

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

% **Date of Decision: 17th August, 2012**

+ **CRL.A.10/2009**

MOHD. ARIF Appellant
Through : Mr.Riaz Mohd., Adv.
versus

STATE Respondent
Through : Mr.Navin Sharma, APP for
State.

**CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI**

PRATIBHA RANI, J. (Oral)

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1. Appellant Mohd. Arif has preferred this appeal impugning the judgment dated 21.11.2008 and order on sentence dated 04.12.2008 vide which he alongwith his co-accused Samyuddin @ Danish was convicted for having committed the offence punishable under Section 392/397/34 IPC and sentenced to undergo RI for seven years with fine of Rs.5000/-.

2. In brief, the prosecution case is that on 10.05.2001, the appellant Mohd.Arif alongwith Mohd. Nazim, Irshad @ Pappu, Samyuddin @ Danish and other associates entered the house of the complainant Devender Kaur situated at 62/1, West Punjabi Bagh, Delhi. A robbery was committed by them and at that time, they were armed with knives and countrymade pistol. After committing robbery of gold jewellery, T.V. and two-in-one, they managed to flee after threatening the inmates of the house. Police was informed and on the statement Ex.PW2/A made by Devender Kaur, FIR No.349/01 was registered at PS Punjabi Bagh.

3. They were arrested in case FIR No.187/2001, PS Shahdara and on the basis of disclosure statement made by them in that case, they were also arrested in this case. On interrogation, they

led to the recovery of two-in-one and the T.V. After completion of investigation, chargesheet was filed against them.

4. During trial, prosecution examined eleven witnesses including the inmates of the house i.e. PW-1 Ramandeep Singh , PW-2 Devender Kaur, PW-3 Taranjeet Kaur and PW-9 Ritu. Pursuant to the trial, the appellant Mohd. Arif and Samyuddin @ Danish were convicted and sentenced in the manner aforesaid.

5. On behalf of appellant Mohd. Arif, it has been submitted that the evidence adduced against Mohd. Arif for proving his guilt for committing the offence punishable under Section 397 IPC is wholly insufficient. Neither there is recovery of any weapon from him nor the material prosecution witnesses PW-3 Taranjeet Kaur and PW-4 Ritu i.e. inmates of the house have indentified Mohd. Arif to be the person who was either holding any weapon or used the same within the meaning of Section 397 IPC at the time of commission of robbery.

6. It has been further submitted that in the absence of recovery of any weapon from Mohd. Arif, he could not have been convicted under Section 397 IPC with the aid of Section 34 IPC. Learned counsel for the appellant has further submitted that he is not challenging the conviction of the appellant under Section 392/34 IPC. His only grievance is that in the absence of recovery of any weapon from his possession, his conviction under Section 397 IPC is wholly unjustified and in the circumstances, the minimum sentence of seven years awarded to him under Section 397 IPC may be set aside. Learned counsel for the appellant has relied upon ***Samiuddin vs. State of NCT Delhi*** 2010 (175) DLT 27 and ***Mohd. Dulal @ Fazal Karim vs. State*** in CrI.A. No.82/2010 decided on 25.05.2010 in support of his contentions.

7. Mr.Navin Sharma, learned APP for State has submitted that Mohd. Arif has been arrested in this case on the basis of disclosure statement made by him in FIR No.187/2001, Ps Shahdara. Further PW-1 Ramandeep Singh and PW-2 Devender

Kaur have duly identified Mohd. Arif to be the person who was carrying fire arm. Learned APP has relied upon **Ashfaq vs. State (Govt. of NCT of Delhi)** AIR 2004 SC 1253 and **Phool Kumar vs. Delhi Administration** AIR 1975 SC 905 and submitted that the actual use of the weapon is not necessary to attract Section 397 IPC, hence he has rightly been convicted under Section 397 IPC and the impugned judgment may not be interfered with in this regard.

8. I have considered the rival contentions and also gone through the Trial Court record especially the deposition of PW-1 Ramandeep Singh and PW-2 Devender Kaur, who are material witnesses examined by the prosecution. As submitted by learned counsel for the appellant that he is not challenging his conviction under Section 392/34 IPC, so this Court has only to consider the testimony of PW-1 Ramandeep Singh and PW-2 Devender Kaur to ensure that the evidence adduced by the prosecution to prove the guilt of the appellant for committing the offence punishable under Section 397 IPC is convincing and creditworthy. At the outset, it is worthwhile to mention that PW-3 Taranjeet Kaur and PW-9 Ritu who were also present in the house at that time have not said even a word about Mohd. Arif being armed with any weapon at that time of commission of the robbery.

9. PW-1 Ramandeep Singh in his statement running into 3½ pages, after deposing about the occurrence, identified the case property i.e. TCV as Ex.P1 and two-in-one as Ex.P2. Regarding the identity of the accused persons, he testified as under :-

'I identify both the accused present in the court today who are samyuddin @ Danish and Nazim, who came to my house alongwith their associates on the date of occurrence.'

10. Thereafter further statement of PW-1 Ramandeep Singh was deferred at the request of learned APP for State and when he was re-examined on 03.02.2005, he was examined by the State

only on the role of Mohd. Arif which he did not state earlier. His further examination-in-chief recorded on 03.02.2005 is as under :

'Today I can identify the accused. The witness has seen the accused and said that all were present at the time of incident. Accused Arif has been identified as one of the accused present on that day. Arif was carrying one fire arm with him. Accused Nazim was having one fire arm. Accused Danesh was also carrying one gun with him.'

11. Similarly PW-2 Devender Kaur also after deposing about the incident and identifying the case property i.e. TV as Ex.P1 and two-in-one as Ex.P2, regarding identity of the accused persons, deposed as under :-

'I identify both the accused present in the Court today who are Samyuddin @ Danesh and Nazim who came to my house alongwith their associates on the date of occurrence.'

12. Further statement of PW-2 Devender Kaur was also deferred at the request of learned APP on 11.10.2004. When PW-2 appeared in the witness box on 03.02.2005, her further examination-in-chief recorded is only to the effect that :

'Accused Arif, today present in the Court. Arif was having a fire arm with him. There was one more person who is not present today in the Court. Accused Nazim was having a knife in his hand.'

13. Taking into consideration that PW-3 Taranjeet Kaur and PW-9 Ritu have not deposed about the appellant Mohd. Arif being armed with any weapon at the time of occurrence and rather, they were confused even about the identity of Mohd. Arif, statement of PW-1 Ramandeep Singh and PW-2 Devender Kaur proved the involvement of the accused in committing robbery and that part of the conviction, even appellant is not challenging. The manner in which examination-in-chief of PW-1 Ramandeep Singh and PW-2 Devender Kaur was deferred on 11.10.2004 and then recorded on 03.02.2005 wherein they stated that appellant Mohd. Arif was armed with fire arm is indicative of the fact that this part

of the statement was tutored. Their failure to even describe the nature of the fire arm whether it was pistol, revolver, gun or any other weapon in itself is sufficient to make their testimony in this regard doubtful. The submission of learned APP for State that to meet the requirements of Section 397 IPC, actual use of the weapon is not necessary do find favour with this Court but at the same time, the prosecution is required to prove its case beyond reasonable doubt. It is settled legal position that to bring home the guilt, the prosecution must lead evidence of such impeachable character that rules out the innocence of the accused.

14. In the case ***Ashfaq vs. State (Govt. of NCT of Delhi)*** (Supra), the submission made by learned counsel for the appellant was to the effect that according to PWs, it was only one person who was said to be in possession of countrymade pistol and in the absence of recovery of the same or proof of concrete materials of the role of others individually as the accused, no conviction under Section 397 with the aid of Section 34 IPC was permissible and that the necessary ingredients, to attract Section 397 IPC were also conspicuous by their absence in this case and that on the facts and circumstances of the case, when it was not shown by any evidence that the deadly weapon was actually used or put into any use as such, Section 397 IPC cannot at all be resorted to. In paras 8 and 9 of the judgment, it was held as under :-

'8. Thus, what is essential to satisfy the word "Uses" for the purposes of Section 397 IPC is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of victim and not that it should be further shown to have been actually used for cutting, stabbing, shooting, as the case may be.

9. The further plea that one accused alone, was in any event in possession of the country-made pistol and the others could not have been vicariously held liable under

Section 397 IPC with the assistance of Section 34 IPC overlooks the other vital facts on record found by the Courts below that the others were also armed with and used their knives and that knife is equally a deadly weapon, for purposes of Section 397 IPC. The decision of the Division Bench of the Bombay High Court relied upon turned on the peculiar facts found as to the nature of the weapon held by the accused therein and the nature of injuries caused and the same does not support the stand taken on behalf of the appellants in this case. The provisions of Section 397, does not create any new substantive offence as such but merely serves as complementary to Section 392 and 395 by regulating the punishment already provided for dacoity by fixing a minimum term of imprisonment when the dacoity committed was found attendant upon certain aggravating circumstances viz., use of a deadly weapon, or causing of grievous hurt or attempting to cause death or grievous hurt. For that reason, no doubt the provision postulates only the individual act of the accused to be relevant to attract Section 397 IPC and thereby inevitably negates the use of the principle of constructive or vicarious liability engrafted in Section 34 IPC. Consequently, the challenge made to the conviction under Section 397 even after excluding the applicability of Section 34 IPC does not merit countenance, for the reason that each one of the accused in this case were said to have been wielding a deadly weapon of their own, and thereby squarely fulfilled the ingredients of Section 397 IPC, de hors any reference to Section 34 IPC.'

15. It is necessary to mention here that in view of the judgment of Apex Court in **Ashfaq's case**, appellant Mohd. Arif could not have been convicted under Section 397/34 IPC without there being any convincing evidence available on record to prove that he was armed some deadly weapon which was used by him at the time of commission of robbery. Thus the appellant could not have been convicted under Section 397/34 IPC.

16. While maintaining the conviction of the appellant under Section 392/34 IPC, his conviction and sentence under Section 397/34 IPC is set aside.

17. The appeal is partly allowed. The conviction and sentence of the appellant Mohd. Arif for the offence punishable under Section 392/34 IPC is maintained. However, his conviction and

sentence under Section 397/34 IPC is hereby set aside. The appellant Mohd. Arif be released on completion of the sentence awarded under Section 392/34 IPC, if not wanted in any other case.

18. Copy of the order be sent to Jail Superintendent for necessary compliance. Trial Court Record be sent back alongwith copy of the order.

PRATIBHA RANI, J

August 17, 2012
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