

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. A. No. 233/2008

% Judgment decided on: 10th December, 2010

SYAM SUNDER & ORS.

.....APPELLANTS

Through: Mr. Sarvesh Bisari and Ms. Anita
Abraham, Advs.

Versus

STATE

.....RESPONDENT

Through: Mr. Arvind Gupta, APP for the
State along with ASI Charan Das,
P.S. Mandir Marg.

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

- | | |
|---|-----|
| 1. Whether the Reporters of local papers
may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be
reported in the Digest? | Yes |

A.K. PATHAK, J. (Oral)

1. This appeal is directed against the judgment dated 18th February, 2008 of the Trial Court, whereby appellant no.1 has been convicted under Section 392 IPC read with Section 397 IPC; sentenced to undergo rigorous imprisonment for seven years and fine of ₹5,000/-; in default of payment of fine to undergo simple imprisonment for three months. Appellant nos. 2 and 3 have been convicted under Section 392 IPC and sentenced to undergo rigorous imprisonment for five years and fine of ₹5,000/-; in default of payment of fine to undergo simple imprisonment for

three months.

2. It is this judgment which is under challenge in this appeal.

3. As per the prosecution, complainant Vikas Gulati (PW3) was going on his motorcycle, along with his friend Santosh Kumar Pandey (PW4) from Noida to Paschimpuri on 10th January, 2003. At about 9:30 pm when they reached at Shankar Road, complainant stopped his motorcycle in order to ease himself. In the meanwhile, appellants came there. Appellant no. 1 was armed with a knife. He commanded the complainant to hand over to them whatever he was having in his possession. While appellant nos. 2 and 3 surrounded the complainant, appellant no. 1 forcibly took out the purse of complainant from his pocket, which contained ₹3800/- in cash besides his driving license. Complainant had a scuffle with appellants and in the process his ring fell down on the road. While the incident was going on, a PCR Van was noticed coming towards them. On seeing the police appellant nos. 2 and 3 ran away. Appellant no. 1 tried to escape on the motorcycle of complainant, however, complainant pushed the motorcycle as a consequence whereof appellant no.1 fell down and his leg came under the motorcycle. By that time police van had arrived there and appellant no.1 was apprehended. Appellant nos. 2 and 3 were arrested on the next day of incident. Appellant no. 1 got recovered a knife from the bushes on the next day of incident, pursuant to his disclosure statement.

4. Complainant has been examined as PW3. He has fully

supported the prosecution story. PW4 has fully corroborated the version of PW 3. Their testimony had been found trustworthy and reliable by the Trial Court, consequently, appellant no.1 has been convicted under Section 392 IPC read with Section 397 and appellant nos. 2 and 3 under Sections 392 IPC.

5. I have carefully perused the statements of PW3 and PW4 and find them to be trustworthy and reliable witnesses. From their testimony it is proved beyond the shadow of reasonable doubt that incident did happen in which appellants had robbed the complainant. No material discrepancy could be pointed out by the learned counsel, in their statements so as to discard their version with regard to the incident of robbery. In my view, offence under Section 392 IPC is made out against all the appellants and they had been rightly convicted by the Trial Court under this provision of law.

6. The next question which needs consideration is as to whether ingredients of offence under Section 397 IPC are attracted in this case qua the appellant no. 1. Admittedly, no knife was recovered from him immediately after the incident even though he had been apprehended at the spot. From the statement of PW 3, it is clear that while appellant nos. 2 and 3 managed to escape, appellant no. 1 could not do so since his leg was stuck under the motorcycle and he was apprehended at the spot itself. He neither had any occasion to run away nor throw the knife as PW 3 had remained present there all along. In his

statement, complainant had not whispered a single word that appellant no.1 had thrown the knife in the bushes before sitting on the motorcycle in a bid to escape. Thus, recovery of knife on the next day becomes suspicious. For this reason, appellant no.1 is entitled to benefit of doubt on this count.

7. Knives are weapons available in various sizes and may just cause little hurt or may be the deadliest. They are not deadly weapons per se. What would make a knife deadly is its design or the manner of its use such as is calculated to or is likely to produce death. Whether a knife is a “deadly weapon” is a question of fact which is required to be proved by the prosecution and in absence of any such evidence particularly, non-recovery of weapon, would certainly bring the case out of the ambit of Section 397 IPC.

8. In Rakesh Kumar Vs. State of NCT of Delhi 2005 (1) JCC 334, a Single Judge of this Court has held that there are knives of hundreds of type available in different length and width. All the knives cannot be graded as “deadly weapon” within the meaning of Section 397 IPC. It is the length, shape and the manner of use which makes a knife “deadly weapon”. In Sunil @ Munna Vs. The State 2010 (1) JCC 388, this Court has held that in the event of recovery of knife being doubtful accused is entitled to benefit of doubt with regard to offence under Section 397. In Charan Singh Vs. State 1998 CrI. L.J. NOC 28 (Delhi), it was held that in order to bring home a charge under Section 397, the prosecution must

produce convincing evidence that the knife used by the accused was deadly weapon.

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

- i) 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 and
- iii) the above acts were done during the commission of robbery or dacoity.

10. In this case, prosecution has failed to lead any evidence to show that appellant no. 1 had used the “deadly weapon” while committing robbery, thus, in my view, ingredients of offence under Section 397 IPC are not attracted in this case. In the absence of necessary ingredients that have not been established by the prosecution, conviction of appellant no. 1 under Section 397 IPC cannot be sustained. Accordingly, conviction of appellant no. 1 is altered from Section 392 IPC read with 397 IPC to 392 IPC.

11. Learned counsel for the appellants next contended that in the facts and circumstances of this case, leniency be shown while awarding the sentence and the same be reduced to the period already undergone by them. Appellant no. 1 is a married man having two children, who are dependent upon him; his widowed mother and unmarried handicapped sister are also dependent upon him; appellant no. 1 is in incarceration for about four years.

As regards appellant no.2, it is contended that he has three children aged between 11 years to 15 years; his ailing widowed mother is also dependent upon him. As regards appellant no. 3, learned APP for the State, on instruction of Investigating Officer, submits that he has already completed his sentence and has been released.

12. Keeping in mind the above contentions of learned counsel, sentences of appellant nos. 1 and 2 are reduced to the period already undergone by them. As regards the sentence in default of payment of fine is concerned, same shall form part of the sentence already undergone by them. Appellant nos. 1 and 2 be released forthwith, if not wanted in any other case.

13. Appeal is disposed of in the above terms. Copy of this order be sent to Superintendent Jail for serving it on the appellant nos. 1 and 2 as also for compliance.

A.K. PATHAK, J.

DECEMBER 10, 2010

ga