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

+ Crl. A. 875/2010

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Decided on: 18th September, 2012

SURESH @ PAUVVA Appellant

Through: Ms. Rakhi Dubey, Adv.

versus

STATE OF NCT OF DELHI ... Respondent

Through: Ms. Fizani Hussain, APP

AND

Crl. A. 1027/2011

REHMAT ALI @ VIKKI Appellant

Through: Mr. Aditya Wadhwa, Adv.

versus

STATE OF NCT OF DELHI ... Respondent

Through: Ms. Fizani Hussain, APP

A.K. PATHAK, J. (Oral)

1. Both the above referred appeals arise out of the same incident, FIR and judgment thus, are disposed of together.

2. Appellants have been convicted under Sections 392/394/34 Indian Penal Code, 1860 (for short hereinafter referred to as

“Act”). Appellant Rehmat Ali @ Vicky has also been convicted under Section 397 IPC. Both the appellants have been sentenced to undergo rigorous imprisonment of 4 years with fine of ₹1,000/- and in default of payment of fine to undergo one month rigorous imprisonment for the offences punishable under Sections 392/394/34 IPC. Rehmat Ali @ Vicky has also been sentenced to undergo rigorous imprisonment for 7 years with fine of ₹2,000/- and in default of payment of fine to undergo rigorous imprisonment for two months under Section 397 IPC. All the sentences have been directed to run concurrently. Benefit of Section 428 Cr.P.C. has also been accorded to the appellants.

3. Aggrieved by their conviction as also the quantum of sentences as awarded by Trial Court, appellants have approached this Court by way of present appeals.

4. Briefly stated, prosecution story as unfolded is that on 13th February, 2008 victim Yamin was going to C-Block, Jahangir Puri for purchasing meat and when he reached near the gate of A-Block Park, Mangal Bazar Road, Jahangir Puri at about 6.30 pm four boys intercepted him and commanded to handover to them

whatever he was having in his possession. One boy caught hold of his shirt's collar; while second boy snatched his gold chain which he was wearing; whereas third boy took out ₹3,500/- from his shirt's pocket. When he resisted, fourth boy gave a blow on his forehead by some sharp edged object. On the victim raising an alarm all the four boys ran away. Names of two boys were Gudu and Vicky. After the incident victim fell down and became unconscious. He regained consciousness in his house. Police Control Room was informed. Later, he was removed to Babu Jagjeevan Ram Hospital by a PCR van. His statement was recorded, on the basis whereof FIR No. 88/08 under Sections 392/397/411/34 IPC was registered.

5. On 21st February, 2008 victim Yamin approached Police Station Jahangir Puri and informed that the persons who had robbed him were present near a public toilet in B-Block, Jahangir Puri near State Bank of India. DD No. 28-A was recorded in this regard and handed over to Investigating Officer ASI Vijender Singh who along with Ct. Ramesh reached there and apprehended the appellants and their third accomplice, Hasmat Ali @ Guddu.

Appellants disclosed name of their fourth accomplice as Mulla, but failed to give his address, thus, he could not be apprehended.

6. After completion of investigation, charge-sheet was filed in the court of Metropolitan Magistrate who committed the case to Sessions Court for trial.

7. Yamin has been examined as PW1. His wife Haseena has been examined as PW2. HC Angrez Sigh has been examined as PW3, who has deposed that he had removed Yamin to Babu Jagjeevan Ram Hospital. PW7 Dr. Neeraj Chaudhary has proved MLC of victim as Ex. PW7/A. Investigating Officer, ASI Vijender Singh has been examined as PW8 who has given details of investigations conducted by him. PW6 HC Ramesh was with Investigation Officer on 21st February, 2008 when appellants were apprehended. All of them have supported the prosecution, inasmuch as their testimony has remained unshaken in their cross-examination. Their testimonies have been found trustworthy and reliable by the Trial Court so as to conclude that it is the appellants who, with their accomplices, had robbed the victim of his

belongings comprising of a gold chain and ₹3,500/-, inasmuch as, Rehmat Ali had assaulted him by a blade.

8. Learned counsels for the appellants have vehemently contended that the PW1 is not a trustworthy and reliable witness as he has taken shifting stand at different stages. While deposing in Court, PW1 has deposed that the appellants were not known to him; whereas in the FIR he has specifically named Vicky, who is also known as Rehmat Ali. PW1 had failed to explain as to how he came to know the name of the Rehmat Ali @ Vikki. Test Identification Parade (TIP) was not conducted. It is further contended that appellants were not known to victim, thus, TIP was necessary and in absence thereof identification of appellants in Court for the first time is valueless. It is further contended that the statements of PW2 and PW1 are inconsistent more particularly with regard to the arrest of appellants. Thus, Trial Court has committed a patent error and illegality in accepting the testimonies of PW1 and PW2 to conclude that appellants had robbed the victim. It is further contended that weapon of offence was not got recovered by Rehmat Ali @ Vicky and in absence thereof,

prosecution has failed to prove that the weapon allegedly used by Rehmat Ali was a “deadly weapon”, thus, he could not have been convicted under Section 397 IPC. Reliance has been placed on Rakesh Chauhan versus The State (NCT of Delhi) MANU/DE/0924/2011.

9. I have considered the arguments advanced by the learned counsels in the light of Trial Court Record and do not find much force in the contentions raised by them. PW2 Haseena was admittedly not present at the spot, therefore, her statement as regards to the incident is not of much relevance. She had no occasion to see the appellants. It is the statement of PW1 which is material to prove the incident and identity of appellants. PW1 has supported prosecution version on both these counts. In a nutshell his deposition indicates that on 13th February, 2008 at about 6.30 PM when he reached near Mangal Bazar Road, Jahangir Puri four boys came there, waylaid him and robbed him and it is Rehmat Ali, who assaulted him while Suresh removed wallet containing money from his shirt’s pocket. PW1 has identified the appellants correctly in Court. Statement of PW1 has remained unshattered on material

points, inasmuch as he has correctly ascribed role of each appellant. From his statement, it has been proved that the appellants had robbed Yamin of his belongings.

10. I do not find much force in the contentions of learned counsel that in the absence of TIP identification of appellants in Court was valueless. In the peculiar facts of this case, in my view, TIP was not required since the appellants had been arrested at the instance of victim. It is not the case that appellants had been apprehended by the police without any assistance of the victim. Had the case been so, the matter would have been different. MLC of PW1 supports his version regarding injuries, thus, Trial Court has rightly convicted appellants under Sections 392/394/34 IPC. Conviction under the said provisions is upheld.

11. However, in my view, ingredients of offence under Section 397 IPC are not attracted against Rehmat Ali @ Vicky. Admittedly, weapon which was allegedly used in the commission of crime had not been recovered, inasmuch as statement of PW1 is discrepant in this regard. In the FIR PW1 has stated that some pointed object was used; whereas in Court he stated that injury was

caused by a blade. That apart, no evidence has been led to prove that such an object was a “deadly weapon”. Non recovery of weapon allegedly used in the commission of crime also goes in favour of Rehmat Ali @ Vicky. Section 397 IPC envisages that “If, at the time of committing robbery or dacoity, 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.” This provision prescribes minimum sentence of 7 years to such an offender who uses any ‘deadly weapon’ at the time of commission of crime or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person. The use of deadly weapon is of paramount necessity for attracting the ingredients of offence under Section 397 IPC. In this case, no grievous hurt has been caused to the victim nor is there any clinching evidence to suggest that attempt was made to cause death or grievous hurt to victim. Thus, in my view, ingredients of offence under Section 397 IPC are attracted in this case. Accordingly, conviction of Rehmat Ali @ Vicky under

Section 397 IPC is set aside. Consequence of this is that the sentence under Section 397 IPC handed down to Rehmant Ali also goes.

12. Keeping in mind the nature and gravity of offence, sentences as handed down by the Trial Court are not disproportionate to the acts of appellant and are, thus, are maintained. All the sentences shall run concurrently. Needless to add that these appellants shall be entitled to benefit of Section 428 Cr.P.C.

13. Both the appeals are disposed of in the above terms.

A.K. PATHAK, J.

SEPTEMBER 18, 2012

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