Advocate for Def. : Mr. O. P. Saxena, Adv.

Advocate for Pet/Ap. : Mr. Mukesh Jain, Adv.

Judgement :

1.This is an appeal against the judgment dated 05 th December, 2008 and Order of Sentence dated 12th December, 2008, whereby the appellant was convicted under Section 392 IPC read with 397/34 thereof and was sentenced to undergo RI for 7 years and to pay a fine of Rs.5000/- and in default of payment of fine to undergo simple imprisonment for three months.

2. The complainant Saravjeet Singh went to Police Station Paschim Vihar on 01.01.2005 and lodged FIR, stating therein, that on that day he was returning home in his car No. DL 9 CG-6789. When he was reached at the traffic light of T

Point of Road No. 19/20 at about 12:30 a.m. and was waiting at the intersection, four boys came there. Two of them stood in front of his car, whereas the remaining Crl.A.No.605/1999 Page 1 of 11 two knocked at the window of his car. When the complainant pulled down the glass of the window, one of them put a knife on his neck and the other took out the keys of the car. When the complainant tried to remove the knife from his neck, he sustained injuries on his right hand and on his nose. The culprits then removed the two gold rings which the complainant was wearing and also snatched the mobile phone which he was carrying.

3. The prosecution examined 10 witnesses in support of its case. No witness was examined in defence. The complainant came in the witness box as PW-4 and stated that in the night intervening 31.12.2004 and 01.01.2005, he was going to his house from his office in his car No. DL 9 CG-6789. When he reached the traffic light of T Point of Road No. 19/20 at about 12:30 a.m. and was waiting at the intersection, four boys came there, two of whom stood in front of his car, whereas the remaining two knocked at the window and sought lift. When he pulled down the window glass one of them put a knife on his neck and the other took out the keys of the car. When the complainant tried to remove the knife from his neck, he sustained injuries on his right hand and head but those boys removed the two gold rings and also snatched the mobile phone. He identified the appellant Raju as one of those four boys and said that Raju was having knife with him and was asking the other associates to kill him.

4. PW-8 Ms. Sukhvinder Kaur, Presiding Officer, New Delhi Court has stated that on 05.05.2005, the appellant Raju refused to join the Crl.A.No.605/1999 Page 2 of 11 TIP before her in jail court, despite warning and caution that an adverse interference shall be drawn against him on account of his refusal to join the TIP. PW-9 Dr. V.K. Jha has proved the MLC of the complainant EX PW-9/A. One incise wound over palmar surface of right hand of the complainant was found when he was examined in the hospital.

5. In his statement recorded under Section 313 Cr.P.C. the appellant denied the allegation against him. He however admitted that he has refused to join the TIP before PW-8 Ms. Sukhvinder Kaur in Tihar Jail. According to him he had been

shown to witnesses.

6. The testimony of PW-4 Sarabjit Singh Kalsi, which I see no reason to disbelieve and which finds corroboration from the injury sustained by him shows that four persons including the appellant robbed him of his two rings and mobile phone on 01.01.2005. He has identified the appellant during trial. During investigation the appellant refused to join TIP before PW-8 on the ground that he was shown to about 10, 15 persons in Police Station Punjabi Bagh, he was taken to the court in unmuffled face and his photographs were also taken. There is absolutely no evidence to prove that the appellant was shown to the complainant, Saravjeet Singh at any point of time. During cross examination of PW-8 no suggestion was given to him that the appellant was shown to him in Police Station Punjabi Bagh. During cross examination PW-10 Karan Singh, no suggestion was given to him that the appellant was shown by him to Crl.A.No.605/1999 Page 3 of 11 complainant Saravjeet Singh in Police Station Punjabi Bagh, though it was suggested that he has shown to the complainant at the time when he was produced to the Court. Thus, there is no material or circumstance from which it may be interfered that the appellant was or could have been shown to the complainant Saravjeet Singh in Police Station Punjabi Bagh.

7. Though as noted earlier it was suggested to the Investigating Officer that he had shown the appellant to the complainant at the time of producing him, for taking remand, I find that no suggestion was given to the complainant that he was present in the Court when the appellant was produced for the purpose of taking his remand. Even otherwise there could have been no occasion for the complainant to remain present in the Court at the time of production of the appellant for the purpose of taking his remand. There is no way the complainant could have come to know that the appellant was being produced before the Court on a particular date unless Investigating Officer decided to inform the complainant in this regard. No suggestion was given to the Investigating Officer that he had informed the complainant to remain present in the Court, on the date the appellant was produced for taking his remand. In fact, there was no direct suggestion to the Investigating Officer that the complainant was present in the Court on the day the appellant was produced for taking his remand. Thus, there is no material from

which it may be inferred that the complainant was present in the Crl.A.No.605/1999 Page 4 of 11 court on the date the appellant was produced for the purpose of taking his remand. In fact there is no material on record even to show that the appellant was unmuffled when he was produced in the court for taking his remand. No suggestion was given to Investigation Officer that the appellant was produced in unmuffled at the time of seeking his remand.

8. As regards, the photographs of the appellant I find that no suggestion was given to the Investigation Officer that he had taken photographs of the appellant when he was in Police custody. In any case, taking photographs would be meaningless unless those photographs are shown to the witness before refusal of the accused to join TIP. No suggestion was given to the complainant that the photographs of the appellant were shown to him at any point of time. I, therefore, have no hesitation in holding that the appellant refused the TIP without any justification any without any reasonable ground. If the accused refused Test Identification Parade without any justifiable cause, he does at his own peril and the Court will, in such circumstances, be justified in drawing an interference that had the appellant participated in Test Identification Parade he would have been identified by the witnesses and that precisely was the reason why he refused to join the TIP. Similar view was taken by the Honble Supreme Court in Suraj Pal vs. State of Haryana (1995) 2 SCC 64. The identification of the appellants in Court, coupled with Crl.A.No.605/1999 Page 5 of 11 their refusal to join TIP, without any reasonable ground, is sufficient to establish their identity.

9. It was pointed out by the learned counsel for the appellant that neither the co-accused of the appellant has been arrested nor have any of the stolen articles been recovered. I find that there is no cross-examination of IO on these aspects. He was not asked as to whether he had interrogated the appellant as regard identity of the other persons who were involved with him in commission of this robbery. The Investigation Officer was not asked as to whether he made any effort to recover the stolen items from the appellant or not. He was not asked as to whether he tried to ascertain from the appellant as to what he and his accomplishes had done with the stolen articles. In the absence of any cross examination the appellant does not get any benefit on account of the failure the

investigating agency to recovery to the stolen articles or to arrest the co-accused of the appellant. Had the stolen property been recovered from the appellant, that would definitely have been a corroborative piece of evidence against him. But, absence of such evidence, by itself would not justify acquittal, if the other evidence available against the accused is sufficient to justify his conviction. If recovery of stolen property is to be insisted upon in a case of robbery, every robber may escape punishment simply by disposing of or even destroying the stolen property, before the Investigating Agency is able to reach him.

10. It, therefore, stands proved that the appellant and his accomplices had robbed the complainant of his mobile phone and two rings in furtherance the common intention which they shared with each other.

11. The complainant sustained injury in his right, when he tried to remove the knife which was put on his neck. This, to my mind, would not amount to the appellant or any of his accomplices voluntarily causing hurt to him. Had the appellant not tried to remove the knife, he would not have injured his right hand. The intention of the appellant and his companions was to intimidate him by putting knife on his neck so as to facilitate commission of robbery by them, and was not to cause any injury to him. They did not do any such act from which it may be inferred that they intend to cause hurt to the complainant. Had that been the intention, nothing prevented them from inflicting some injury on his person. This is not the case of the prosecution that the appellant or any of his accomplish voluntarily cause heart to the complainant. The injury in the right hand of the complainant, therefore, cannot be attributed to the appellant or any of his accomplices. Hence, Section 394 IPC is not attracted to the facts of the present case.

12. According to the complainant, the appellant was having a knife in his hand at the time of the commission of the robbery and had in fact asked his accomplices to kill him. I find that in the statement of the appellant recorded under Section 313 Cr.P.C. it was not put to Crl.A.No.605/1999 Page 7 of 11 him that he was carrying a knife. In the absence of any question being put to the appellant in this regard he had no opportunity to say whatever he could possibly have said in respect of this part of the evidence appearing against him. The purpose of recording the

statement of accused under Section 313 Cr.P.C. is to enable him to say whatever he may have to say in respect of material circumstance appearing in evidence against him. Carrying of knife at the time of commission of robbery was definitely a material circumstance appearing in evidence against the appellant, as it was on account of this part of the evidence that Section 397 IPC came into play thereby attracting minimum sentence of imprisonment of 7 years. It was, therefore, further obligatory on the part of learned Trial Judge to put this part of the evidence to the appellant in his statement recorded by him.

13. In Harijan Megha Jesha v. State of Gujarat, AIR 1979 SC 1566, recovery of a blood stained cloth from the accused, which was a material circumstance to establish the charge against him, was not put to him. It was held by the Honble Supreme Court that the appellant could not be convicted of the offence charged against him.

14. In State of Maharashtra v. Sukhdeo Singh {JT 1992 (4) SC 73}, the Honble Court inter alia observed as under:- "It is trite law that the attention of the accused must be specifically invited to inculpatory pieces of evidence of circumstances laid on record with a view to giving him an opportunity to offer an explanation if he chooses to do so. Section 313 imposes a heavy duty on the court to take great care to ensure that the incriminating circumstances are pout to the accused and his response solicited. The words shall question him clearly bring out the mandatory character of the clause and cast an imperative duty on the court and confer a corresponding right on the accused to an opportunity to offer his explanation for such incriminating material appearing against him" From the above, it is clear that it is the mandatory duty of the trial court to put all such material circumstances on which the prosecution relies to base a conviction to the accused when his statement is recorded under section 313 Code."

15. In Yusuf @ Babu v. State of Rajasthan, JT 2003 SC 585, the allegations against the accused was that he was found in possession of explosives which were being carried in a Maruti van. However, evidence relating to his being in the van was not put to him in his statement under Section 313 Cr.P.C. The Honble Supreme Court observed that it was mandatory upon the trial court to put to him

the circumstance on which the guilt of the accused is based, when his statement is recorded under Section 313 Cr.P.C. It was noticed that the entire case of the prosecution was based on the circumstances which had not been put to the appellant before the Honble Supreme Court. It was noted that the entire case of the prosexutrix was based on the circumstance that the appellants were found in a Maruti van, from which explosives were seized. If they were not found in van, there was no material to connect them with the explosive found in Crl.A.No.605/1999 Page 9 of 11 the vehicle. It was ultimately held that the circumstances being material, the omission would go to the root of prosecution of case and benefit would go to the accused.

16. The Honble Supreme Court, thereafter, proceeded to consider whether to proceed with the request made by the State Government to remand back to the TADA Court from for fresh trial from the stage prior to the stage at which the statement was recorded under Section 313 Cr.P.C. After noticing that the incident dated back to the year, the Honble Court decided to put an end to the proceedings.

17. In the present case also the appellant has been in custody for almost last more than 04 years and 09 months, he having been arrested on 07.04.2005. If the matter is remanded back to the trial court it will result in further delay and thereby prolong the detention of the appellant in jail. Considering all the facts and circumstances of the case, it would not be appropriate and justified to remand the matter back to the trial court for the purpose of recording the evidence as regards his carrying a knife with him and then deciding the matter afresh.

For the reasons given above, I am of the view that the offence under Section 392 IPC read with Section 34 IPC has been proved against the appellant. Since, the evidence regarding the appellant carrying a knife with him cannot be used against him Section 397 Crl.A.No.605/1999 Page 10 of 11 IPC cannot be applied for the purpose of convicting and sentencing him. The appellant has already completed 04 years and 09 months in jail. He is therefore sentenced to imprisonment for the period already spent by him in jail and is further sentenced to pay fine of Rs.1000/- or to undergo SI for one month in default. Once copy of this order be sent to the

appellant immediately through the Jail Superintendent.

Trial Court record be sent back along with copy of this judgment.

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