

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. A. 874/2009

% Judgment decided on: 3rd December, 2010

RAMU @ RAJU

.....APPELLANT

Through: Ms. Rakhi and Mr. Hem C.
Vashisht, Advs.

Versus

STATE

.....RESPONDENT

Through: Mr. Arvind Gupta, APP for
the State

AND

CRL. A. 4/2010

VIJAY

.....APPELLANT

Through: Mr. Madhu Sudan Bhayana,
Adv.

Versus

STATE

....RESPONDENT

Through: Mr. Arvind Gupta, APP for
the State

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

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| 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. Both the above noted appeals are being disposed of

together as these germinate from the same incident, FIR and judgment of the Trial Court.

2. Both the appellants have been convicted under Sections 392/397 IPC. Appellant Vijay has also been convicted under Section 27 of the Arms Act. Appellants have been sentenced to undergo rigorous imprisonment for seven years each and to pay fine of ₹ 3,000/- ; in default of payment of fine to undergo simple imprisonment for three months each. Appellant Vijay has also been sentenced to undergo rigorous imprisonment for three years and to pay fine of ₹ 2,000/- ; in default of payment of fine to undergo simple imprisonment for two months under Section 27 of the Arms Act. Benefit of Section 428 Cr.P.C. has also been given to the appellants.

3. It is this judgment which is under challenge in these appeals.

4. In brief, prosecution case is that complainant Brij Mohan Rathi (PW-2) was travelling in a bus, plying on route no. 971, on 22nd October, 2005 at about 10 am. On the way, appellants boarded the bus and when the bus reached at Wazirpur Flyover appellants came near the complainant and snatched his bag. At that time appellant Ramu @ Raju was armed with katta while appellant Vijay was armed with a knife. When the bus stopped at Netaji Subhash Palace both of them de-boarded the bus and started running.

Complainant also got down from the bus and chased them by raising alarm “pakro-pakro”. In front of Wazirpur Depot one PCR Van was parked. ASI Uttam Chand (PW3) and Const. Birpal Singh (PW6), who were present in the said PCR Van, apprehended both the appellants. On their search, one desi katta was recovered from Ramu @ Raju and one button actuated knife from Vijay. Appellants had thrown the bag somewhere on the way which they later on got recovered from the bushes.

5. PW 3 ASI Uttam Chand sent wireless message about the incident to Police Station Saraswati Vihar pursuant whereof, DD No. 42 B was recorded and handed over to SI Ram Sharan (PW9) who along with Const. Balwan Singh (PW1) reached at the spot. PW 9 SI Ram Sharan recorded statement of PW2 Brij Mohan Rathi, wherein, he narrated the incident in the manner as has been described in para 4 hereinabove. Katta and knife were measured and their sketches were prepared. Thereafter, both the weapons were sealed in separate pulandas and taken in possession vide seizure memos Ex. PW1/A and PW1/B respectively and later on deposited in Malkhana. Both the appellants were arrested. Site plan (PW2/F) was prepared. Statements of other witnesses were also recorded. Later on katta was sent to Forensic Science Laboratory (FSL) and its report was

obtained.

6. After completion of investigation appellants were sent up to face trial for having committed offences under Sections 392/397/34 IPC and 27 of the Arms Act by filing a charge-sheet in the court of Metropolitan Magistrate, on 16th February, 2005 who after completing the formalities under Section 207 Cr.P.C., committed the case to the Sessions Court, since offence under Section 397 IPC is exclusively triable by the Sessions Court.

7. Charges under Sections 392/397 IPC were framed against both the appellants. Separate charge under Section 27 of the Arms Act was also framed against the appellant Vijay. Appellants pleaded not guilty and claimed trial.

8. Prosecution examined twelve witnesses in all. Material witnesses in this case are PW2 Brij Mohan Rathi, PW3 ASI Uttam Chand, PW6 Const. Birpal Singh and PW9 SI Ram Sharan. All other witnesses are formal in nature having been joined in the investigation at one or the other stage. After prosecution concluded its evidence entire incriminating material, which had come on record, was put to the appellants in their statements under Section 313 Cr.P.C. recorded separately on 5th June, 2009. Appellants denied their complicity in the crime and claimed themselves to be innocent. They stated that they had been falsely implicated.

However, they did not lead any evidence in their defense.

9. As regards the incident, PW2 has fully corroborated the same as he has deposed that on 22nd October, 2005 at about 10 am he was travelling in a bus plying on route no. 971. On the way, appellants boarded the bus. Appellant Ramu @ Raju was having a katta in his hand, while appellant Vijay was having a knife. They snatched his bag and alighted the bus at Netaji Subhash Palace and started running. He also got down from the bus and chased them. He also raised alarm. His this statement has remained unshattered in his cross-examination. With regard to bag snatching incident PW2 has fully supported the prosecution story. From the testimony of PW2 it is evident that it is the appellants who had robbed his bag on the fateful day. Both the appellants had been correctly identified by the PW2 in court. From his testimony it has been proved that appellants had robbed the complainant PW2, thus, had committed offence under Section 392 IPC. Trial court has, thus, rightly convicted them under this provision.

9. In view of the evidence adduced by the prosecution before the trial court, I am of the view that the conviction of the Appellants under Section 397 IPC cannot be sustained as recovery of katta and knife is under the cloud of suspicion. PW2 has deposed that appellant Ramu @ Raju was having a

katta in his hand while appellant Vijay was having button actuated knife in his hand. In the FIR, PW2 had stated that both the appellants were apprehended by the PCR Van immediately after the incident in his presence and on their search knife and katta were recovered. However, while deposing in court he has not corroborated this fact, inasmuch as, in his cross-examination he has deposed that officials of PCR Van had already apprehended the appellants and had recovered katta and knife by the time he reached there. His this testimony in the court shows that while giving chase to the appellants he lagged behind and appellants had gone out of his sight and were apprehended by the PCR Van. Later when he reached at the place where the PCR Van was parked, appellants had already been apprehended by ASI Uttam Chand and Const. Birpal. Testimony of PW3 ASI Uttam Chand and PW6 Const. Birpal Singh is also to this effect. Deposition of PW3 also suggests that katta and knife had already been recovered from the appellants before complainant reached there. Version regarding recovery of weapons of offence, which had surfaced during the trial, is not in consonance with the prosecution case as set out in the charge-sheet. In my view, appellants are entitled to benefit of doubt on this point of recovery of weapons from them more so, when the same is not in line with the prosecution story.

10. There is yet another reason for which appellant Ramu @ Raju is entitled to be acquitted under Section 397 IPC. I have perused the statement of appellant Ramu @ Raju recorded under Section 313 Cr.P.C. and I find that the incriminating circumstance of recovery of katta from him had not been put in his statement. If that is so, then this incriminating circumstance of recovery of katta from him cannot be used against him. In absence of any question being put to him in this regard, he had no opportunity to say whatever he could possibly have said in respect of this part of the evidence appearing against him. Purpose of recording of statement under Section 313 Cr.P.C is to enable him to say whatever he may have to say in respect of material circumstance appearing in evidence against him. Appellant being in possession of katta at the time of commission of robbery was definitely a material circumstance appearing in evidence against the appellant. Since appellant had been apprehended immediately after the incident, recovery of katta from him was a material circumstance against him to show that he had used the same at the time of commission of offence. Since this material circumstance was not put to him same cannot be read and used against him and this fact also goes in his favour as regard his conviction under Section 397 IPC is concerned. In **Raju Vs. State 2010 II AD (DELHI) 674**,

recovery of knife from the accused was not put to him in his statement under Section 313 Cr.P.C. Benefit of this fact was given to said accused and he was acquitted of the offence under Section 397 IPC. Since recovery of katta from this appellant is shrouded with suspicion in view of inconsistent stand taken by the prosecution, inasmuch as, this material circumstance of recovery of katta having not been put to him in his statement under Section 313 Cr.P.C., Appellant Ramu @ Raju is acquitted of the charge under Section 397 IPC.

12. Similarly, recovery of knife from Appellant Vijay also fails. That apart, no evidence has been led by the prosecution to show that the knife which this appellant possessed at the time of incident was a “deadly weapon”. Section 397 IPC envisages that if, at the time of robbery, the offender uses any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years. Thus, what is essential to satisfy the word “uses” for the purpose of this Section is that the robbery being committed by an offender, who was armed with a deadly weapon, which was within the vision of the victim, so as to be capable of creating terror in the mind of the victim. 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 such as would ordinarily result to death by

their use. 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. Thus, it is a question of fact to be proved by the prosecution that the knife used by the offender was a deadly one. In this case, recovery of knife has failed. Only statement of PW-2 is available to show that this accused was armed with a knife. None of the witness has deposed that knife in possession of the appellant was a deadly one. This fact has remained unproved. Thus, the ingredients of Section 397 are not attracted so as to convict the appellant Vijay under this provision. Appellant Vijay is acquitted of the charge under Section 397 IPC. Since recovery of knife has also failed he is also acquitted under Section 27 of the Arms Act.

13. Result of above discussion is that conviction of appellants under Section 392 IPC is maintained.

14. Appellant Ramu @ Raju is a married man having two children. His aged parents are also dependent upon him. Appellant Vijay is aged about thirty five years and his aged parents are dependent upon him. In the facts and circumstances of this case, sentences of the appellants are reduced to five years from seven years. Sentence of fine is maintained. However, in case of default in depositing the fine, appellants shall undergo simple imprisonment for 15 days.

They shall also be entitled to the benefit of Section 428 Cr.P.C.

15. Both the appeals are disposed of in the above terms. Copy of the order be sent to Superintendent Jail to serve it on the appellants.

A.K. PATHAK, J.

DECEMBER 03, 2010

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