

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. A. No.479/2009

% Judgment decided on: 18th January, 2011

NOOR MOHD. APPELLANT

Through: Mr. Siddharth Aggarwal,
Adv.

Versus

STATE (G.N.C.T.) OF DELHI RESPONDENT

Through: Mr. M.P.Singh, APP

AND

Crl. A. No. 574/2009

GULZAR APPELLANT

Through: Ms. Ritu Mishra,
Amicus Curiae

Versus

STATE (G.N.C.T.) OF DELHI RESPONDENT

Through: Mr. M.P.Singh, APP

AND

Crl. A. No. 67/2010

YUNUS APPELLANT

Through: Mr. Riaz Mohd., Adv.

Versus

STATE (G.N.C.T.) OF DELHI RESPONDENT

Through: Mr. M.P.Singh, APP

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

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. All the above referred Appeals are being disposed of together by this judgment as these arise from the same incident, FIR and judgment of the Trial Court.

2. Appellants have been convicted under Sections 394/34 and 397/34 IPC; sentenced to undergo rigorous imprisonment for ten years with fine of ₹10,000/- each and in default of payment of fine, each of the Appellants to further undergo simple imprisonment for six months. Appellant Noor Mohd. has also been convicted under Section 27 of the Arms Act, 1959 and sentenced to undergo rigorous imprisonment for three years with fine of ₹5,000/-; in default of payment of fine to undergo simple imprisonment for three months. Both the sentences of Noor Mohd. had been directed to run concurrently. Benefit of section 428 Cr.P.C. has also been given to the Appellants.

3. Factual matrix as unfolded is that complainant Jai Narayan, on 29th May, 2005, hired a three-wheeler scooter (TSR) driven by Yunus for going to Seemapuri from Maujpur. On the way, Noor Mohd. and Gulzar also boarded the TSR. When the TSR reached near Afsara border, Yunus abruptly stopped his TSR; he got down

from it and took out a knife hidden beneath the seat and handed over to Noor Mohd. Yunus slapped the complainant and asked him to handover whatever he was having in his possession. Gulzar forcibly took out mobile phone of the complainant from his shirt's pocket and ₹2400/- from his pants' pocket. Complainant raised alarm, on which Noor Mohd. gave a knife blow to him, causing injuries on his elbow. While Gulzar caught hold of the complainant, Noor Mohd. aimed a knife blow on his abdomen, however, he saved himself by catching the knife with his left hand, consequently, sustained injuries on his fingers. In the meanwhile, Head Constable Giliya Ram and Constable Naresh arrived there and on seeing them Appellants boarded the TSR and started moving towards the flyover. Police officials along with one passer-by Maninder Singh chased Appellants and apprehended them. Knife was recovered from the possession of Noor Mohd.

4. Complainant Jai Narayan has been examined as PW1. Maninder Singh has been examined as PW2. Constable Naresh and Head Constable Giliya Ram have been examined as PW7 and PW10, respectively. These are the material witnesses to prove the incident. All other witnesses are formal in nature having been joined in the investigation, at one or the other stage. PW2 Maninder Singh had turned hostile and his testimony is of no help.

5. PW1 Jai Narayan has deposed that he had boarded the TSR driven by Yunus on 29th May, 2005 at about 2/2:30 AM for going

to Seemapuri. Noor Mohd. and Gulzar also boarded the same TSR. On the way Yunus stopped the TSR and got down from it. He took out a churra and handed over to Gulzar. He slapped him. ₹70/- and one mobile were taken from him. ₹2400/- was also taken from his pants' pocket under threat. He again said that Yunus gave chura to Noor Mohd. who put it on his abdomen while Gulzar caught hold of him. He again said that Gulzar tried to give chura blow on his abdomen and when he tried to save himself he sustained injuries on the three fingers of his left hand. On seeing police officials he raised alarm. Appellants started running away with the TSR. Police officials chased the TSR and apprehended the appellants with the help of driver of another TSR. PW7 Constable Naresh Kumar and PW10 Head Constable Giliya Ram have corroborated PW1 with regard to the apprehension of appellants.

6. As regards incident of robbery is concerned, his testimony is in line with the prosecution case as set-up in the charge-sheet. He has fully corroborated his earlier version as contained in the FIR to the effect that the Appellants had robbed him of his mobile phone and ₹2470/- on the point of knife. No material discrepancy could be pointed out in his testimony on this point. Appellants were apprehended at the spot by the PW7 and PW10, whose testimonies have remained unshattered in their cross-examination on this point. MLC Ex. PW9/A shows that the complainant had suffered simple injuries on the date of incident. A perusal of Section 394

IPC provides that if any person in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit robbery shall be punished under the said provision. Section 394 IPC envisages that not only the person, who causes hurt but accomplices would also be liable for punishment under this provision. On the face of clinching evidence on record, Trial Court has rightly held that it is the Appellants who had robbed the complainant on the fateful day i.e. on 29th May, 2005 at about 2/2:30 AM and had also caused simple injuries on his person, thus their conviction under Sections 394/34 IPC does not suffer from any irregularity or illegality.

7. The next question which arises for consideration is as to whether the Trial Court was right in convicting the Appellants under Section 397 IPC. Section 397 IPC provides that if, at the time of committing robbery, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years. The word “such offender” used in this Section clearly indicates that it is only the accused who uses deadly weapon at the time of committing robbery, would be liable for punishment under Section 397 IPC.

8. In **Dilawar Singh Vs. State of Delhi 2007 (12) SSC 641** Supreme Court observed that "Offender" refers to only culprit who actually used deadly weapon. When only one has used the deadly weapon, others cannot be awarded the minimum punishment. It only envisages the individual liability and not any constructive liability. Section 397 IPC is attracted only against the particular accused who uses the deadly weapon or does any of the acts mentioned in the provision. But other accused are not vicariously liable under that Section for acts of co-accused. Similar view has been taken by the Supreme Court in **Phool Kumar v. Delhi Administration (AIR 1975 SC 905)**. It was held that the term "offender" under Section 397 IPC is confined to the offender who uses any deadly weapon. Use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397 IPC for the imposition of minimum punishment on another offender who had not used any deadly weapon.

9. In this case, inconsistent stand has been taken by the complainant with regard to use of knife by the accused persons. In the FIR, complainant had stated that Yunus had taken out the knife after removing his seat and handed over the same to Noor Mohd. Subsequently, Noor Mohd. had caused injuries to him by this knife. However, in his examination-in-chief, recorded on 13th October, 2005 complainant deposed that Yunus took out knife and handed over the same to Gulzar. Examination-in-chief of PW1

could not be completed on that day and had been deferred. On 22nd December, 2006 further examination-in-chief was recorded, when he changed his version and deposed that Yunus gave chura to Noor Mohd., who had put the same on his abdomen. However, subsequently he again changed his version by saying that accused Gulzar was trying to give chura blow and when he tried to save himself, he sustained injuries on his fingers of left hand. In view of the shifting stand taken by him with regard to use of knife, Appellants are entitled to benefit of doubt, as regards offence under Section 397 IPC is concerned. Accordingly, Appellants are acquitted of the charge under Section 397 IPC.

10. Recovery of knife from Noor Mohd. has been duly proved. All the Appellants were apprehended at the spot itself. Seizure memo of knife has been duly proved. However, in view of the statement of PW1, it cannot be concluded beyond the shadow of reasonable doubt that it is the Appellant Noor Mohd., who had used the same while committing robbery. As per the complainant himself Appellants had been passing on the knife to each other. It has also come on record that after the incident, Appellants tried to escape in the TSR and were apprehended by the police officials after giving chase to them. Since, use of this knife by Noor Mohd. has remained inconclusive, he is entitled to benefit of doubt with regard to his conviction under Section 27 of the Arms Act.

However, since the knife has been recovered from his possession, he is convicted under Section 25 of the Arms Act.

11. The result of above discussion is that Appellants are convicted under Section 394/34 IPC, however, they are acquitted under Section 397 IPC. Their sentences, as awarded by the Trial Court under Sections 394/34 IPC, are reduced to five years from ten years. Appellant Noor Mohd. is convicted under Section 25 of the Arms Act also but his sentence is reduced to two years. Sentences of fine, as awarded by the Trial Court, are maintained as it is. As regards Appellant Noor Mohd. is concerned, his sentences shall run concurrently. Needless to add that the Appellants shall be entitled to benefit of Section 428 Cr.P.C.

12. Fee of Ms. Ritu Mishra, Amicus Curiae for the Appellant Gulzar is fixed as ₹5000/- to be paid by the Delhi High Court Legal Services Committee.

13. All the three Appeals are disposed of in the above terms.

14. Copy of this order be sent to Superintendent Jail for serving it on the Appellants and for due compliance.

A.K. PATHAK, J.

JANUARY 18, 2011

rb