

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

Judgment delivered on: January 18, 2011

+ **CRL.A. NO. 496/2008 & CRL.M.B. 210/2010**

MUDDASIR

....APPELLANT

Through: Mr.Ajay Verma, Advocate with Mr.
Gaurav Bhattacharya, Advocate & Ms.
Swati Gupta, Advocate.

Versus

STATE (NCT) OF DELHI

.....RESPONDENT

Through: Mr.R.N.Vats, APP.

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.(ORAL)

1. This appeal is directed against the impugned judgment of the Additional Sessions Judge dated 29th October, 2007 and consequent order on sentence dated 02nd November, 2007 in Sessions Case No. 69/2006, FIR No. 48/2006, P.S. Gokal Puri whereby the appellant Muddasir has been convicted for the offences punishable under Sections 452, 392 & 397 IPC. For the offence punishable under

Section 452 IPC, the appellant has been sentenced to undergo RI for the period of 04 years and to pay fine of ₹ 5000/-, in default to undergo RI for further period of six months. Appellant has also been sentenced for offence punishable under Section 392 IPC to undergo RI for the period of 04 years and to pay a fine of ₹ 10,000/-, in default to undergo RI for one year and for the offence punishable under Section 397 IPC, the appellant has been sentenced to undergo RI for the period of 07 years. It was ordered that substantive sentences awarded to the appellant shall run concurrently.

2. Briefly stated, case of the prosecution is that on 20th January, 2006, complainant Ms. Afsana Praveen was alone in her house. At about 1.30 p.m., her son Suhail returned home. When he entered the house, four robbers including the appellant Muddasir followed him. The robbers caught hold of the complainant Afsana Praveen. One of them gagged her mouth, other offender caught hold of Suhail and the third one threatened the complainant with a dagger and demanded keys of almirah from her but the complainant maintained silence. One of them then started searching the house and took out the keys of the almirah from the drawer. They opened the almirah and removed cash ₹ 1,50,000/-, one gold necklace, two gold rings, two other ear-rings and some other ornaments from the house. They had tied the thumbs of both the hands of the complainant with a shoe lace. When the robbers left, complainant managed to untie

her thumbs, came out of the house and raised alarm. Someone informed the husband of the complainant Vakil Ahmed who reached there and informed the police.

3. Statement of complainant Afsana Praveen Ex.PW1/A was recorded by the Investigating Officer SI S.B.Gautam, on the basis of which formal FIR was registered. During investigation, accused Saleem was arrested on 28th January, 2006 in an Arms Act case and on interrogation, he made a disclosure statement about his involvement in the robbery in this case and stated that the appellant Muddasir, Ashraf and one other were his associates. The appellant Muddasir and his co-accused Ashraf were arrested on 30th January, 2006. On interrogation, they made disclosure statements, pursuant to which they got recovered the stolen ornaments of the complainant. On completion of investigation, charge sheet against the appellant and others was filed.

4. The appellant was charged for the offences punishable under Sections 452, 392 read with Section 120B IPC and Section 397 IPC. The appellant pleaded not guilty to the charge and claimed trial.

5. In order to bring home the guilt of the appellant and others, prosecution examined 12 witnesses including the complainant.

6. In order to afford an opportunity to explain circumstances appearing in evidence against the appellant, he was examined

under Section 313 Cr.P.C. wherein he claimed that he has been framed in this case. He, however, failed to lead evidence in defence.

7. Learned Additional Sessions Judge, on consideration of record acquitted co-accused Saleem and convicted the appellant Muddasir for offence under Section 452, 392 and 397 IPC and his co-accused for the offence punishable under Section 452 and 392 IPC.

8. Learned Sh. Ajay Verma, Advocate appearing for the appellant has not challenged the conviction and sentence of the appellant for the offences punishable under Section 392 and 452 IPC. He, however has challenged the conviction of the appellant under Section 397 IPC.

9. Learned counsel for the appellant contended that Section 397 IPC provides punishment for aggravated form of the offence of robbery and this Section is attracted only if the person guilty of robbery, uses any deadly weapon, or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person. Therefore, in order to bring the appellant Muddasir within the purview of Section 397 IPC, the prosecution was required to prove either of the aforesaid three ingredients, which are lacking in this case. Learned counsel further contended that learned Additional Sessions Judge has committed a grave error in convicting the

appellant Muddasir under Section 397 IPC on the strength of testimony of PW1 Afsana Praveen wherein, she claimed that the appellant, during robbery, had placed a country-made pistol on the head of her son. Learned counsel argued that learned Trial Judge failed to appreciate that aforesaid version of PW1 Afsana Praveen is unreliable being a major improvement upon her previous statement Ex.PW1/A, which is the basis of registration of the case. He submitted that there is no mention in Ex.PW1/A of user of country-made pistol by the appellant Muddasir during the course of robbery. Thus, learned counsel has urged for rejection of that part of testimony as unreliable and quashing of conviction of the appellant under Section 397 IPC.

10. Learned APP, on the contrary, has argued in support of the impugned judgment. He contended that the Trial Court has rightly relied upon the testimony of PW1 Afsana Praveen because a possibility cannot be ruled out that due to fear and trauma of robbery, the complainant might have forgotten to mention about the user of country-made pistol by the appellant Muddasir in her statement Ex.PW1/A made to the Investigating Officer.

11. I have considered the rival contention and perused the evidence on record. There appears to be merit in the contention of learned counsel for the appellant. On perusal of complaint

Ex.PW1/A, it transpires that the complainant Afsana Praveen in her statement made to the Investigating Officer, did not mention about the user of country-made pistol either by the appellant Muddasir or any other co-accused though she mentioned about use of a dagger by one of the accused persons. If she could narrate about user of dagger, it is highly improbable that she would have forgotten to tell about use of the country-made pistol by the appellant in her statement made to the Investigating Officer. The version of the complainant regarding use of country-made pistol by the appellant definitely is a major improvement on her previous statement, therefore, I do not find it safe to rely upon that part of testimony of the complainant. Thus, in my considered view, the prosecution has failed to prove beyond doubt that the appellant Muddasir used a deadly weapon during robbery. There is no evidence on record to show that the appellant either caused grievous hurt to anyone during robbery or he attempted to cause death or grievous hurt to anyone during the course of robbery, as such, it is apparent that necessary ingredients of Section 397 IPC are lacking in this case. Therefore, I find it difficult to sustain the conviction of the appellant under Section 397 IPC. Accordingly, I partly accept the appeal and while maintaining the conviction and sentence awarded to the appellant for the offences punishable under Sections 392 and 452

IPC, set aside the conviction and sentence of the appellant under Section 397 IPC.

12. Appeal along with pending Criminal Miscellaneous Bail Application No. 210/2010 are disposed of accordingly.

13. Copy of this judgment be sent to the Jail Superintendent concerned.

(AJIT BHARIHOKE)
JUDGE

JANUARY 18, 2011
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