

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: November 11, 2010
Date of Order: 19th November, 2010

+ Crl.Appeal No. 973/2010

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19.11.2010

Nihal Akhtar @ Chun Chun

... Appellant

Through: Ms. Charu Verma, Advocate

Versus

State (NCT) of Delhi

... Respondent

Through: Mr. Sunil Sharma, APP for the State

JUSTICE SHIV NARAYAN DHINGRA

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| 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 judgment should be reported in Digest? | Yes. |

JUDGMENT

By present appeal, the appellant has assailed his conviction under Section 392 read with Section 397 IPC and under Section 482 IPC and order on sentence whereby the appellant was sentenced to undergo RI for seven years under Section 392/397 IPC and RI for one year under Section 482 IPC.

2. Brief facts relevant for the purpose of deciding this appeal are that on 23rd January, 2004 Mohan Mishra ex-employee of RAW was coming home at 11.00 pm in the night in his Maruti Wagon-R Car No.DL-6CH-6809. When he was opposite SPG Colony, a white colour Maruti Car overtook his Wagon-R and the boys sitting in the car indicated him to stop as they wanted to ask direction. He stopped his car, the moment he stopped his car two boys got down from the Maruti Car, came on both sides of front sides of his car, opened the doors and forcibly entered the car and pushed him in between them. One of the boys started driving the car and the other placed a knife on his neck, abused him and

told him to keep shut otherwise he would be killed. He was driven through airport road behind Centaur Hotel. Their car followed his Wagon-R car. He was taken behind Centaur hotel at a dark lonely place. His purse (containing Rs.6000/- cash, his PAN Card, Election I-card, SBI card and some papers) and mobile phone were snatched, he was pushed out of the car and both the boys ran away with his car. He went to Centaur Hotel and made a call at "100". This call was recorded vide DD No. 38/A at 11.48 pm. at PS Dwarka and his statement was recorded by the Investigating Officer who reached the Centaur Hotel on 24th January 2004 at 1.30 a.m. in the night and FIR was registered. The accused persons could not be arrested immediately however, on 3rd February, 2004 four persons were found traveling in the same Wagon-R with a changed number plate of DL-6CH-809. They were intercepted on suspicion and the chasis number and engine number were checked and it was found that the engine and chasis number were that of car no. was DL-6CH-6809. These four persons were arrested. The appellant was one of them. The other persons found travelling in the car were Narender, Nitin and Naresh. They were interrogated and their other accomplice in this crime viz. Narpat was also arrested. Accused Naresh expired before the charge-sheet could be filed. Accused Narender absconded and became PO during trial. Thus, finally the case proceeded against Nihal, Nitin and Narpat. The testimony of complainant provides that the present appellant and Narender were those two persons who had forcibly entered the Wagon-R of complainant by opening the two front doors and robbed him of his purse, mobile phone while the other persons were allegedly following Wagon-R in the other Maruti Car. It was case of prosecution that even the other Maruti Car was a stolen car. Recovery of purse of the complainant was effected at pointing out of the present appellant.

3. The learned trial Court convicted the appellant. The other accomplice of the appellant i.e. Narender who had entered the car, robbed the complainant had become PO. Out of the three other accused since one had died, the remaining two were acquitted by the trial Court on the ground that they were not identified by the complainant.

4. It is argued by the Counsel for the appellant that conviction of the appellant was based only on testimony of the complainant and other witnesses and testimony of complainant regarding identification of the appellant should not have been believed by the trial Court. She submitted that the purse of the complainant recovered at the instance of the appellant, was produced in the Court in unsealed condition. This recovery was therefore highly doubtful and should not have been believed. She urged that as the weapon of offence was not recovered in this case, the conviction of the appellant under Section 392/397 IPC in absence of recovery of weapon of offence was not maintainable. She also submitted that the weapon of offence cannot be said to be used as no injury was caused by the appellant to the complainant. Simply because the weapon is alleged to have been put on the neck of the complainant it cannot be said to be used. Unless an injury was caused to the complainant, the knife could not be said to be used by the appellant. She pleaded for acquittal of the appellant. She relied upon Rakesh Kumar v. The State of NCT of Delhi 2005(1) JCC 334 to fortify her argument regarding non-recovery of weapon of offence and to plead acquittal of the appellant. In the alternative she argued that the appellant should not be convicted under Section 397 IPC but should be convicted only under Section 392 IPC as there was no recovery of weapon of offence and his sentence should be reduced.

5. To decide whether an accused was guilty of crime or not, the Court has to consider the entire facts and circumstances of the case and come to a conclusion, if the accused was actually involved in the crime or not. If the testimony of witnesses leads to the conclusion that the accused was involved in the crime, the next question arises what was the offence committed by the accused, whether the accused was guilty of lesser charge or more serious charge, as framed against him and the next issue would be what should be the sentence awarded to the accused. In the present case, the appellant and his co-accused Narender (who became absconder during trial and did not turn up after grant of bail) were the two persons who had forcibly entered the car of the complainant on the excuse of asking direction and then driven him to a lonely place. The complainant made a complaint immediately after the incident. He narrated the incident in the same manner in the Court as he had narrated the incident to the police. The two persons who robbed him, had come from another Maruti Car that followed the complainant's car. There were other persons in the Maruti Car following Wagon-R. Since the complainant had no opportunity to see to other persons sitting in the following car he did not identify the other accused persons involved in the crime leading to their acquittal. This cannot be a ground for doubting the testimony of the complainant but is a ground to give credence to the testimony of the complainant, as observed by the trial Court. The appellant along with his accomplices was found travelling in the same Maruti Wagon R car, which was robbed by him and others from the complainant. This fact has not been disputed by the appellant. It is not the case of the appellant that he was not travelling in the same Maruti Wagon-R, when he was apprehended by the police. No suggestion had been given to the police officials who apprehended him travelling in that Wagon-R with a fake number plate. It is also not the case of the appellant that number plate was not fake. Since the appellant and his

accomplices were found travelling in the same Wagon-R which they had robbed from the complainant, the onus was on the appellant to show how the Wagon-R came into his possession, if it was not obtained by him and others by robbery, in view of Sections 106 & 114(a) of the Indian Evidence Act. The appellant did not lead any defence evidence to discharge the onus. In view of the appellant being found in possession of the same Wagon-R, which was robbed from the complainant and in view of the fact that the complainant categorically identified the appellant being the person who had put knife on his neck, abused him and told him to keep shut and thereafter robbed him along with his accomplice of his purse and mobile phone, no doubt remains that it was the appellant who was involved in the crime. The purse of complainant was also recovered at the instance of the appellant. Cash was not there but other articles of the complainant were found in the purse. The purse was in unsealed condition when produced in the Court during trial. The argument that it being unsealed creates doubt is baseless since the seizure memo of the purse shows that it was not sealed at the time of recovery. The testimony of IO that it was sealed seems to be inadvertent deposition about sealing. In fact recovery memo prepared on the spot is more trustworthy. It is possible that IO, deposing from memory, had not remembered about the sealed/unsealed condition. Thus I find that the trial Court rightly came to the conclusion that the appellant was the person who was involved in this robbery.

6. Whether this robbery was an armed robbery and whether trial Court rightly held that the appellant had used knife, a dangerous weapon, at the time of offence is the next issue. Testimony of PW-4, complainant in this case is vital and important. PW-4 categorically stated in his initial complaint itself that one of the robbers had put knife on his neck and told him to keep shut otherwise

he would be killed. A weapon is stated to be used if the user takes out the weapon and with the help of weapon threatens the victim. The moment the weapon is pointed out to the victim and he is threatened that he would be killed, the weapon stands used, even if no injury is caused to the victim. Need to cause injury by the weapon held by criminal arises if the victim resists or does not obey the commands of the criminal. Where the victim does not resist, being afraid of the injuries and under threat follows the commands that does not mean that the weapon has not been used. Section 397 of IPC does not provide that use of deadly weapon can be there only if a hurt is caused by the deadly weapon. The words used in this section are wide enough to include a case in which person points out his revolver or knife to another person so that other person submits to his command. It would be a wrong interpretation of the Section to say that a person does not use his revolver or knife unless he causes injury to the person with the weapon and to bring the victim under threat of life is not sufficient to infer the use of weapon. Non-recovery of weapon in this case cannot be considered as fatal. The accused was not arrested either on the spot or on a chase so that weapon would have been recovered from him. The accused was arrested in this case after about 11 days and 11 days were sufficient for the accused to dispose of the weapon or throw the weapon. The purse was also not recovered from the possession of the accused. The purse was recovered from the place near the incident at the instance of appellant as the accused had taken out the cash and thrown rest of the purse and belongings near the place of incident in the bushes. Since the accused was a criminal, the weapon would not have been thrown by him in the bushes and would have been carried by him for further use. I also consider the testimony of PW-4 the victim of crime in this case, cannot be disbelieved that a knife was used in the crime neither a suggestion was given to him that this robbery was committed without use of knife. Rather the victim in his

testimony had stated that he did not raise alarm as the knife had been placed on his neck by the appellant and he was threatened if he raised alarm he would be killed. In his cross examination also he testified that he could not raise alarm for above reason. No suggestion was given that knife was not used in the crime. In view of this testimony, I consider that there is no doubt that the accused had used the knife, a deadly weapon, and placed it on the neck of the victim and threatened him that in case he raised alarm he would be killed. This was sufficient to convict the accused under Section 397 IPC.

7. I find that the trial Court rightly convicted the accused under Section 392 read with Section 397 and awarded the minimum sentence of seven years to the accused under the offence for which he was convicted. I find no force in the appeal. The appeal is hereby dismissed.

November 19, 2010
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SHIV NARAYAN DHINGRA, J.