

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

RESERVED ON : 18th JULY, 2013

DECIDED ON : 19th JULY, 2013

+ CRL.A. 170/2011 & CRL.M.B. 1765/2012

KAYUM @ SUNIL Appellant
Through : Mr.K.Singhal, Advocate.

versus

STATE OF DELHI Respondent
Through : Mr.M.N.Dudeja, APP.

+ CRL.A. 1451/2011

DEEPAK @ RAGUVIR @ KALLU Appellant
Through : Mr.K.Singhal, Advocate with Mr.Shiv
Kumar Dwivedi, Advocate.

versus

THE STATE (N.C.T. OF DELHI) Respondent
Through : Mr.M.N.Dudeja, APP.

AND

+ CRL.A. 169/2011

BHOLA Appellant
Through : Mr.Vivek Sood, Advocate.

versus

STATE OF DELHI Respondent
Through : Mr.M.N.Dudeja, APP.

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. Kayum @ Sunil (A-1), Deepak @ Raghubir @ Kallu (A-2) and Bhola (A-3) challenge a judgment dated 24.12.2010 of learned Additional Sessions Judge in Sessions Case No. 93/2006 arising out of FIR No. 113/2006 PS DBG Road by which A-1 was convicted under Section 392 read with Section 397 IPC and A-2 and A-3 were convicted under Section 392 IPC. By an order dated 04.01.2011, they all were sentenced to undergo RI for seven years with fine ₹ 10,000/- each.

2. Allegations against A-1 to A-3 were that on 12.04.2006 at about 06.40 A.M. at DBG Road, they committed robbery of one gold chain, wrist watch, mobile phone make Nokia and cash ₹ 1,300/- belonging to Vishnu Kumar Bansal at the point of knives while he was travelling in a private bus No. DL-1PB-5088. Investigating Officer lodged First Information Report after recording his statement (Ex.PW-2/A). On 27.04.2006, A-1 and A-2 were arrested in case FIR No.132/2006 PS DBG Road. Their involvement in this case surfaced during their confessional statements recorded therein. On 11.05.2006, A-3 was arrested. Pursuant to the appellants' disclosure statements, robbed articles were recovered. The

applications were moved for conducting Test Identification Proceedings. A-2 was identified while A-1 and A-3 declined to participate in the TIP Proceedings. The Investigating Officer recorded statements of the witnesses conversant with the facts. After completion of investigation, a charge-sheet was submitted against A-1 to A-3 for committing offence under Section 392/397/411/34 IPC. They were duly charged and brought to trial. The prosecution examined sixteen witnesses to prove the guilt of the accused. In their 313 statement, they denied the allegations and pleaded false implication. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held A-1 to A-3 perpetrators of the crime as mentioned previously and sentenced them. Being aggrieved, they have preferred the appeals.

3. During the course of arguments, on instructions, counsel for the appellants stated at Bar that the appellants have opted not to challenge findings of the Trial Court on conviction under Section 392 IPC and accept it. They however, strongly contended that Section 397 IPC was not attracted and conviction thereunder was unsustainable. Prayer was made to release them as they are in incarceration for more than three years.

4. Since A-1 to A-3 have not opted to challenge conviction under Section 392 IPC and there is overwhelming evidence against them in the form of PW-2's testimony coupled with recovery of the articles, their conviction under Section 392/34 IPC is affirmed.

5. Under Section 397 IPC, it is to be proved that 'deadly' weapon was used at the time of committing robbery or dacoity or grievous hurt was caused to any person. The assailant who actually uses the 'deadly' weapon is liable for minimum punishment with the aid of Section 397. The provisions of Section 397 do not create new substantive offence but merely serve as complementary to Section 392 and 395 by regulating the punishment already prescribed. In the instant case DD No.9 (Ex.PW-1/A) was recorded at Police Post Dev Nagar, PS DBG Road on 12.04.2006 at 07.15 A.M. that in bus No. DL-1PB-5088, 4 - 5 boys robbed passengers after brandishing knives. Investigation was assigned to SI Lekh Raj Singh who recorded the statement of victim- Vishnu Kumar Bansal and lodged First Information Report. In statement (Ex.PW-2/A), the complainant disclosed that at about 06.40 A.M. he was robbed by three assailants; two or three of them took out knives and deprived him of articles after putting him in fear. He did not specify if all the assailants were armed with knives. He also did not specifically disclose as to who

was the assailant who used the 'deadly' weapon while committing robbery. It is not in dispute that the victim was not injured with knife. He was not taken to hospital for medical examination. Admittedly, knife was not recovered from appellants' possession or at their instance. The victim had not given description or dimensions of the knife allegedly used in the incident. PW-2 (Vishnu Kumar Bansal) in his Court statement improved the version given to the police at the first instance in Ex.PW-2/A. He deposed that 7 – 8 persons robbed him in the bus. He elaborated that 2 – 3 individuals came from front side and 2 – 3 from the back side. He did not depose that all of them were armed with knives. He merely stated that 2 – 3 of them were holding knives in their hands. He was not specific as to which of the assailants was armed with a knife. He did not identify any of the appellants who had the knife in his hand or used it at the time of committing robbery. In the cross-examination, he was unable to say as to which of the accused persons in the Court had taken out his articles. The witness was unable to pinpoint as to who among the appellants used 'deadly weapon' while committing robbery. The prosecution did not examine any other witness to establish that any of the appellants was armed with knife. The Trial Court in its wisdom did not convict A-2 and A-3 with the aid of Section 397 IPC. The Trial Court convicted A-1 with

the aid of Section 397 holding that he used the knife while committing robbery. However, there is no legal evidence on record to arrive at these findings. It appears that the Trial Court based its conclusion on suspicion as it was A-1 who allegedly robbed the victim and took out the articles from his possession. It is well settled that suspicion however strong cannot take the place of proof. The Trial Court did not confront A-1 in his 313 statement about use of knife, a 'deadly weapon' by him. The prosecution, thus, could not establish beyond doubt that any one among the appellants was in possession of a knife, or it was a 'deadly weapon' and used at the time of committing the offence.

6. Section 397 fixes a minimum term of imprisonment. It is imperative for the Trial Court to return specific findings that the 'assailants' were armed with 'deadly' weapons and it were used by them before convicting them with the aid of Section 397. In the instant case, the evidence is lacking on this aspect and benefit of doubt is to be given to A-1.

7. In CrI.A.515/2010 '*Gulab @ Bablu vs. The State (NCT of Delhi)*', this court held:

"8. A perusal of the aforesaid provision makes it clear that if an offender at the time of committing robbery or dacoity, uses any deadly weapon or causes grievous hurt 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 which shall be handed down to such an offender. In this case neither the victim has sustained grievous hurt nor there is an evidence that attempt was made to cause death or grievous hurt to the victim nor is there any evidence to show that the knife used at the time of committing robbery was a 'deadly weapon'. Simple injuries have been sustained by the victim on his thigh.

9. In '*Charan Singh vs. The State*', 1988 Crl.L.J. NOC 28 (Delhi), Single Judge has held as under :-

"At the time of committing dacoity one of the offenders caused injury by knife on the hand of the victim but the said knife was not recovered. In order to bring home a charge under Section 397, the prosecution must produce convincing evidence that the knife used by the accused was a deadly weapon. What would make knife deadly is its design or the method of its use such as is calculated to or is likely to produce death. It is, therefore, a question of fact to be proved by the prosecution that the knife use by the accused was a deadly weapon. In the absence of such an evidence and particularly, the non-recovery of the weapon would certainly bring the case out of the ambit of Section 397. The accused could be convicted under Section 392."

10. In '*Samiuddin @ Chotu vs. State of NCT of Delhi*', 175 (2010) Delhi Law Times 27, a Bench of co-ordinate jurisdiction has held that when a knife used in the commission of crime is not recovered the offence would not fall within the ambit of Section 397 IPC. In '*Rakesh Kumar vs. The State of NCT of Delhi* 2005 (1) JCC 334 and '*Sunil @ Munna vs. The State (Govt. of NCT)*, 2010 (1) JCC 388, it was observed that in the absence of recovery of the knife used by the appellant at the time of commission of robbery charge under Section 397 IPC cannot be established.

11. In the present case, indubitably the knife used for commission of crime was not recovered. Accordingly, in my view, appellant could not have been sentenced under Section 397 IPC and Trial Court has erred on this point."

8. For the foregoing reasons, while upholding the conviction of the appellants under Section 392 IPC, A-1's conviction under Section 397 is set aside.

9. The Trial Court awarded RI for seven years with fine ₹ 10,000/- to all the appellants though A-2 and A-3 were convicted under Section 392 IPC only. A-1's nominal roll dated 21.02.2013 reveals that he has already undergone three years, nine months and nineteen days incarceration as on 20.02.2013. He also earned remissions for nine months and twenty one days. He is not a previous convict and is not involved in any other criminal case. His overall jail conduct is satisfactory. A-2's nominal roll dated 24.10.2011 shows that he has already spent three years, nine months and twenty one days in custody as on 24.10.2011. He also earned remission for three months and sixteen days. A-3's nominal roll dated 16.01.2012 discloses that he was in custody for two years, eight months and four days as on 16.01.2012. He also earned remission for four months and three days.

10. Taking into consideration, the substantial period of substantive sentence already undergone by A-1 to A-3, their sentence is modified. They are directed to be released for the period already

undergone/ spent by them in this case which is more than three years with fine ₹ 1,000/- each and failing to pay the fine to undergo SI for 15 days each.

11. The appeals are decided in the above terms. Pending application also stands disposed of. Copy of the order be sent to the Jail Superintendent. Trial Court record be sent back forthwith.

(S.P.GARG)
JUDGE

JULY 19, 2013

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