

\$~R-2

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

+ CRL.A. 100/2010

%

Decided on: 9th July, 2012

JITENDER & ANR.

..... Appellants

Through: Mr. Sudhir Shokeen, Mr.
Yogesh Shokeen and Mr.
Dinesh Kumar, Advs.

versus

STATE

..... Respondent

Through: Mr. Mukesh Gupta, APP

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J. (Oral)

1. Vide judgment dated 8th July, 2009 passed by the Trial Court appellants have been convicted under Section 392 read with Section 34 of the Indian Penal Code, 1860 ("IPC" for short). Appellant no. 1 has also been convicted under Section 397 IPC and 25/27 of the Arms Act, 1959. Appellant no. 1 has been sentenced to undergo rigorous imprisonment for seven years with fine of ₹1,000/- and in default of payment of fine to undergo simple imprisonment for one month for the offence punishable under Sections 392/397/34 IPC. He has been further sentenced to undergo rigorous imprisonment for a period of three years along with fine of ₹1,000/- and in default

of payment of fine to undergo simple imprisonment for one month under the Arms Act, 1959. Both the sentences have been directed to run concurrently. Appellant no. 2 has been sentenced to undergo rigorous imprisonment for three years with fine of ₹1,000/- and in default of payment of fine to undergo simple imprisonment for one month for the offence punishable under Section 392/34 IPC. Co-accused of the appellants, namely, Ashok @ Chap has also been convicted under Section 392/34 IPC and sentenced to rigorous imprisonment for a period of three years along with fine of ₹1,000/- and in default of payment of fine to undergo simple imprisonment for one month. However, he has not joined the appellants to prefer the present appeal and no discussion about his role is made in this appeal.

2. In brief, prosecution case as unfolded is that on 12th February, 2004 at about 11 p.m. victim Shankar Lal was returning home from his factory on his bicycle and when he reached near DDA park, Sector 20, Rohini, four boys surrounded him out of whom one boy gagged his mouth while another kept a knife on his neck. Thereafter, they snatched ₹1250/- from his shirt pocket. They threatened him that in case he raised any alarm he would be killed. Thereafter, they ran towards the Masjid. Shankar Lal raised alarm.

One PCR Van was passing through the area wherein HC Satpal and HC Chand Singh were present. On hearing the alarm raised by the victim they chased those four boys and apprehended two out of them, who disclosed their names as Jitender (appellant no.1) and Jagdish (appellant no.2). From the pocket of appellant no.1, that is, Jitender one buttandar knife was recovered. Investigating Officer SI Jagdish completed the investigation. He prepared a sketch plan of knife and sealed the same in a pulanda. Appellants were arrested. Site plan was prepared. On the disclosure of appellants Ashok @ Chap was arrested. The fourth boy could not be apprehended.

3. Victim Shankar Lal has been examined as PW4. He has fully supported the prosecution story. His testimony has been found trustworthy and reliable by the Trial Court. I have also perused the testimony of PW4 and find the same to be trustworthy and reliable. As regards incident and identity of the appellants are concerned, same has been duly established from the statement of PW4. PW4 has identified the appellants in court. He has categorically deposed that the appellants were apprehended by the police officials who were present in the PCR van. He has further deposed that a knife was recovered from the appellant no.1. PW1 HC Satpal and PW3

HC Chand Singh were in the PCR Van and they had approached the appellant. They have corroborated the version of PW4. They have deposed in unison that they were patrolling near Masjid, Sector 20, Rohini when they heard cries of victim Shankar Lal, who further informed them that four boys had robbed him at the point of knife and were running away. They chased the four miscreants who were running towards the jhuggies. They over powered two of them whose names were revealed as Jagdish and Jitender. PW3 HC Chand Singh recovered a knife from the possession of appellant no.1.

4. Investigating Officer has also supported the version of PW1, PW3 and PW4. No material discrepancy could be pointed out by the counsel for the appellants in their statements with regards to occurrence of the incident and apprehension of appellants at the spot. Accordingly, I am of the view that the appellants have been rightly convicted by the Trial Court under Section 392/34 IPC.

5. As regards offence under Section 397 IPC against the appellant no. 1 is concerned, in my view, same is not made out. Prosecution has failed to prove that a deadly weapon was used by the appellant no.1, at the time of commission of crime. A perusal of Section 397 IPC makes it clear that this section can be invoked if at

the time of committing robbery or dacoity the offender (a) uses any deadly weapon; or (b) causes grievous hurt to any person; or (c) attempts to cause death or grievous hurt to any person. In the present case, victim has not suffered any injury what to say of grievous injury. PW4 has not deposed about injury inasmuch as, no medical evidence has been led in this regard. None of the witnesses have deposed that knife recovered from appellant no.1 was a 'deadly weapon' and this fact infact has remained unproved. In **Balak Ram vs. State 1983 Crimes 1037**, it has been held that "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 in 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. It is, therefore, a question of fact to be proved and prosecution should prove that the knife used by the accused was a deadly one." Similar is the view expressed in **Shri Bishan vs. State (Delhi) 1984 (1) Crimes 883**. Onus to prove that knife was deadly one lies on the prosecution which, in my view, prosecution has failed to discharge in this case. Accordingly, Section 397 IPC cannot be invoked in this case against the appellant no. 1, consequently, conviction under

Section 397 IPC is set aside.

6. As regards conviction of appellant no.1 under Section 25/27 of the Arms Act 1959 is concerned no witness, including the Investigating Officer has deposed that the knife falls within the meaning of 'knife' as defined in the notification under Section 4 of Arms Act 1959. Trial Court Record shows that even no charge under Section 25/27 of the Arms Act 1959 was framed against the appellant no.1. Trial court has neither held any discussion on this point nor has returned any finding as to how the ingredients of offence under the said provisions is made out. Accordingly, conviction of the appellant no.1 under Sections 25/27 of the Arms Act is also set aside.

7. In view of the above discussions, conviction of appellants under Section 392/34 IPC is affirmed.

8. Now, coming to the question of sentence, I find that appellant no. 1 is in incarceration for about five years; whereas sentence awarded to him under Section 392/34 IPC is three years which he has already completed. He be released forthwith, if not wanted in any other case.

9. As regards appellant no.2, he has remained in incarceration for more than one year including the remission. Son of appellant

no.2 is suffering from profound mental retardation. As per the certificate issued by the National Institute for the Mentally Handicapped, Ministry of Social Justice & Empowerment, Govt. of India, son of appellant no. 2 is suffering from 100% permanent disability. It is on this ground that the appellant no. 2 was admitted to bail vide order dated 28th April, 2011. Keeping in mind that appellant no.2 has remained in incarceration for about one year and his son is suffering from permanent disability, his sentence is reduced to the period already undergone by him. He be also released forthwith, if not wanted in any other case.

10. Appeal is disposed of in the above terms.

A.K. PATHAK, J.

JULY 09, 2012

ga