Present:
Mr. Justice Borhanuddin
and
Mr. Justice Md. Ruhul Quddus

Criminal Appeal No. 300 of 1997

Zahangir Sheikh and another
…Appellants
-Versus-
The State
…Respondent

Mr. Mohammad Ali Khan, Advocate
…for the appellants
Mr. Md. Asheque Momin, A.A.G.
...for the respondent

Judgment on 28.4.2011

Md. Ruhul Quddus, J:

This appeal is directed against judgment and order dated 20.2.1997 passed by the Additional Sessions Judge, Bagerhat in Session Case No.41 of 1995 convicting the appellants under section 394 of the Penal Code and sentencing each of them thereunder to suffer rigorous imprisonment for five years with a fine of Taka 2000/- for each in default to suffer rigorous imprisonment for another one year.

Prosecution case, in brief, is that in the night following 12.8.1994 the informant Torap Ali Shaikh (P.W.1) and the members of his family went to bed after having supper at about 9 p.m. His wife (Sufia Begum,

P.W.2) and daughter waked up at about 3 o'clock and went out side of the room to respond natural call. In the meantime, two robbers entered into the room, following whom his wife and daughter rushed there. The robbers had threatened them to keep silent and one of them forcefully took earrings of his wife causing injury to her right ear, when the other took gold ornaments from his daughter. Hearing her (daughter's) cry, the informant waked up and saw the robbers standing in his front with *Ramdao* in their hands. He could recognize two of them as Zahangir and Emdad (herein the appellants) in electric light. His wife and daughter could also recognize them. The robbers took key of Almira from the informant on threat of his life and picked up Taka 5000/- only from its drawer. His son Nurul Islam also waked up and tried to go out side of the house, when one of the robbers dealt him on his forehead with a stick causing bleeding injury. However, his son could go out side and raise alarm, in which event the robbers fled away. Hearing the alarm raised by his son, the neighbours namely, Mohammad Ali Fakir (P.W.4), Nowab Ali Sheikh (not examined), Amjad Ali Shaikh (not examined), Asharaf Ali Sheikh (not examined), and Mohar Ali (not examined) rushed into the house of occurrence, when the informant disclosed their (robbers') identity to the said neighbours.

The informant lodged an *ejahar* over the said occurrence at 4.30 p.m on 13.8.1994, which gave rise to Bagerhat Police Station Case No.10 dated 13.8.1994. The police, after investigation submitted charge sheet against the appellants under section 394 of the Penal Code. The

case after being ready for trial, was sent to the Sessions Judge, Bagerhat, wherein it was registered as Session Case No.41 of 1995. The learned Sessions Judge framed charge against the appellants under section 394 of the Penal Code by his order dated 1.11.1995, to which they pleaded not guilty and claimed to be tried. Subsequently the case was sent to the Additional Sessions Judge, Bagerhat for disposal.

The prosecution, in order to prove its case, examined six witnesses out of twelve, who were named in the charge sheet. Of them P.W.1 Sheikh Torap Ali is the informant. P.Ws.2-3 Sufia Begum and Nurul Islam are his wife and son respectively, who are also victims of the alleged occurrence and inmates of the same house. P.Ws.4-5 Mohammad Ali Fakir and Amir Ali are his two neighbors, while P.W.6 Binoy Krishna Mitra is the Investigating Officer. Out of the said witnesses P.W.4 was tendered by the prosecution and the defense cross-examined him. After closing the prosecution, the learned Additional Sessions Judge examined the appellants under section 342 of the Code of Criminal Procedure, to which they reiterated their innocence but did not adduce any evidence in defense. The defense case, as it appears from the trend of cross-examination, that the appellants are quite innocents and have been falsely implicated in the case at the instance of one Mohiuddin Chairman, having rivalry with them.

After conclusion of trial, the learned Judge found the appellants guilty of offence under section 394 of the Penal Code and accordingly pronounced his judgment and order of conviction and sentence on 20.2.1997 as stated above. The appellants moved in this Court with the instant criminal appeal against the said judgment and order, and subsequently obtained bail.

Mr. Mohammad Ali Khan, learned Advocate appearing for the appellants submits that there was a delay of thirteen hours in filling of the *ejaher,* although the police station was very near to the house of occurrence. P.W.3. Md. Nurul Islam admits in his cross examination that the *ejaher* was drafted after consultation with an Advocate in presence of Mohiuddin Chairman. The said Mohiuddin was having rivalry with the appellants. P.W.2 in her examination-in-chief stated that she did not disclose any name to the neighbors immediately after the occurrence took place. The most independent witnesses namely P.Ws.4 and 5 being neighbors of the informant are vital witnesses in the present case, who did not support the prosecution case and admitted in cross-examination that immediately after the occurrence took place, the inmates of the house did not disclose any name to them. Beside that, most of the independent witnesses, who are neighbors of the informant and who's names are mentioned in the *ejahar,* have not been examined and as such the appellants will get benefit of presumption under section 114(g) of the Evidence Act. On this point, he refers to the case of Kawsarun Nessa and another Vs. State reported in 48 DLR 196,

wherein a Division Bench of this Court allowed a criminal appeal, amongst others, on the reason:

> “27. ... Non-examination of independent witnesses, especially some of the close neighbours calls for a presumption under section 114(g) of the Evidence Act against the prosecution to the effect that had they been examined, they might have deposed against the prosecution case. This view finds support from the case reported in 25 DLR 398.”

The learned Advocate further submits that the hurt allegedly caused upon P.Ws.2 and 3 having not been proved by producing any medical certificate and examining the Doctor, no offence under section 394 has been proved. In this regard he refers to the cases of Nizamuddin and others Vs. The State and another reported in 13 BLT 460, and Noor Islam and another Vs. State reported in 6 BLC 178. In the latter, a Division Bench of the High Court Division, under similar facts and circumstances held:

> “25. ... in order to complete the offence under section 394 of the Penal Code there must be hurt sustained by the victim during occurrence at the hands of the accused person/persons. In the instant case it appears that some of the PWs including the victim himself as PW11 have said that he sustained bleeding injuries on different parts of his body. We have already found from their evidence that the victim was treated first at Dinajpur General Hospital wherefrom he was taken to Rangpur Medical College Hospital and finally moved to Pangu Hospital, Dhaka for his better

treatment. But it is a matter of regret that the prosecution did not file any scrap of paper nor examined doctor who allegedly treated the victim to prove the hurt sustained by the victim during the occurrence. .... So, it appears that the main ingredients of the offence charged in this case found to have not been established inasmuch as has been disproved for want of legal evidence. ...”

In the case of 13 BLT 460, a judgment and order of conviction and sentence under section 394 was set aside by the High Court Division on the ground amongst others that the medical certificate cannot be taken into evidence as the doctor was not examined.

Mr. Khan, lastly submits that the delayed *ejahar* in consultation with an Advocate in presence of an influential Chairman having rivalry with the appellants indicates subsequent embellishment of the prosecution case and makes the case doubtful. In this regard he refers to the case of Azizur Rahman and others Vs. The State reported in 4 BCR (AD) 370, wherein a complaint filed with delay of three days without satisfactory explanation by a complainant having rivalry with the accused, was held doubtful.

On the other hand, Mr. Md. Asheque Momin, learned Assistant Attorney General appearing for the State submits that P. Ws.1,2 and 3 clearly supported the prosecution case and corroborated each other. In spite of exhaustive cross-examination, nothing adverse was disclosed. The inmates of the house of occurrence and their neighbors did not

chase the robbers up to their houses in the very night of occurrence, does not mean that they (appellants) have not committed the occurrence. In our social context, it should be considered that innocent citizens may be afraid of chasing robbers and speak against them. However, the learned Assistant Attorney General feels it difficult to oppose the contention of the learned Advocate for the appellants, that the charge of robbery under section 394 of the Penal Code can not be proved without proving the fact of causing hurt upon the victims by producing and proving medical certificate in support of the injury and examining the Doctor to that effect.

We have examined the evidence on records, considered the submissions of the learned Advocates of both the sides, and gone through the decisions cited as well as the impugned judgment and order.

From a close reading of the evidence, it appears that P.W.1 stated in his cross-examination that after commission of the alleged occurrence, the appellants were residing in the same village. The local witnesses rushed into his house, but did not chase them (robbers) or make any query at their houses. P.W.2 deposed in her examination-in-chief that she could recognize the appellants at the time of occurrence. After commission of the occurrence, the neighbours rushed into her house, when she disclosed the occurrence to them, but did not disclose the names of the robbers. In cross-examination she stated that earlier

she did not see the money, which was taken away by the robbers. P.W.3 stated in cross examination that he accompanied his father up to the police station, where he lodged the *ejahar* and further stated that all of them had consulted together before drafting the *ejahar* sitting in a chamber of a lawyer. P.W. 4 Mohammad Ali Fakir, who's name is cited in the *ejahar* as well as in depositions of P.Ws.1-3, stated in cross-examination that immediately after the occurrence took place, he went to the house of occurrence with Nurul Islam (P.W.3). On his query, the informant and his wife told him that they could not recognize any of the robbers. P.W.5 Amir Ali, a neighbour and seizure list witness stated in cross-examination that on the following day he met the informant and his son, who did not disclose any name. P.W.6, the Investigating Officer deposed as a formal witness. In cross-examination he stated that no medical certificate in support of the injury was produced to him.

It is very unusual in a case under section 394 of the Penal Code that any robbers commit robbery in their own village without having any musk, or that after commission of the occurrence all the people do not rush into their houses, if they are identified by the inmates of the house of occurrence. It is also unbelievable that if the robbers are recognized by the inmates of the house, they would not disclose their identity to the neighbours, who rush to the house immediately after the alleged occurrence. In the facts and circumstances, and the evidence on records, it cannot be inferred that P.Ws.1-2 recognized the appellants at the time of occurrence.

In the bottom of the *ejahar*, the informant stated that due to treatment of his wife and son, and his discussion with others on lodgment of the same, there had been some delay. But no medical certificate was produced or the doctor was examined to prove the injuries inflicted upon the victims. Therefore the offence under section 394 was not proved. Lodgment of the delayed ejahar after consultation with others also cast a doubt on the prosecution case. Moreover, non-examination of the close neighbours, who rushed to the house of occurrence immediately after the occurrence, calls for a presumption that had they been examined, might have not supported the prosecution case.

In view of the above, we find substance in the submissions of the learned Advocate for the appellants. The decisions cited by him also match with the present case. Therefore, we are inclined to allow the appeal.

In the result, the appeal is allowed. The impugned judgment and order dated 20.2.1997 passed by the Additional Sessions Judge, Bagerhat in Session Case No.41 of 1995 is hereby set aside. The appellants are released from their bail bond.

Send down the lower Court records.

Borhanuddin, J:

I agree.