

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on: 20<sup>th</sup> November, 2009*  
*Judgment Delivered on: 27<sup>th</sup> November, 2009*

+ **CRL.A No.25/2008**

SUNIL @ MUNNA .....Appellant  
Through: Mr.Rajesh Mahajan, Amicus Curiae.

Versus

THE STATE (GOVT. OF NCT) .....Respondent  
Through: Mr.Manoj Ohri, APP.

CORAM:  
HON'BLE MS. JUSTICEINDERMEET KAUR

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

**INDERMEET KAUR, J.**

1. On 17.8.2005 at about 10.30 PM, Pandhari Yadav after parking his vehicle in the transport compound, near Kirti Nagar Railway Station while going towards his house was accosted by two persons. One of the said two persons i.e. Sunil put an open knife on his abdomen and threatened him that he would tear his abdomen if he moved. PW-1 stood frozen at the spot; the other person i.e. Ayub took search of PW-4 and removed his Sonata wrist watch, Rs.400/- in cash and his driving licence. The matter was reported to the police vide complaint Ex.PW-4/A.

2. On this complaint Ex.PW-4/A endorsement Ex.PW-6/A was made by ASI Kali Charan PW-6 at 5.00 PM pursuant to

which formal FIR Ex.PW-2/A under Sections 392/34 of the IPC was registered.

3. The accused persons could not be apprehended from the spot; they had fled. On the following day i.e. on 18.8.2005 at 7.00-8.00 PM PW-6 accompanied by Const. Mahender Kumar PW-1 Const.Sudershan PW-3 and the secret informer went in search of the accused. Both the accused persons were found sitting on the edge of the ganda nala near railway line, Kirti Nagar from where they were apprehended at the pointing out of PW-4.

4. From the possession of Sunil @ Munna i.e. the present appellant a buttondar knife was recovered from the right side of his pant pocket. Sketch Ex.PW-1/A was prepared. The knife had a total length of 23.7 cm and its blade is 10.5 cm long. It was taken into possession vide memo Ex.PW-1/G.

5. From the co-accused Ayub Khan a Sonata wrist watch of the complainant and his driving licence were recovered. The said articles were taken into possession vide memo Ex.PW-1/C. The notes were identified by the complainant.

6. Vide judgment dated 11.10.2007 appellant had been convicted under Sections 392 read with Section 397 of the IPC; it had been held that the knife seized vide Ex.PW-1/A had been brandished/used by the present appellant. His co-accused Ayub Khan was convicted under Section 392 of the IPC.

7. Vide order of sentence of the same day i.e. 11.10.2007, the appellant had been sentenced to undergo RI for seven

years and to a fine of Rs.2000/- in default of payment of fine to undergo SI for 15 days for the offence under Section 392 read with Section 397 of the IPC.

8. This judgment has now been impugned by Sunil @ Munna.

9. A short point which has been raised by the learned counsel for the appellant is that the role attributed to the present appellant does not qualify and fulfill the ingredients of an offence under Section 397 of the IPC; at best he can be convicted under Section 392 of the IPC for simple robbery. It is submitted that admittedly no hurt was suffered by the victim; in fact, he has also not been medically examined and there is no medical record of the complainant on record. The knife which is purported to be "deadly weapon", although shown to PW-4 but PW-4 has nowhere deposed that this was the same weapon which had been used by the appellant; in the absence of PW-4 having deposed on oath that the knife seized vide Ex.PW-1/A was the same knife which had been used by the appellant to threaten PW-4, the essential ingredients of Section 397 of the IPC are not made out. It is submitted that the appellant has already undergone incarceration of about four years and nine months which includes his remissions up to April 2009; he would have earned remission even in this intervening period. Convict is in Jail and he could avail not of the facility of bail because of financial constraint; he had moved an application for early hearing; this is as to how his appeal has taken up for hearing.

It is submitted that the submission of the appellant be considered in this background.

10. The Trial Court had examined six witnesses of whom the star witness is Pandhari Yadav PW-4 the complainant. PW-4 on oath has reiterated the averments made in his complaint; he has inter alia deposed:

“..... Accused Sunil present in the court today put an opened knife on my abdomen and threatened me and he will tear my abdomen if I will move. I remained standing at the direction of accused Sunil and the other accused namely Ayub started taking my search and removed my wrist watch make Sonata and Rs.400/- in the denomination of Rs.100/- each and my original driving licence and photocopy of my driving licence. After that accused persons went away and I went to the PS Kirti Nagar and narrated the above said facts to the police. .... I pointed out towards the accused persons and the police had apprehended both the accused persons. Police had taken the search of the accused. From search of accused Sunil a knife was recovered and from the search of accused Ayub Rs.400/-, a photocopy of my driving licence and my robbed Sonata Watch were recovered. The names of the accused persons were revealed after their apprehension and disclosed by them to the police. The police had prepared sketch of the knife Ex.PW-1/A which bears my signatures at point C. .... At this stage Knife Ex.P-1 is shown to the witness and witness identifies the same which was recovered from the possession of accused Sunil.”

11. In cross-examination, PW-4 denied the suggestion that this knife had not been recovered from the possession of the appellant.

12. Investigating Officer ASI Kali Charan had been examined as PW-6. He has deposed as follows:-

“I took formal search of accused Munna and a buttondar knife was recovered from the right side pocket of the wearing pant. The knife was opened with the help of the button and its sketch Ex.PW-1/A was prepared. It was measured and its total length was 23.7 cm and its blade was found 10.5 cm. The knife was again closed and sealed in a parcel with the seal of KC and was taken into possession vide seizure memo Ex.PW-1/E. .... At this stage a sealed parcel duly sealed with the court seal is produced. Same is allowed to be opened and contents are shown to the witness. Knife Ex.P-1 is the same which was recovered from the possession of the accused Sunil. ....”

13. In his cross-examination PW-6 has denied the suggestion that the accused persons were lifted from their house and they had been falsely implicated in the present case.

14. PW-4 and PW-6 are the persons relevant to decide the submission of the learned counsel for the appellant as to whether the ingredients of the offence under Section 397 of the IPC are made out or whether the altered offence under Section 392 of the IPC alone is made out.

15. Perusal of the version of PW-4 shows that as per PW-4 an opened knife had been brandished by Sunil who put it on his abdomen threatening him that he would tear his abdomen if he moved. Admittedly no hurt had been suffered by the appellant. The sketch of the knife shows that it has a total length of 23.7cm with its blade measuring 10.5 cm. PW-4 while identifying the knife recovered from the possession of

the appellant has nowhere stated that this was the same knife which had been used by him to cause or attempt to cause a grievous hurt to him; he has also not given any description of the knife.

16. Even presuming that from the features of the knife it can be said that the knife in question being a buttondar knife having a blade of 10.5 cm, was a 'deadly weapon' within the meaning of Section 397 of the IPC, but the question which has not been answered by the prosecution and which the prosecution has failed to prove is that this was in fact the same knife which had been used by the appellant. This has neither come in the version of PW-4 nor in the version of PW-6. No details or description of the knife has been given by PW-4. Further PW-4 has described this knife as an opened knife whereas the knife recovered from the petitioner was a buttondar knife; Pw-6 has deposed that the knife recovered from the possession of the petitioner was opened with the help of a button; PW-4 and PW-6 have given varying and conflicting descriptions of this knife; which is another lacuna for which, in the view of this Court, the appellant is entitled to a benefit of doubt and it cannot be said that the ingredients of Section 397 of the IPC have been proved. This assumes a greater significance as the knife was admittedly recovered on the following day.

17. In order to prove the offence under Section 397 of the IPC, the prosecution must establish:-

i. the commission of robbery or dacoity;

- ii. that the accused used the deadly weapon; or caused grievous hurt; or attempted to cause death or grievous hurt;
- iii. the above acts were done during the commission of robbery or dacoity.

18. In the absence of the necessary ingredients not having been established by the prosecution the conviction of the appellant under Section 397 cannot be sustained. His conviction is altered from Section 397 to a conviction under Section 392 of the IPC.

19. In Balik Ram v. The State 1983 Cri.L.J. 1438, a coordinate Bench of this court had held that:

“.....Though the knife that was recovered from the accused a few hours of the occurrence was no doubt a deadly one on account of its size and design but it was not shown to the victim when he came to depose nor has he given any description of the knife so that it could be held that the knife alleged to have been placed by the accused on his abdomen was the one recovered or the one similar to that one. The accused can, therefore, legitimately claim that the weapon used by him has not been proved to be a deadly one.....”

20. In Madan Lal vs. State 70(1997) DLT 595, a coordinate Bench of this Court while altering the conviction under Section 397 to a conviction under Section 392 of the IPC had held that the evidence on record had not established that the same knife was used for the purpose of commission of the offence by Madan Lal; only after the appellant had been chased and overpowered was the knife recovered from him; Section 397 of the IPC had been held not attracted.

21. In the instant case as well, it is clear that the prosecution not having proved that Ex.P-1 was the same knife which had been used by the appellant in the commission of

the offence and he not having so stated on oath in Court, this being shrouded in doubt, benefit of the same i.e. the use of this weapon by the appellant in the offence has accrued in his favour.

22. Petitioner is accordingly entitled to a modified conviction under Section 392 of the IPC. Nominal roll of the appellant shows that he has already suffered incarceration of four years and nine months. He is sentenced under Section 392 of the IPC for the period already undergone by him. Appeal is disposed of in the above terms.

(INDERMEET KAUR)  
JUDGE

November 27, 2009  
nandan