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

+ CRL.A. 172/2005

% **Judgment dated 11.12.2013**

MUSTAFA @ KALA BABA ..... Appellant  
Through : Mr.Adhirath Singh, *Amicus Curiae*

versus

STATE ..... Respondent  
Through : Mr.Feroz Khan Ghazi, Adv.

**CORAM:**

**HON'BLE MR. JUSTICE G.S.SISTANI**

**G.S.SISTANI, J (ORAL)**

1. Present appeal has been filed under Section 374 Cr.P.C. against the judgment dated 14.2.2004 and order on sentence dated 18.12.2004 passed by the trial court by which the appellant has been convicted under Sections 395/397 IPC and sentenced to undergo RI for seven years with fine of Rs.10,000/- and in default of payment of fine to further undergo SI for six months.
2. The version of the prosecution, as noticed by the trial court, is as under:  
*“Prosecution case is that on 21.2.1992 on receipt of an information vide DD no.14 A from lady Ct. Kanta Lochan of PCR that a dacoity had been committed at house No.17 Babar Road and also on an information received from Smt.Sen by telephone No.3715876 that one person had been injured with a knife and dacoity had been committed at House No.17, Babar Road, SI Puran along-with his staff went to H.NO.17, Babar Road, where complainant Ashish Anand met him and got recorded his statement wherein he stated*

*that he along-with his family members was residing at 17, Babar Road, Bengali Market, New Delhi; that on that day at about 4 p.m. he was in his bathroom and he heard the voice of his mother who was crying 'What are you doing' upon which he tied a towel and came out of the bathroom; that he saw that seven persons who were wearing dark colour clothes had come inside their house one of them aged about 27/28 years wearing a gray coloured pant and spots shoes and having short hair was having a pistol/revolver in his hand, one of them was aged about 20/22 years old having a short height wearing a blue coloured jeans and blue coloured shirt and was having a knife in his possession. One of them was wearing check pants and shirts and sport shoes and having thin body was having a country-made revolver in his hand and he also showed cartridges after opening the country-made revolver. The remaining persons were also wearing clothes of different dark and dirty colours and spot shoes. When he asked them about the matter, they held him and brought him and his mother in a room, tied their hands from behind and gagged their mouths with clothes. They demanded keys and he told them that the keys were in possession of his paternal aunt upon which the fattyman told that he was telling a lie and asked him as to where the cash had been kept. He told them that there was no cash in the house upon which the fatty man told him either to tell about the cash or he would shoot him and his mother told them not to kill them and to take whatever they wanted to take. In the meantime, his paternal aunt and her daughter Reeta Anand also came inside the house from Babar Road side and they were also made to sit in a room, and after giving a threat to kill. His paternal aunt was forced to part with four gold bangels, one*

*diamond ring and Neeta was forced to remove two earrings, two pairs of tops made of gold and one nose pin from her person. His paternal aunt and Neeta Anand were also beaten and their hands and mouths were tied with clothes and tie etc. The whole house was searched by these men and they took possession of the articles on which they could lay their hands. In doing so they took about half an hour and in the meantime, his elder brother Jitender Anand came on his scooter from the rear door and parked his scooter and on seeing him, his mother told that Babbi had come. Jitender was also known as Babbi. In the meantime, one of these boys came running and gave knife blow to Jitender and Jitender cried in a loud voice Bacha Le Bacha Le. He (the complainant) also came out having his hand and mouth tied and saw that Babbi had held himself from his left side. All these boys ran away from the rear door of the house and when he also went behind them, they also fired a shot while running away towards the railway line. Their neighbour's son Vicky came there and removed Jitender to the hospital. It was alleged that the complainant and his family members could identify all those seven men. On these allegations, the present case under sections 395/397/307 IPC was registered. Afterwards, the investigation was carried out by Ins. Ramesh Malik, Special Staff, New Delhi, vide orders dated 27.2.1992 of the DCP Crime and thereafter by SI Gnga Bishan. During investigation one empty cartridge, one plastic bag, one bullet lead and one diary were taken into police possession. MLC NO.14549 of injured Jitender was collected. The blood stained clothes sealed in a pulanda with the seat of CMO/RMO were taken into police possession. Site plan was prepared. On 29.2.1992 accused Mohd.*

*Anis was arrested by the crime branch in case FIR No.177 dated 29.2.92 U/S 25 AND 27 Arms Act, PS Kotwali and he made a disclosure statement regarding the commission of the offence relating to this case with his associates accused Mohd. Farooq, Mintu alias Chota Mental, Mohd. Abdul Aziz and three other associates whose addresses he did not know. All these four accused persons were produced in the court for their TIP but they refused to join the same and they were later on identified by the eye witnesses. All the four accused persons pointed out the place of occurrence. Case property relating to this case was recovered from accused Mohd. Farooq and Abdul Aziz which was identified in the TIP by Smt. Poonam Anand. The lead, empty cartridge blood stained clothes and the revolver recovered from the possession of the accused Farooq and Anis were sent to CFSL. CFSL report was obtained. Chance prints lifted from the spot by the crime team and the finger prints and the palm prints of the accused persons were sent for comparison. Finger Print report was obtained and vide report No.14743, FPE dated 19.5.92, it was found that the chance prints lifted from the spot tallied with the palm prints of accused Anis. Accused Kalia Babu, Mental Babu and Gobinda could not be arrested. After completing the investigation, charge sheet under Sections 395/397/307/412 IPC was filed against three accused persons by stating therein that the charge sheet against accused Minto alias Chota Mental aged about 14 years would be filed in the Juvenile Court. Present accused Mustafa @ Kalia Babu was arrested in FIR No.683/02, wherein he made disclosure statement before the present offence. He was formally arrested and produced before the link MM for TIP, which he refused. The disclosure*

*statement was recorded but no recovery could be effected. On the statement of witnesses already recorded, he was charge-sheeted for offence punishable under Section 395, 397, 307, 412 IPC.*

*2. After complying with the provisions of Sec. 207 Cr.P.C., ld. Metropolitan Magistrate committed the case to the court of Sessions for trial and was assigned to this court for trial.*

*3. After hearing the ld. Addl. P.P. for the State and defence counsel, vide order dated 7.8.2003, charge under Section 397 read with Section 34 IPC, was framed against the accused, to which he pleaded not guilty and claimed trial.”*

3. Learned counsel for the appellant submits that the judgment of the trial court is erroneous as the same has been passed on the basis of conjectures and surmises, based on false, fictitious and fabricated version of the prosecution witnesses and, thus, the appellant has been falsely implicated in the matter. Counsel contends that there are material contradictions in the depositions of the prosecution witnesses, their evidence is not trustworthy and, thus, the appellant is liable to be acquitted. It is also submitted that the prosecution has failed to assign any specific role to the appellant, moreover, there has been no recovery of a weapon, which was used at the time of dacoity, thus, no case under Section 397 IPC is made out.
4. Learned counsel for the State submits that the prosecution has been able to establish its case beyond any shadow of doubt. The evidence of the witnesses are trustworthy and reliable, no material contradictions have been pointed out and minor contradictions cannot be a ground to set aside the order of conviction as the contradictions pointed out do not go to the root of the matter. Counsel also contends that the evidence of PW-1, PW-

8, PW-9 and PW-10 are consistent with regard to the date and time of the incident, the manner in which the dacoity was committed and the fact that deadly weapons were used by the accused persons. Counsel also submits that the present appellant was arrested on 24.3.2003 whereas the incident pertains to the year 1992 and, thus, it is not unusual that the revolver could not be recovered.

5. I have heard learned counsel for the parties, considered their rival submissions and also perused the testimonies of material witnesses. The prosecution in all has examined 10 witnesses. PW-1, Mr.Ashish Anand, is the complainant. PW-8, Mrs.Poonam Anand, is the aunt of the complainant. PW-9, Ms.Neeta Anand, is the daughter of PW-8, and PW-10, Smt. Raj Anand, is the mother of PW-1.
6. In his testimony PW-1 has testified that on 21.2.1992 at about 3 or 3.30 p.m. he was taking a bath at his residence when he heard his mother, Mrs.Raj Anand, talking to someone. When he opened the door of the bathroom a revolver was put on his head and he was threatened that he would be killed if he shouts. He was taken to the bedroom, and tied with a loose saree lying in the room. His mother was also brought to the bedroom and tied with the loose clothes lying in the bedroom. His mother was threatened that they would kill PW-1 if she would not tell where the keys of the house and the almirahs were lying. The mother of PW-1 had begged them not to cause any harm but to take whatever they find. After fifteen minutes aunt of PW-1, Umee Anand, and sister, Nina Anand, also came in from the front door; they were taken to the adjacent bedroom; *and* they were tied, gagged and threatened in the same manner as PW-1 and his mother were threatened. Entire episode went on for almost one hour. During this period his aunt, Umee Anand, was hit on the head with the butt of the revolver, jewellery on the person of his mother, aunt and

sister was forcibly removed, keys of the almirahs were snatched, the entire house was ransacked and valuables were taken away from the almirahs. Meanwhile, the elder brother of PW-1 entered into the house from rear door, his brother slapped one of the accused upon which he was stabbed in the abdomen and thereafter all the seven accused ran out of the house. PW-1 identified the appellant, Mustafa, as one of co-accused, in Court, who had tied his hands and who had threatened to kill him with a revolver.

7. PW-8, Ms.Poonam Anand, has also testified on the same lines. She has also deposed that there were seven persons. She had seen one person waiving a knife. She was asked to remove her jewellery. She was also gagged. She further testified that one of the persons, who had threatened them, was carrying a pistol.
8. PW-9, Ms.Neeta Anand, who is the daughter of PW-8, has also testified on the lines of her mother, as she along with her mother had gone to drop her sister at the rickshaw stand.
9. PW-10, Smt.Raj Anand, has also testified on the same lines as the complainant, PW-1. The date and approximate time of the incident have been rightly mentioned. She has also stated that she had called out to her son, who was taking a bath. She and her son were threatened, jewellery items were taken and Poonam was hit on the head by the butt of the revolver. She has also testified that her eldest son, Jitender Anand, who had entered the house later on, was stabbed on his abdomen and thereafter the accused persons had run away.
10. The Apex Court in the case of Shyamal Ghosh Vs. State of West Bengal reported at (2012) 7 SCC 646, has held as under:

“46. Then, it was argued that there are certain discrepancies and contradictions in the statement of the prosecution witnesses

inasmuch as these witnesses have given different timing as to when they had seen the scuffling and strangulation of the deceased by the accused. It is true that there is some variation in the timing given by PW 8, PW 17 and PW 19. Similarly, there is some variation in the statement of PW 7, PW 9 and PW 11. Certain variations are also pointed out in the statements of PW 2, PW 4 and PW 6 as to the motive of the accused for commission of the crime. Undoubtedly, some minor discrepancies or variations are traceable in the statements of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially. Every variation may not be enough to adversely affect the case of the prosecution.

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49. It is a settled principle of law that the Court should examine the statement of a witness in its entirety and read the said statement along with the statement of other witnesses in order to arrive at a rational conclusion. No statement of a witness can be read in part and/or in isolation. We are unable to see any material or serious contradiction in the statement of these witnesses which may give any advantage to the accused.

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68. From the above discussion, it precipitates that the discrepancies or the omissions have to be material ones and then alone, they may amount to contradiction of some serious consequence. Every omission cannot take the place of a contradiction in law and therefore, be the foundation for doubting the case of the prosecution. Minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to reject the prosecution evidence in its entirety. It is only when such omissions amount to a contradiction creating a serious doubt about the truthfulness or creditworthiness of the witness and other witnesses also make material improvements or contradictions before the court in order to render the evidence unacceptable, that the courts may not be in a position to safely rely upon such evidence. Serious contradictions and omissions which materially affect the case of the prosecution have to be understood in clear contra-distinction to mere marginal variations in the statement of

the witnesses. The prior may have effect in law upon the evidentiary value of the prosecution case; however, the latter would not adversely affect the case of the prosecution.

69. Another settled rule of appreciation of evidence as already indicated is that the court should not draw any conclusion by picking up an isolated portion from the testimony of a witness without adverting to the statement as a whole. Sometimes it may be feasible that admission of a fact or circumstance by the witness is only to clarify his statement or what has been placed on record. Where it is a genuine attempt on the part of a witness to bring correct facts by clarification on record, such statement must be seen in a different light to a situation where the contradiction is of such a nature that it impairs his evidence in its entirety.

70. In terms of the explanation to Section 162 Cr.P.C. which deals with an omission to state a fact or circumstance in the statement referred to in sub-section (1), such omission may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether there is any omission which amounts to contradiction in particular context shall be a question of fact. A bare reading of this explanation reveals that if a significant omission is made in a statement of a witness under Section 161 Cr.P.C., the same may amount to contradiction and the question whether it so amounts is a question of fact in each case. (Sunil Kumar Sambhudayal Gupta v. State of Maharashtra (2010) 13 SCC 657 and Subhash v. State of Haryana (2011) 2 SCC 715.

71. The basic element which is unambiguously clear from the explanation to Section 162 Cr.P.C. is use of the expression 'may'. To put it aptly, it is not every omission or discrepancy that may amount to material contradiction so as to give the accused any advantage. If the legislative intent was to the contra, then the legislature would have used the expression 'shall' in place of the word 'may'. The word 'may' introduces an element of discretion which has to be exercised by the court of competent jurisdiction in accordance with law. Furthermore, whether such omission, variation or discrepancy is a material contradiction or not is again a question of fact which is to be determined with reference to the facts of a given case. The concept of contradiction in evidence under criminal jurisprudence, thus, cannot be stated

in any absolute terms and has to be construed liberally so as to leave desirable discretion with the court to determine whether it is a contradiction or material contradiction which renders the entire evidence of the witness untrustworthy and affects the case of the prosecution materially.”

11. I find no force in the submission made by learned counsel for the appellant that there are material contradictions in the testimonies of the material witnesses, I find the testimonies of the material witnesses to be consistent and trustworthy. No contradiction has been pointed out which goes to the root of the matter.
12. The second submission made by counsel for the appellant is that no case is made out against the appellant under Section 397 IPC as no weapon was used in the commission of the crime. This submission of counsel for the appellant is also without any force in view of the testimony of PW-1, who had identified the appellant, as the person, who had threatened him with a revolver and also fired in the air at the time when he was leaving. The presence of the appellant finds corroboration with the evidence of PW-8 and PW-9 although they have not been able to ascribe the exact role to the appellant herein.
13. In the case of *Shri Phool Kumar v. Delhi Administration*, reported at (1975) 1 SCC 797, the Apex Court has observed as under:

“6. Section 398 uses the expression "armed with any deadly weapon" and the minimum punishment provided therein is also 7 years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. This has created an anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed in committing it attracts the minimum punishment of 7 years under section 398 if he is merely armed with any deadly weapon, while an offender so armed will not incur the liability of the minimum punishment under section 397 if he succeeded in committing the robbery. But then, what was

the purport behind the use of the different words by the Legislature in the two sections, viz., "uses" in section 397 and "is armed" in section 398. In our judgment the anomaly is resolved if the two terms are given the identical meaning. There seems to be a reasonable explanation for the use of the two different expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to any fruitful use because it would have been of use only when the offender succeeded in committing the robbery.

7. If the deadly weapon is actually used by the offender in the commission of the robbery such as in causing grievous hurt, death or the like then it is clearly used. In the cases of Chandra Nath v. Emperor, AIR 1932 Oudh 103; Nagar Singh v. Emperor, AIR 1933 Lah 35; and Inder Singh v. Emperor, AIR 1934 Lah 522 some overt act such as brandishing the weapon against another person in order to over-awe him or displaying the deadly weapon to frighten his victim have been held to attract the provisions of section 397 of the Penal Code. J. C. Shah and Vyas, JJ. of the Bombay High Court have said in the case of Govind Dipaji More v. State, AIR 1956 Bom 353, that if the knife

was used for the purpose of producing such an impression upon the mind of a person that he would be compelled to part with his property, that would amount to 'using' the weapon within the meaning of section 397.

In that case also the evidence against the appellant was that he carried a knife in his hand when he went to the shop of the victim. In our opinion this is the correct view of the law and the restricted meaning given to the word 'uses' in the case of Chand Singh (supra) is not correct."

14. In this case not only PW-1 has identified the appellant as the person in possession of a revolver but the testimony of PW-1 makes it clear that a revolver was put on his head and he was threatened that he would be killed

if he shouts. The mother of PW-1 (PW-10) was also present and has deposed on the lines of PW-1. In view of the testimonies of witnesses it is clear that not only the appellant was armed with a deadly weapon, but he had also used the weapon to frighten and threaten the victims and an impression was created in their mind that the weapon would be used in case they did not part with the valuables.

15. Another submission, which has been made by counsel for the appellant, that since the weapon of offence has not been recovered, the appellant is liable to be acquitted, is also devoid of any merit keeping into consideration that the incident had taken place in the year 1992 and the appellant was arrested in the year 2003, which lends satisfactory explanation for the non-recovery of the revolver.
16. In the case of *Umar Mohammad & Ors. v. State of Rajasthan*, reported at (2007) 14 SCC 711, the Apex Court has held that non-recovery of weapons cannot be a ground to exonerate accused if ocular evidence of witnesses is unimpeachable.
17. In the light of above, I find no illegality or infirmity in the judgment and order on sentence passed by the trial court. Accordingly, no grounds are made out to differ from the same. The appeal is dismissed. Bail bonds be cancelled. The appellant shall surrender within one month from today.
18. The fee of the *Amicus Curiae* shall be paid as per the Schedule of fees of Delhi High Court Legal Services Committee.

**G.S.SISTANI, J**

**DECEMBER 11, 2013**

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