

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

RESERVED ON : 1st JULY, 2013

DECIDED ON : 11th JULY, 2013

+ CRL.A.1411/2011 & CRL.M.B. 1991/2011

MUSTAQ Appellant

Through : Ms.Saahila Lamba, Advocate.

versus

THE STATE (NCT OF DELHI) Respondent

Through : Mr.M.N.Dudeja, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellant- Mustaq challenges judgment dated 16.07.2011 of learned Additional Sessions Judge in Sessions Case No. 27/2010 arising out of FIR No. 602/2009 PS Mehrauli by which he was held guilty for committing offences punishable under Sections 392/397/34 IPC. By an order dated 21.07.2011, he was sentenced to undergo RI for three years under Section 392/34 IPC and RI for seven years under Section 397 IPC with fine ₹ 2,000/-.

2. Allegations against the appellant were that on 07.11.2009 at about 03.00 A.M. at House No. 39, Rajpur Khurd Extension, he and his associates (not arrested) committed lurking house tress-pass and robbed

inmates of the house of various articles including cash, mobile and flower pots etc. They were armed with weapons and gave beatings to the inmates. ASI Girish Kumar lodged First Information Report. During the course of investigation, the appellant was arrested by Special Staff (South District) and confessed his guilt. Pursuant to his disclosure statement, he recovered stolen goods i.e. mobile phone made Nokia-2310, two flower pots and the knife used in the incident. The Investigating Officer recorded statements of the witnesses conversant with the facts. On completion of the investigation, a charge-sheet was submitted against the appellant and he was duly charged and brought to trial. The prosecution examined sixteen witnesses. In his 313 statement, the appellant pleaded false implication. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held the appellant perpetrator of the crime for the offences mentioned previously. Being aggrieved, he has preferred the appeal.

3. During the course of arguments, on instructions, appellant's counsel stated at bar that the appellant has opted not to challenge conviction under Section 392 IPC. She argued that Section 397 IPC was not attracted as the prosecution could not establish beyond doubt that any 'deadly' weapon was used by the appellant while committing robbery.

Learned APP urged that the victims have categorically testified that the assailants were armed with guns, knife, iron rods and these were used for inflicting injuries to the inmates.

4. Since the appellant has not opted to challenge conviction under Section 392 IPC, findings of the Trial Court on conviction under Section 392 IPC are 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. 48A (Ex.PW-14/A) was recorded on 07.11.2009 at 06.50 A.M. on getting information that there was 'theft' near House No. 39, Rajpur Khurd. Susan John, the complainant in her statement (Ex.PW-2/A) disclosed that three or four boys entered into her room and they were armed with knives. One of them was having a '*desi katta*'. There is no mention that the knives and country-made pistol were used in committing robbery. During investigation, the appellant was arrested on 22.11.2009 in FIR No.

30/2009 PS Fatehpur Beri under Section 25 Arms Act. It is relevant to note that he has been acquitted in the said case. Appellant's involvement surfaced pursuant to his disclosure statement in FIR No. 30/2009. PW-1 (Rashmi) in her court statement did not specifically depose that the appellant was armed with any specific weapon. She gave vague statement that 'every person' was armed with a knife, gun, saria and like weapons. There is no mention if any such weapon was used to give her beatings or cause injuries. She was not sure if the appellant was one of the assailants. PW-2 (Smt.Susan John) improved her version in court statement and stated that the number of assailants were 5-6. She was robbed of her ear tops, gold chain on the point of gun and knife and given beatings. She further deposed that the appellant was one of those robbers who used knife, gun and lathi. Again, she was not sure as to what weapon was used by the appellant. The knife recovered at the appellant's instance in FIR No. 30/2009 was not shown to both PW-1 & PW-2 to ascertain if it was the same knife which was used in the incident. The record reveals that no inmate in the house was injured and taken to hospital for medical examination. There is no cogent evidence on record to establish that the appellant was armed with 'deadly' weapon and it was used by him while committing robbery. Section 397 fixes a minimum terms of imprisonment.

It is imperative for the Trial Court to return specific findings that the ‘assailant’ was armed with a ‘deadly’ weapon and it was used by him before convicting him 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 the appellant.

6. In Crl.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.”

7. For the foregoing reasons, while upholding the conviction and sentence of the appellant under Section 392 IPC, his conviction and sentence under Section 397 is set aside.

8. The appeal is disposed of in the above terms. Pending application also stands disposed of. Trial Court record be sent back forthwith.

**(S.P.GARG)
JUDGE**

JULY 11, 2013

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