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

+ CRL.A. 1089/2010

Decided on 16th November, 2012

SONU @ CHHOTU

..... Appellant

Through: Mr. Ajay Verma, Adv.

versus

THE STATE (GOVT OF NCT0 OF DELHI) Respondent

Through: Ms. Fizani Hussain, APP

AND

CRL.A. 1508/2011

HORI LAL

..... Appellant

Through: Mr. A.J. Bhambhani and Ms. Nisha
Bhambhani, Advs.

versus

THE STATE (GOVT OF NCT0 OF DELHI) Respondent

Through: Ms. Fizani Hussain, APP

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

% **A.K.PATHAK, J. (ORAL)**

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

2. Trial court has convicted the appellants under Sections 392/394 read with Section 34 IPC. Appellant Hori Lal has been convicted under Section 397 IPC also. Appellants have been sentenced to undergo rigorous

imprisonment for seven years with fine of Rs.2,000/- each and in default of payment of fine to undergo rigorous imprisonment for six months for the offence under Section 392 IPC read with Section 34 IPC. Appellant Hori Lal has further been sentenced to undergo rigorous imprisonment for seven years for the offence under Section 397 IPC.

3. Aggrieved by their conviction as also the sentences, as awarded by the trial court, appellants have preferred above said appeals.

4. Prosecution story, as emerges from the record, is that on 12th October, 2008 complainant Babu Lal Mishra S/o Radhy Shyam (PW4) alongwith eye witness Babu Lal Pal S/o Beche Lal Pal (PW8) was carrying on three bundles of jeans on a cycle rickshaw from Shastri Park to the factory of their owner, in the evening. At about 8.30 pm when they reached near Shahdara Flyover, G.T. Road in front of Mansarovar Park one auto rickshaw intercepted them. Three boys got down from the said auto rickshaw and asked PW4 Babu Lal Mishra and PW8 Babu Lal Pal to run away after leaving their cycle rickshaw loaded with bundle of jeans. When PW4 and PW8 refused to obey their command Hori Lal, whose name was disclosed after he was apprehended, showed a knife to PW8 Babu Lal Pal and threatened to stab on his abdomen in case he offered any resistance.

Appellant-Hori Lal also snatched mobile phone of PW4 and handed over the same to his accomplices. Thereafter, PW8 Babu Lal Pal along with one bundle of jeans was dumped in the auto rickshaw and taken away by Kamal and Mobin, whose names were disclosed after they were apprehended. As regards cycle rickshaw, Hori Lal and Sonu @ Chhotu took away with them. PW4 Babu Lal Mishra raised alarm “bachao bachao” at which PW2 HC Ram Pal and PW3 Const. Virender Singh, who were on patrolling duty, came there and apprehended Hori Lal and Sonu @ Chhotu. Cycle rickshaw and two bundles of jeans were also recovered. Knife was recovered from Hori Lal.

5. As regards Kamal he has been acquitted by the trial court since he was not identified by PW4 Babu Lal Mishra and PW8 Babu Lal Pal. Trial court did not find enough evidence on record regarding complicity of Mobin in the offence of robbery. However, he has been convicted under Section 411 IPC and it appears that he has not filed appeal against his conviction. Thus, their roles are not discussed in these appeals.

6. In my view, prosecution has succeeded in proving its case against the appellants Hori Lal and Sonu @ Chhotu as regards offence of robbery is concerned, thus, their conviction under Sections 392/34 IPC cannot be found

faulted with. PW4 Babu Lal Mishra and PW8 Babu Lal Pal have fully corroborated the prosecution story as regards robbery is concerned, they have deposed in unison that they were carrying three bundles of jeans from Shastri Park to Shaheed Nagar, Dharamshala Building, UP in a cycle rickshaw. PW8 Babu Lal Pal was pulling the cycle rickshaw while PW4 Babu Lal Mishra was sitting on the bundles of jeans loaded thereon and when they reached near Shahdara Flyover on G.T. Road, one auto rickshaw intercepted them. Hori Lal, Sonu @ Chhotu and their accomplices got down from the said auto rickshaw and asked them to run away after leaving their rickshaw loaded with jeans. Their third accomplice lifted one bundle of jeans from the cycle rickshaw and kept it in the auto rickshaw; PW8 was also forced to sit in the auto rickshaw and thereafter they went away from there while Hori Lal and Sonu snatched the cycle rickshaw loaded with remaining two bundles of jeans and tried to escape. On PW4 raising alarm, HC Ram Pal and Cont. Virender Singh, who happened to be present in the area, apprehended Hori Lal and Sonu along with bundles of jeans and cycle rickshaw. Statements of PW4 and 8 have remained unshattered on the material points with regard to the incident is concerned. Accordingly, conviction of appellants under Section 392 read with Section 34 IPC is

upheld.

7. As regards offence under Section 394/34 IPC is concerned, the same is not attracted in this case. It is not the prosecution case that the appellants or their accomplices had caused any hurt to the complainant and eye witness in any manner whatsoever. PW4 and PW8 have also not deposed in this regard. Neither PW4 nor PW8 have disposed that the appellants or their accomplices had caused any injuries on their person, inasmuch as, neither MLC has been placed on record nor has been proved. Section 394 IPC envisages 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 such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. Section 394 IPC is attracted against an accused or his co-accused only if hurt is caused while committing robbery or in attempting to commit robbery and not otherwise. In this case, prosecution has failed to prove that any hurt was caused to the victims, thus, ingredients of offence under Section 394 IPC are not attracted in this case. Accordingly, conviction of the appellants under Sections 394/34 is set aside.

8. The next question which needs attention is as to whether ingredients of offence under Section 397 IPC are attracted against Hori Lal. Section 397 IPC provides 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. Section 397 IPC prescribes minimum sentence of seven years only to such accused who uses “deadly weapon” in committing robbery or dacoity or attempting to commit robbery or causes or attempts to cause grievous hurt. It is only against such person who uses the “deadly weapon” ingredients of Section 397 IPC gets attracted. In the peculiar facts of this case ingredients of Section 397 IPC are not attracted against Hori Lal firstly for the reason that the recovery of knife from Hori Lal is doubtful as in his personal search memo Ex. PW3/A there is no mention of any knife having been recovered from him. As per the prosecution, PW2 HC Ram Pal had taken search of Hori Lal and the knife was recovered from his belt. However, Jamatalashi mentions only about recovery of mobile phone and purse. Secondly, none of the witness has deposed that the knife allegedly recovered from Hori Lal was a “deadly weapon”. Whether a knife is a

“deadly weapon” is a question of fact which is required to be proved by the prosecution and in absence of any such evidence particularly, non-recovery of weapon, would certainly bring the case out of the ambit of Section 397 IPC.

9. In Rakesh Kumar Vs. State of NCT of Delhi 2005 (1) JCC 334, a Single Judge of this Court has held that there are knives of hundreds of type available in different length and width. All the knives cannot be graded as “deadly weapon” within the meaning of Section 397 IPC. It is the length, shape and the manner of use which makes a knife “deadly weapon”. In Sunil @ Munna Vs. The State 2010 (1) JCC 388, this Court has held that in the event of recovery of knife being doubtful accused is entitled to benefit of doubt with regard to offence under Section 397. In Charan Singh Vs. State 1998 CrL. L.J. NOC 28 (Delhi), 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. In order to prove the offence under Section 397 IPC the prosecution must establish:- i) commission of robbery or dacoity; ii) that the accused used the deadly weapon; or caused grievous hurt; or attempted to cause death or grievous hurt and iii) the above acts were done during the commission of robbery or

dacoity. In this case, prosecution has failed to lead any evidence to show that Hori Lal had used the “deadly weapon” while committing robbery, thus, in my view, ingredients of offence under Section 397 IPC are not attracted in this case. In the absence of necessary ingredients that have not been established by the prosecution, conviction of Hori Lal under Section 397 IPC cannot be sustained and is set aside.

10. Now, coming back to the sentences awarded to the appellants under Section 392 IPC is concerned, a perusal of their nominal roll shows that they are in jail for over four years and their conduct in jail is fairly good. Keeping in mind totality of the circumstances, sentences of the appellants are reduced from seven years to the period already undergone by them. Appellants be released from jail forthwith if not wanted in any other case.

11. Copy of the order be sent to the Jail Superintendent for serving it upon the appellants as also for compliance.

12. Both the aboveresferred appeals are disposed of in the above terms.

A.K. PATHAK, J.

NOVEMBER 16, 2012

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