

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. APPEAL NO. 255/2005

% Judgment decided on: 16th March, 2011

RAKESH CHAUHAN

....APPELLANT

Through: Mr. Riaz Mohd., Adv.

Versus

THE STATE (NCT OF DELHI)

.....RESPONDENT

Through: Mr. M.P. Singh, 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. This appeal is directed against the judgment dated 28th February, 2005 passed by Additional Sessions Judge, Delhi whereby appellant along with co-accused Samiuddin @ Chotu has been convicted under Section 397 read with Section 392 IPC and under Section 457 IPC; sentenced to undergo rigorous imprisonment for seven years with fine of Rs.500/- for the offence under Section 397 IPC; sentenced to undergo rigorous imprisonment for three years with fine of Rs.500/- for the offence under Section 457 IPC and in default of payment of fine

to undergo rigorous imprisonment for three months. Both the sentences have been directed to run concurrently.

2. Prosecution case as unfolded is that appellant and co-convict Samiuddin @ Chotu along with Mohd. Arif and Nazim forcibly entered in the second floor of premises bearing No.1669, Kucha Dhakni Rai, Daryaganj, Delhi on 15.03.2001 at about 10.30 p.m. and committed robbery at the point of knife. Jafar Hussain was present in the house at that time along with his daughter-in-law Shehnaaz and other family members. Appellant and his accomplices intimidated the family members and forced the women to hand over their ornaments to them. They also opened almirah and removed valuable articles. While appellant and his accomplices were committing robbery, Jafar Hussain's son, namely, Waseem Ahmed arrived there. He rang up the door bell at which door was opened by one of the assailants. He was also surrounded by appellant and his accomplices and cash, which he was carrying, was robbed. Thereafter, appellant and his accomplices locked up the family in the bathroom and decamped with the robbed articles. On 24th May, 2001 appellant and his accomplices were arrested. After investigation was completed charge sheet was filed against the appellant and his co-accused. During trial Smt. Shehnaaz, Jafar Hussain, and Waseem Ahmed were examined as PW3, PW4 and PW10 respectively. They have identified the appellant. Trial court found their testimonies trustworthy, credible and

reliable so as to conclude that appellant and Samiuddin @ Chotu had committed robbery. However, Mohd. Arif and Nazim were acquitted by giving benefit of doubt to them.

3. It may be noted here that co-convict Samiuddin @ Chotu had filed Criminal Appeal No. 461/2006 against the judgment impugned in this appeal thereby challenging his conviction. The said appeal has been disposed of by a Single Judge of this Court vide order dated 9th November, 2010. Conviction of Samiuddin @ Chotu under Section 397 IPC has been modified to one under Section 392 IPC. Consequently, his sentence has also been reduced to rigorous imprisonment for a period of four years in view of alteration of his conviction to Section 392 IPC. Conviction under Section 397 IPC was modified to Section 392 IPC in absence of recovery of knife allegedly used at the time of robbery. It was held that prosecution had failed to prove that Samiuddin @ Chotu was armed with a knife which could have been termed as 'deadly weapon'.

4. Learned counsel for the appellant has not pressed this appeal against the conviction of appellant under Section 457 IPC. He has pressed this appeal against the conviction of appellant under Section 397 IPC.

5. The short question which needs to be addressed in this appeal is whether the offence under Section 397 IPC is made out against the appellant or not in the facts of this case. Admittedly, the knife allegedly used by appellant while

committing robbery had not been recovered. No evidence has been led before the Trial Court to show that the knife used by the appellant was a 'deadly weapon'. Even otherwise, in absence of recovery of knife it cannot be said that the same would fall within the meaning of 'deadly weapon' as envisaged under Section 397 IPC. In ***Bishan Vs. State 1984 (6) DRJ 78***, it has been held that in the absence of recovery of knife, allegedly used by 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. Similar is the view in ***Rakesh Kumar Vs. The State (Govt. of NCT) 2005 (1) JCC 334*** and ***Sunil @ Munna Vs. The State (Govt. of NCT) 2010 (1) JCC 388***.

6. In ***Balik Ram Vs. The State 1983 Crl. L.J. 1438***, a Single Judge of this Court has 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 deadly one. In ***Charan***

Singh Vs. The State 1988 Crl. L.J. NOC 28 (Delhi) also, 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'. What would make a 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 which is required to be proved by the prosecution that the knife used by the appellant was a 'deadly weapon' and in absence of such evidence and particularly non-recovery of the weapon, would certainly bring the case out of the ambit of Section 397.

7. In the present case, it is an undisputed fact that knife used in the crime was not recovered. Prosecution has not led any evidence to show that the knife used by the appellant was a 'deadly weapon'. In absence of evidence to this effect, in my view, Trial Court was not right in convicting the appellant under Section 397 IPC and his conviction under this provision is altered to Section 392 IPC, which is a lesser offence than Section 397 IPC.

8. The result of the above discussion is that appellant stands convicted under Sections 392 and 457 IPC. Perusal of nominal roll shows that appellant has remained in incarceration for about four and a half years. Accordingly, he is awarded sentence under both the provisions equivalent to the period he has already remained in jail. Personal bond of the appellant is cancelled and bail bond discharged.

9. Appeal is disposed of in the above terms.

A.K. PATHAK, J.

MARCH 16, 2011

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