

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **Crl.A. No.461/2006**

Decided on 09.11.2010

IN THE MATTER OF :

SAMIUDDIN @ CHOTU

..... Appellant

Through: Mr. Sumeet Verma, Advocate

versus

THE STATE OF NCT DELHI

..... Respondent

Through: Mr. M.N. Dudeja, APP for the State

CORAM

* **HON'BLE MS.JUSTICE HIMA KOHLI**

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

HIMA KOHLI, J. (Oral)

1. The present appeal arises out of the judgment dated 28.02.2005 passed by the learned Additional Sessions Judge, convicting the appellant, accused No.1 and one other in FIR No.155/2001 lodged under Sections 397/392/457 IPC with Police Station: Darya Ganj, Delhi.

2. Briefly stated, the facts of the case are that on 15.03.2001 at about 10:30 PM, when the complainant, Zaffar Hussain was at his residence on the second floor of premises No.1669, Kucha Dhakni Rai, Daryaganj, Delhi, in the company of the members of his family, the door bell rang and the appellant with three other persons entered the room, intimidated the

inmates and forced the women to hand over their ornaments. They opened the almirahs and removed certain valuable articles. Twenty minutes later, when the son of the complainant rang the door bell, the accused persons opened the door and surrounded the son and took away his cash. Thereafter, they locked the family in the bathroom and decamped with the stolen articles. On 24.05.2001, the accused persons were arrested and they made disclosure of their involvement in the robbery. Upon completion of investigation, the charge-sheet was filed, charges were framed and the accused persons pleaded innocence. The matter was taken up for trial. The prosecution examined 14 witnesses in support of its case. PW-3, Smt. Shehnaaz and PW-10, Waseem Ahmed identified the four accused, including the appellant.

3. The trial court considered the entire evidence and concluded that there was no doubt that the robbery committed at the residence of the complainant by the accused persons. Taking into consideration the testimony of PW-3, PW-10 and PW-14, Mr. Shahabuddin, the involvement of the appellant and three other accused was confirmed by the impugned judgment. However, accused Nos.2 & 3, Nazim and Mohd. Arif were given the benefit of doubt. The appellant/accused No.1 and accused No.4, Rakesh Chauhan were held guilty of the offence under Section 397 read with Section 392 IPC as also under Section 457 IPC, having intruded in the house at night by force. As per the order on sentence passed by the learned ASJ on 01.03.2005, the appellant was sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of ₹500/- for committing the offence under Section 397 read with Section 392 IPC. For the offence

punishable under Section 457 IPC, the appellant was sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of ₹500/-. In default of payment of fine, the appellant was required to undergo further rigorous imprisonment for a period of three months. Both the sentences were directed to run concurrently and the benefit under Section 428 Cr.PC was given to the appellant.

4. At the outset, counsel for the appellant submits that he shall confine his submissions in the appeal, to the order of sentence alone. He states that in the present case, the provision of Section 397 IPC is not applicable as the knife, which was the weapon of offence and purportedly carried by the appellant, was not recovered or for that matter, produced during the trial. He relies on the judgments in the cases of Bishan vs. State reported as **1984 (6) DRJ 78**, Rakesh Kumar vs. The State of NCT of Delhi reported as **2005 (1) JCC 334** and Sunil @ Munna vs. The State (Govt. of NCT) reported as **2010 (1) JCC 388** to submit that in the absence of recovery of the knife, allegedly used by the appellant at the time of commission of robbery/dacoity, it cannot be presumed that the knife used was a deadly weapon and in such circumstances, charge under Section 397 IPC cannot be established. Thus, he submits that the accused could be convicted only under Section 392 IPC.

5. In the case of Balik Ram vs. The State reported as **1983 Cri.L.J. 1438**, a coordinate Bench of this Court had held as below:-

“..... 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.....”

6. In the case of Charan Singh vs. The State reported as **1988 Crl.L.J. NOC 28 (Delhi)**, in a similar situation where it was not established that the knife used for committing the robbery was in fact a deadly weapon within the meaning of Section 397 IPC, the Court held that in the absence of recovery of the knife, which was allegedly used at the time of commission of the offence/dacoity, it could not be presumed that the knife so used was a deadly weapon. Following were the observations made by the Court in this regard:-

“At the time of committing dacoity one of the offenders caused injury by knife on the hand of the victim but the said knife was not recovered. In order to bring home a charge under S. 397, the prosecution must produce convincing evidence that the knife used by the accused was a deadly weapon. What would make knife deadly is its design or the method of its use such as is calculated to or is likely to produce death. It is, therefore, a question of fact to be proved by the prosecution that the knife used by the accused was a deadly weapon. **In the absence of such an evidence and particularly, the non-recovery of the weapon would certainly bring the case out of the ambit of S. 397. The accused could be convicted under S. 392.**” (emphasis added)

7. Even in the present case, it is an undisputed fact that the knife in question was not recovered, much less produced in the course of trial. In such circumstances, this Court is inclined to agree with the submission of the counsel for the appellant that the appellant could be sentenced under Section 392 IPC alone and the offence does not fall within the ambit of

Section 397 IPC.

8. Counsel for the appellant submits that as per the nominal roll placed on the record, the appellant had undergone sentence for a period of three years, seven months and four days as on 23.05.2006. Thereafter, the appellant was undergoing conviction in some other case and now for the past three months, he is undergoing conviction in the present case. It is, therefore, submitted that the appellant has undergone conviction for a period of approximately three years 10 months in the present case.

9. Having regard to the fact that this Court has modified the conviction of the appellant to one under Section 392 IPC, the order on sentence is consequently modified and he is sentenced under Section 392 IPC, for a period of four years.

10. The appeal is disposed of.

NOVEMBER 9, 2010
rkb

(HIMA KOHLI)
JUDGE