

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ Crl.A.778/2007

% Date of Decision: 04.11.2009

SONU @ KAPIL Appellant
! Through: Mr. Rajesh Mahajan, Adv.

Versus

\$ THE STATE (NCT OF DELHI) Respondent
^ Through: Mr. Navin Sharma, APP.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

: **MOOL CHAND GARG,I**(Oral)

1. Learned counsel for the appellant submits that the appellant is not interested in challenging the conviction part of the judgment given against him by the learned ASJ holding him guilty of the offence under Section 392/397/34 IPC, but submits that no case is made out against the appellant under Section 397 IPC inasmuch as the Rukka, EX-PW2/A, shows that no weapon was used by the appellant or his co-accused at the time of commission of alleged robbery. As such it is

submitted that the appellant who is in judicial custody for a period of more than six years is entitled to be released forthwith by reducing the sentence awarded to him by the learned ASJ vide order dated 14.09.2007 to the period already undergone, which is to the tune of R.I. for seven years. The punishment of seven years has been awarded to the appellant only because that is the minimum prescribed under Section 397 IPC.

2. I have examined the Rukka, Ex-PW2/A which reads as under:

Statement of Sh. Ram Babu, S/o Sh. Jhamman Lal Saini, H.No.182, Pocket G-30, Sector-3, Rohini Delhi, Age-54 Years, P.H.25180887(S)

Bayan kiya hai ki main pata uprokt par sapariwar rahta hoon aur meri Plot NO.43, Pocket-1, Sector 20, Rohini Delhi me Sanitrywear House ke naam se dukaan hai jo dukan par mera ladka Manish Saini baithta hai jo aaj kisi kaam se kahin gaya hua tha. Dukaan par main apne naukar Ashok, S/o Srinath, R/o C-1/12, Sector-20, Rohini, age 28 years ke saath maujud tha ki sham kareeb 5:30 baje do ladke umra kareeb 24-25 saal. Ek ka sharer patla, rang kala aur dusra darmayana jism, rang saanwala ek puraani cycle par aaye jo dukaan ke andar aakar unme se ek ne saaman dekhne ke bahaane hamara dhyan bata liya jabki doosre ne dukaan ke counter ke paas khade hokar daraaj me rakhe mera purse wa ghadi nikal liye jo mere purse me Rs.5,000/-, mera driving licence, kuchh dukaan ke visiting cards, jin par aaj ke Date daali hai wa mere Sign hain tatha meri Ghadi golden colour hai jo un dono ladkon ke nikalne par main ne dekha ki unhone apni paint me katte numa cheezon ko khonsa hua tha jis se main dar gaya aur ghar chala gaya jo ab ghar par main ne salah ki aur waapis dukaan par aakar police ko phone kar diya. Un dono ladkon ko main saamne aane par pehchaan sakta hoon. Kanooni karwai ki jaaye. Bayan Sun liya, thik hai.

(emphasis supplied)

3. The interesting part is that the so called “*kattanuma cheez*” which was not even taken out of the pocket has not even been recovered from the appellant after his arrest. As far as the complainant is concerned, who appeared as PW-2, he has stated as follows:

“PW2, Sh. Ram Babu Saini, S/o Sh. Jhamman Lal Saini, Age-54 Years, Shopkeeper, R/o182, Pocket G-30, Sector-3, Rohini Delhi.

On S.A.:-

.....As we tried to resist both the accused took out desi kattas and pointed out towards us and then ran away from the shop. They also threatened me not to chase them.....”

4. However, this portion of the statement of the complainant is contrary to the complaint and shows an improvement made by him in his earlier statement which rather falsifies the case of the prosecution.
5. In these circumstances, taking into consideration the judgment delivered by the Apex Court in the case of Ajit Singh Vs. State of Haryana 1996 (3) SCC 335 wherein a case a robbery was committed by using a pistol but the pistol was not used to hurt the victims and the fire was opened presumably in self-defence, the conviction of the appellant under Section 397 IPC was converted in a sentence under Section 392 IPC and the sentence imposed were reduced.

The relevant discussion which appears in Para 4 to 5 are reproduced hereunder:

4. Mr. Sushil Kumar, learned Senior counsel appearing as amicus curiae for the appellant in this case, has submitted that an accused cannot be convicted under Section 397 IPC if he had not used a weapon. In support of such contention, a decision of this Court in *Phool Kumar V. Delhi Admn*, 1 was cited. Mr. Sushil Kumar has also submitted that conviction under Section 397 IPC of co-accused who was unwarned (sic unarmed), only indicates that there has been non-application of mind to the facts of the case in convicting the accused. Mr. Sushil Kumar has also submitted that against the appellant, Ajit, no conviction under Section 397 was warranted even if the prosecution case is accepted on its face value. He has indicated that it appears from the evidence of the witnesses for the prosecution that for committing alleged robbery, the said pistol was not used but when a milk can was thrown by Suresh on the accused Ajit, he had opened fire from his countrymade pistol presumably by way of self-defence which hit the thumb and finger of the left hand of Suresh, PW 7. Accordingly, the conviction of Ajit under Section 397 is also unjustified. Mr. Sushil Kumar has submitted that the evidences adduced in this case do not inspire confidence. It also does not appear how and when the said countrymade pistol was recovered from the possession of the appellant Ajit. There is no reliable and unimpeachable evidence which may connect the appellant with the no reliable and unimpeachable evidence which may connect the appellant with the commission of the offence alleged against him. So far as the identification of the accused is concerned, it is an admitted position that in the presence of PW 7, the accused were taken out from police lock-up and they were interrogated. Hence no reliance can be based on identification of the accused in court. Mr. Sushil Kumar has submitted that the accused should be acquitted by giving benefit of doubt. Mr. Sushil Kumar has further submitted that in any event, since from the date of their arrest, the appellant is in custody and by this time he has suffered detention for more than five years. The appellant should be released even if his conviction under

Section 392 is sustained by this Court.

5. It appears to us that there is force and justification in the contention of Mr. Sushil Kumar. In the facts and circumstances of the case, we do not think that the appellant should be convicted under Sections 397 and 394 IPC. But in our view, on the basis of depositions of PWs 7 and 8 the appellant's conviction under Section 392 IPC should be sustained. The convictions under Sections 394 and 397 IPC do not appear to be justified. Such convictions are set aside. We therefore allow the appeal in part by setting aside the convictions and sentences under Sections 394 and 397 IPC but conviction under Section 392 is affirmed. The appellant is stated to have undergone sentence for more than five years. In the facts of the case, justice will be met if the sentence for offence under Section 392 IPC is reduced to the period of five years. The appellant would be released forthwith if he is not wanted in connection with any other criminal case provided by this time he has undergone detention for five years.

6. The learned APP submits that this judgment may not be of any help to the case of the appellant as in another judgment delivered in the case of Ashfaq Vs. State (Govt. of NCT of Delhi) AIR 2004 SC 1253 a different view has been taken by the Apex Court by observing that if the weapon is shown to the victims then offence under Section 397 IPC is made out.
7. The said judgment has no application in the present case as in the present case neither the weapon of offence was seen at the time of lodging of the complaint nor it was, in fact, specified as to what was the weapon of offence. The same was also not recovered. Merely because it is the assessment

of the complainant that some "*Kattanuma Cheez*" was in the pocket of the robbers would not mean that the weapon of offence or the "*Katta*" was used for committing robbery.

8. In these circumstances, the appellant is not liable to be convicted under Section 397 IPC and, therefore, the conviction of the appellant under Section 397 IPC is set aside.
9. Accordingly, the sentence awarded to the appellant is reduced to the period already undergone. In case, the appellant is not wanted in any other case, he may be released forthwith.
10. The appeal is disposed of.
11. Fee of the Amicus Curiae is fixed at Rs.4000/-.
11. A copy of the Order be sent to the Jail Superintendent.

MOOL CHAND GARG,J.

NOVEMBER 04, 2009
anb