

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 7618 of 2014

Sundar Ali

... Appellant

-Versus-

The State

...Respondent

with

Criminal Appeal No. 774 of 2003

Ali Asker

...Appellant

-Versus-

The State

...Respondent

with

Criminal Appeal No. 4068 of 2017

Md. Ali Hossain

...Appellant

-Versus-

The State

...Respondent

Mr. M. Khaled Ahmed, Advocate with

Mr. Md. Al-Amin Sheikh, Advocate

...For the appellant

(In Criminal Appeal No. 7618 of 2014)

Ms. Hamida Chowdhury, Advocate with

Mr. Nabid Nur, Advocate

...For the appellant

(In Criminal Appeal No. 774 of 2003)

Mr. Md. Mustaque Ahmed, Advocate with

Ms. Fatima Akter, Advocate

...For the appellant

(In Criminal Appeal No. 4068 of 2017)

Mr. S.M. Golam Mostofa Tara, D.A.G with

Mr. A. Monnan (Manna), A.A.G

...For the State (In all criminal appeals)

Heard on 09.10.2023, 10.10.2023, 31.10.2023 and
02.11.2023**Judgment delivered on 07.11.2023**

These above-mentioned criminal appeals under Section 408 of the Code of Criminal Procedure, 1898 are directed challenging the legality of the impugned judgment and order of conviction and sentence dated 20.07.2002 passed by the Assistant Sessions Judge, Court No. 2,

Sunamganj in Session Case No. 55 of 2001 arising out of Doara Bazaar Police Station Case No. 3 dated 06.02.2000, G.R. No. 11 of 2000 convicting the appellants under Section 394 of the Penal Code, 1860 and sentencing them thereunder to suffer rigorous imprisonment for 7(seven) years and a fine of Tk. 30,000 each, in default, each of them to suffer rigorous imprisonment for 6 (six) months.

The prosecution case, in a nutshell, is that the informant P.W. 1 Md. Azad Mia is the owner of a hask shop situated at Sreepur Bazaar under Doara Bazaar Thana. On the eighteenth Magh 1406 B.S. at 9.00 pm after closing his shop he started along with Abdur Rashid, Gedha Miah and Abdul Majid for their home keeping Tk. 85,000 in his pocket. When he crossed the government culvert situated at village Dauker Khara, the accused persons focused torchlight indiscriminately. At that time, with the help of torchlight, he recognized the accused Sundar Ali, Ali Hossain and Ali Asker but he could not recognize the other accused persons. The accused persons pointing daggers threatened the informant to give money, scolded them with filthy language and threatened with dire consequences if they failed to give the money. While he refused to give the money, accused Sundar Ali dealt a dagger blow on his right thigh which caused blood injury. At that time, accused Ali Hossain and Asker Ali tried to snatch away the money from his pocket. The accused Sundar Ali also dealt four blows on his backside. The accused Ali Hossain gave a blow on his left eye and he fell to the ground. At that time, accused Sundar Ali snatched away Tk. 85,000 from his pocket. Thereafter, he became senseless. After first aid, he was admitted to Sylhet M.A.G Osmani Medical College Hospital for treatment and after release from the hospital he lodged the FIR.

P.W. 11 S.I. Shafiqul Islam took up the investigation of the case. During the investigation, he visited the place of occurrence, prepared the sketch map and index, seized the alamat, recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898 and after completing the investigation found prima facie truth of the allegation

made in the FIR against the accused-persons and submitted charge sheet against them under Section 394 of the Penal Code, 1860.

After that, the case record was sent to the Sessions Judge, Sunamganj and the case was registered as Session Case No. 55 of 2001. The Sessions Judge, Sunamganj took cognizance of the offence against the accused persons and sent the case to the Assistant Sessions Judge, Court No. 2, Sunamganj for trial. During the trial, charge was framed under Section 394 of the Penal Code, 1860 against the accused persons. At the time of framing the charge the accused persons were absconding. The prosecution examined 11(eleven) witnesses to prove the charge against the accused persons. Since the accused persons were absconding they were not examined under Section 342 of the Code of Criminal Procedure, 1898. After concluding the trial, the trial Court by impugned judgment and order convicted the accused persons and sentenced them as stated above against which the accused persons preferred this appeal.

P.W. 1 Md. Azad Miah is the informant. He stated that the occurrence took place on the eighteenth Magh 1406 at about 8.45 pm. After closing his shop he kept Tk. 85,000 in his chest pocket and along with Abdul Majid, Geda Miah and Abdur Rashid started for their house. At 09 pm while they crossed the government culvert situated to the west of village Dowker Khara, somebody focused the torchlight from 50 yards away from them. At that time, with the help of torchlight, he recognized the accused Sundar Ali, Ali Hossain and Ali Asker but they could not recognize the other accused persons. The accused persons took position beside his two sides and pointed a dagger. At that time, using filthy language, they demanded money failing which they threatened to kill them. Since he refused to give money accused Sundar Ali dealt a dagger blow on his right thigh which caused bleeding injury. At that time, accused Ali Hossain and Ali Asker tried to snatch away the money. Since he did not give the money, accused Sundar Ali caused 4(four) injuries on his back which caused bleeding injuries. The accused Ali Hossain dealt a blow on the left eye of the informant. Consequently, he fell on the ground. At that time, accused Sundar Ali snatched away Tk. 85,000 from his chest

pocket. After raising a hue and cry, he became senseless. The witnesses who accompanied the informant going to the local Bazaar informed the matter to the locals. Thereafter, Abdul Hannan took him to Kuddus doctor and after first aid, he was admitted to Sylhet M.A.G Osmani Medical College Hospital and he was admitted there for 5 days. On 06.02.2000, he lodged the FIR. He proved the FIR as exhibit 1 and his signature as exhibit 1/1.

P.W. 2 Abdul Majid stated that on eighteenth Magh 1406 at 9 pm the occurrence took place. At that time, he was present along with P.W. 1 who started keeping Tk. 85,000 in his pocket. At that time, he, Geda Miah and Rashid Miah accompanied P.W. 1. While they reached at the place of occurrence situated at village Dowker Khara, he recognized the accused persons by the flashes of the torch. He claimed that he recognized the accused Sundar Ali, Ali Hossain, Ali Asker and Ali Ahmad but he could not recognize the other accused persons. The accused Ali Hossain and Ali Asker pointed a dagger beside the two sides of P.W. 1 and accused Sundar Ali dealt dagger blow on the thigh of the P.W. 1. Since he refused to give the money, accused Sundar Ali caused injuries on the back of the P.W. 1. The accused Ali Hossain dealt a blow on the eye of P.W. 1. At that time, he fell on the ground and the accused-persons snatched away Tk. 85,000 from his pocket. Thereafter, he went to the local Bazaar and Jaifar and others came and took the victim for first aid and subsequently he was taken to Hospital.

P.W. 3 Araj Ali stated that the informant and the accused persons were known to him. The occurrence took place on the eighteenth Magh 2(two) years ago at about 9 pm. At that time, he was present in his house. The place of occurrence was situated 3/4 miles from his house. He went to the place of occurrence at 10.30 pm. At that time, the P.W. 1 was taken to Sylhet. After returning home, he wanted to know about the occurrence from P.W. 1. P.W. 1 informed that accused Sundar Ali, Ali Hossain and Ali Asker attacked him and accused Sundar Ali dealt a dagger blow on his right thigh and 4(four) injuries on back. He claimed that he saw the mark of injuries of P.W. 1. Ali Hossain dealt a blow on the left eye of P.W. 1

and accused Ali Asker hold the victim and accused Sundar Ali snatched away Tk. 85,000. At the time of occurrence, Abdul Majid and Geda of Dakerkha village were also present at the time of occurrence at the government road. There was no previous enmity between P.W. 1 and the accused persons. He claimed that the accused persons are bad people and that many cases regarding theft and dacoity are pending against them.

P.W. 4 Abdul Hannan stated that P.W. 1 and the accused persons were known to him. The occurrence took place on the eighteenth Magh about 2 years ago at 9 pm. At that time, he was an employee of the shop of P.W. 1. At about 9/9.45, he heard the hue and cry of Abdul Majid and Geda Miah. Thereafter, he along with the locals present at Bazaar went to the place of occurrence and saw the victim in injured condition. He took the victim to the doctor. The accused persons snatched away Tk. 85,000. P.W. 4 disclosed the names of the accused Sundar Ali, Ali Hossain and Ali Asker. He claimed that the P.W. 1 was taken to Sylhet for treatment.

P.W. 5 Bazlur Rashid stated that the occurrence took place on the eighteenth of Magh about 2 years ago at about 9 pm. At that time, he was present in his house situated 3/4 miles away from the place of occurrence. Abdul Hannan told him about the occurrence. He went to Sreepur Bazaar and saw his brother P.W. 1 in injured condition in the pharmacy of the doctor. Thereafter, he was taken to Sylhet for treatment. While P.W. 1 regained his senses, he disclosed that on the way to his house from Bazaar when they reached near the culvert, accused Sundar Ali, Ali Hossain and Asker Ali attacked him. Other accused persons were also present at the time of the attack. The accused Sundar Ali snatched away Tk. 85,000. He claimed that the accused persons were professional dacoits.

P.W. 6 Abdul Wahid is the Chairman of Pandargaon Union Parishad under Doarabazaar Thana. He stated that he was elected Chairman in 1997. The accused persons and the informant were known to him. On 31.01.2000 at 9 pm, after closing the shop keeping Tk. 85,000 P.W. 1 along with him started for his house situated at village Gazi Nagar and while they reached near the culvert situated at Dowker Khara Road, the assailants snatched away Tk. 85,000 from P.W. 1 causing grievous

injury. On 01.02.2000 he came back to Doarabazaar from Sylhet and heard about the occurrence from the locals that accused Sundar Ali, Ali Asker and Ali Hossain committed the dacoity. On 07.02.2002, the investigating officer S.I. Shafique seized one jumper, one full shirt and the soil of the place of occurrence and brought those into his office and prepared the seizure list. He signed the seizure list. He proved the jimmanama and his signature. He proved the jimmanama as exhibit 2 and his signature as exhibit 2/1. He also stated that he went to Osmani Medical College Sylhet to see the victim Azad Miah. P.W. 1 came back to his home on 05.02.2002 from the hospital.

P.W. 7 Helal Uddin stated that the informant and the accused persons are known to him. The occurrence took place on the eighteenth Magh 2(two) years ago at 9 pm. On that day at 9 pm, Azad Mia reached near the culvert situated at village Dowker Khara keeping Tk. 85,000 in his pocket. At that time, the terrorist attacked him and snatched away money from him. The informant disclosed to him that accused Sundar Ali, Ali Hossain and Ali Azgar took away the money. He claimed that the accused persons were not good people. He heard about the occurrence after half an hour. The defence declined to cross-examine P.W. 7.

P.W. 8 Abdur Rashid stated that the occurrence took place on the eighteenth Magh at 9.00 pm about 2 (two) years ago. At the time of occurrence, he was present along with the P.W. 1 while they reached near the culvert. The accused persons attacked the victim P.W. 1 and beat him, snatched away Tk. 85,000. Due to fear of the accused persons, he fled away from the place of occurrence. He claimed that the accused persons were bad people.

P.W. 9 Elias Ali and P.W. 10 Babruz Ali were tendered by the prosecution.

P.W. 11 S.I. Md. Shafiqul Islam is the investigating officer. He stated that on 06.02.2005 he was posted at Doarabazaar Thana and he is the investigating officer. During the investigation, he visited the place of occurrence, prepared the sketch map and index, seized the alamat, recorded the statement of witnesses under Section 161 of the Code of

Criminal Procedure, 1898 and after completing the investigation, he submitted charge sheet against the accused persons under Section 394 of the Penal Code, 1860. He proved the sketch map as exhibit 3 and his signature as exhibit 3/1. He proved the index as exhibit 4 and his signature on the index as exhibit 4/1. He proved the signature on the seizure list as exhibit 2/2. He proved the blood-stained coloured woollen jumper of the victim as material exhibit I and the blood-stained soil as material exhibit II. He proved the shirt of the victim as material exhibit III. He claimed that the PCPR of the accused Sundar Ali is very bad and two cases are pending against him. The accused Sundar Ali is a dangerous man. He claimed that the recording officer OC Lutfur Rahman was known to him. He proved the FIR as exhibit 5 and the signature of OC Lutfur Rahman as exhibit 5/1.

Learned Advocate Mr. M. Khaled Ahmed appearing along with learned Advocate Mr. Md. Al-Amin Sheikh on behalf of the accused Sundar Ali submits that the occurrence took place at 9 pm and the recognition of the accused persons by the flashes of torchlight directed towards the accused is doubtful and the prosecution did not prove the medical certificate by calling the doctor as witness to prove the injury of P.W. 1. Therefore, the prosecution case is doubtful. He also relied on the decision made in the case of Nawsher Mollah and others vs. the State reported in (1991) 11 BLD (HCD) 295 para 32 and the case of Jamir alias Jimiruddin Vs The State reported in 9 BLD (HC) 474.

Learned Advocate Ms. Hamida Chowdhury appearing along with learned Advocate Mr. Nabid Nur on behalf of the accused Ali Asker and the learned Advocate Mr. Md. Mustaque Ahmed appearing along with learned Advocate Ms. Fatima Akter on behalf of the accused Md. Ali Hossain adopted the submission of the learned Advocate Mr. M. Khaled Ahmed.

Learned Assistant Attorney General Mr. A. Monnan (Manna) appearing on behalf of the State submits that P.W. 1 is the victim and he stated that at the time of occurrence, the accused Sundar Ali causing injuries on his thigh and the back snatched away Tk. 85,000 and at that time, the accused Ali Asker and accused Ali Hossain were also present

along with accused Sundar Ali and the accused persons committed the dacoity. P.Ws. 2 and 8 are the direct witnesses and P.Ws. 3 to 7 who are hearsay witnesses also corroborated the evidence of P.W. 1. The prosecution proved the charge against the accused persons beyond all reasonable doubt. Therefore, he prayed for the dismissal of the appeals.

I have considered the submissions of the learned Advocates engaged on behalf of the accused persons, learned Assistant Attorney General, perused the evidence, impugned judgment and order passed by the trial Court and the records.

On perusal of the records, it appears that P.W. 1 is the informant and injured victim. He stated that on the eighteenth Magh 1406 B.S. at 9 pm after closing his shop, he along with P.Ws. 2 and 8 started for their house from the local Bazaar keeping Tk. 85,000 in his pocket and while they crossed the government culvert situated at village Dowker Khara, the accused persons flashed torchlight on them indiscriminately and with the help of flashes of torchlight, P.W. 1 recognized the accused persons. P.W. 1 also stated that the accused persons pointing daggers demanded money and threatened them with dire consequences. When he refused to give the money, accused Sundar Ali dealt a dagger blow on his right thigh which caused blood injury. At that time, accused Asker Ali and accused Ali Azgar attempted to snatch away the money. Since he resisted, accused Sundar Ali dealt 4(four) injuries on his back and snatched away Tk. 85,000 from his pocket. The evidence of P.W. 1 regarding the causing injury by accused Sundar Ali and snatching away Tk. 85,000 from him and the involvement of the accused Asker Ali and accused Ali Ajgar in the dacoity is corroborated by P.Ws. 2. P.W. 8 stated that the accused persons are dangerous people and due to fear of the accused persons he fled away from the occurrence. The evidence of P.W. 1 as regards the alleged occurrence is also corroborated by P.Ws. 3 to 7 who are the hearsay witnesses. P.W. 6 Abdul Wahid is a local Chairman and he stated that he went to Osmani Medical College Sylhet to see P.W. 1 who was admitted there for treatment. P.W. 6 also proved the blood-stained cloths of the victim and the blood-stained soil of the place of occurrence. At the time of

examination in chief, P.W. 1 exposed his mark of injuries to the Court which was also recorded by the trial Court.

Indeed, the prosecution did not prove the medical certificate of the victim P.W. 1 who was admitted to Osmani Medical College, Sylhet for treatment. The medical certificate of victim P.W. 1 issued from the Osmani Medical College, Sylhet is available with the records. The medical certificate of a witness is corroborative evidence as regards injury sustained at the time of occurrence, not indispensable to prove the charge under Section 394 of the Penal Code, 1860, if other witnesses adduced by the prosecution is found trustworthy, reliable and credible.

It is found that the accused Sundar Ali dealt injuries on the P.W. 1. P.W. 2 and 8 were also present along with P.W. 1 at the place of occurrence. At that time of occurrence, the accused persons came to close proximity to the witnesses and caused injuries on the body of P.W. 1. During the trial, the accused persons were absconding and they did not cross-examine the prosecution witnesses and the evidence of the prosecution witnesses remained uncontroverted by the defence. Therefore, I am of the view that P.Ws. 1, 2 and 8 correctly recognized the accused persons as assailants at the time of occurrence.

In view of the above facts and circumstances of the case, evidence, observation, findings, reasoning and proposition, I am of the view that the prosecution proved the charge against the accused persons beyond all reasonable doubt.

Considering the gravity of the offence, I am of the view that the ends of justice would be best served if the sentence passed by the trial Court is modified as under;

The accused Sundar Ali, accused Ali Asker and accused Md. Ali Hossain are found guilty of the offence under Section 394 of the Penal Code, 1860 and they are sentenced to suffer rigorous imprisonment for 3(three) years and a fine of Tk. 5000 each, in default, to suffer rigorous imprisonment for 3(three) months each.

In the result, the appeals are disposed of with a modification of the sentence.

Send down the lower Court's records at once.