

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

Date of Decision: 16 February, 2016

+ **CRL.A. 380/2011**

MATIN

..... Appellant

Through Mr Vimal Puggal, Adv.
versus

STATE

..... Respondent

Through Mr Hirein Sharma, Additional Public
Prosecutor for the State

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Challenge in this appeal is to the judgement dated 19th February 2011 and order on sentence dated 22nd February 2011 whereby appellant and 3 other accused persons were convicted under 393/34 and sentenced to Rigorous Imprisonment for 5 years and Rs 2000 fine each. Appellant – Matin was further convicted u/s 398 IPC and Section 25 Arms Act and sentenced to Rigorous Imprisonment for 7 years and Rs 3000 fine and R.I. for one year and Rs 1000 fine respectively.

2. Prosecution case succinctly stated is that on 5th October 2006, HC – Vijay Vats alongwith Constable – Balbir, Constable – Satender and Constable Mohan were present at Regal Cinema and were checking the buses when at about 3:40 PM, they noticed one person was being dragged by some persons towards Palika Parking. On seeing the police, those persons started running away from there but they were apprehended. The person who was being dragged made a statement Ex.PW6/A that he had come to New Delhi railway Station in connection with his work and after completion of his work, he boarded a bus to Nangloi. At the Regal Cinema red light, some boys whose name he later learnt as Ashfaq, Mohabbat, Sabbu and Matin boarded the bus. While accused Ashfaq and Mohabbat stood ahead of him, accused Sabbu and Matin stood behind him and on suspicion that they will take out money from his pocket, he got down from the bus out of fear. All the four accused also got down from the bus and started snatching his belongings by dragging him towards the Palika parking. On raising alarm, accused

Matin (appellant) took out a knife threatening him and in the meantime police officials came there and overpowered the accused persons. On this statement, HC Vinay Vats prepared a rukka and got the case registered. Accused persons were arrested and button actuated knife was recovered from accused Matin while blades were recovered from remaining accused. After completing investigation, charge-sheet was submitted against all of them. Charge for offence under Section 393/34 IPC was framed against all the four accused. Additionally, accused Matin was charged under Section 398 IPC and Section 25 of Arms Act.

3. In order to establish the guilt of accused persons, prosecution in all examined ten witnesses. In their statement recorded under Section 313 Cr.PC, the case of all the accused was one of denial simplicitor and it was alleged that after lifting them from Palam where they had gone to sell clothes, they were implicated falsely in this case.

4. Vide impugned judgment, all the accused were convicted and sentenced as mentioned hereinbefore.

5. Accused Ashfaq, Mohabhat @ Bauna and Sabhu filed separate appeal bearing Crl. Appeal Nos. 395/2011 challenging their conviction and the same was disposed of vide order dated 11.05.2015 whereas the present appellant – Matin preferred the present appeal.

6. At the outset, learned counsel for the appellant did not challenge his conviction under Section 393 IPC and submitted that the appellant has remained in jail for more than four year as such he be released on the period already undergone. The basic challenge of learned counsel for the appellant is regarding his conviction under Section 398 IPC on the ground that there is no evidence on record that the knife recovered from the appellant was a “deadly weapon”. Reliance was placed on *Mohan Singh v State*, 1987 DRJ (13); *Balak Ram v State*, 24 (1983) DLT 142; and *Jitender @ Jeetu v. State NCT of Delhi*, 2015 (2) JCC 1018.

7. Controverting the submissions of learned counsel for the appellant, learned Additional Public Prosecutor for the State submits that the impugned judgment does not suffer from any infirmity which calls for any interference. The appellant cannot seek parity with co-accused who have been released on the period already undergone as the appellant was found in possession of a deadly weapon i.e. knife and, therefore, he was

rightly convicted under Section 398 IPC. Learned Additional Public Prosecutor for the State further referred to the antecedents of the appellant for submitting that he is a habitual offender and is involved in as many as five other cases besides this case as such, the appeal is meritless and deserves to be dismissed.

8. As regards the conviction of the appellant under Section 393 IPC is concerned, the same has not rightly been challenged by learned counsel for the appellant as same stands proved from the testimony of PW1 – Constable Satender Kumar; PW4 – Constable Mohan Singh; PW5 – Constable Balbir; PW6 – HC Viney Vats and PW8 – Jagdish Chander, who are the eye witnesses and victim to the incident on 05.10.2006 when the accused were caught red-handed. PW8 – Jagdish Chander has deposed on the same lines as initially stated to the police Ex.PW6/A that on 05.10.2006, he was going to Nangloi from New Delhi Railway Station and boarded bus route no. G1 at 3.20 p.m. When the bus reached near red light point at Regal Cinema, two persons stood at his front side and two at his back side and put their hands in his pocket. Due to their acts, he got suspicious and therefore got down from the bus and the aforesaid persons also got down from the bus and took him towards Palika Bazar side after covering him. One person out of four took out a knife and flared the same in the air. All the three were with him at that time. He immediately shouted ‘bachao, bachao’ on which all the four persons started running here and there but they were apprehended by the police officials from special staff. His statement Ex.PW6/A was recorded by the police. Some blades were recovered from the pockets of three accused while knife was recovered from accused Matin. He identified knife Ex.P1 as well as surgical blades Ex.P2 to P4 recovered from the possession of accused persons. It has further come in his cross examination that the accused person tried to snatch his belongings. The testimony of complainant / victim finds substantial corroboration from PW1 Ct. Satender Kumar; PW4 Ct Mohan Singh; PW5 Ct.Balbir and PW6 HC Vinay Vats. Despite cross examination, nothing material could be elicited to discredit the testimony either of the complainant or any of the police official. All the accused, including the present appellant, were apprehended at the spot as such the defence taken by the appellant that he was taken from Palam while he was selling clothes and then falsely implicated in this case has no legs to stand. Moreover, the accused has not alleged any ill-will or animosity either against the complainant or any of the police officials for

which reason they will falsely implicate him or his associates in this case. As such, the appellant was rightly convicted under Section 393 IPC.

9. The recovery of knife from the possession of accused is also not seriously disputed by learned counsel for the appellant during the course of arguments. Even testimony of aforesaid material witnesses regarding recovery of knife from the possession of accused Martin remained unchallenged as same was never assailed in cross examination. As per sketch of knife Ex.PW1/E, its total length was 24.5, the blade was 11.5 cm while the handle was 13 cm. The width of blade was 2.5 cm. It was a buttondar knife on which 'Rampur Best Steel' was engraved. The prosecution has also placed on record the notification dated 17.02.1979 according to which acquisition, possession and carrying of spring actuated knives, gararidar knives or buttondar knives which open or close with any of the mechanical device with a blade in size or gararidar knives with a sharp edged blade of 17.12 cm or more than in length and 1.72 cm or more than in breadth in public place should be regularized. In the instant case, the knife was a buttondar knife which was in contravention of the aforesaid notification, therefore, the appellant was rightly convicted under Section 25 of the Arms Act.

10. Only question left for consideration now is applicability of Section 398 IPC.

11. Robbery as defined in section 390 IPC is an aggravated form of theft or extortion. Theft is robbery if the accused in order to commit a theft or while committing the theft or carrying away or attempting to carry away the stolen property voluntarily causes or attempts to cause death or hurt to any person and puts the other person in wrongful restraint, fear of instant death or instant hurt or of instant wrongful restraint.

12. Sections 392 and 393, IPC prescribe punishment in case of robbery and attempted robbery respectively. Under Section 392 IPC an accused can be punished with upto 10 years of rigorous imprisonment and fine and upto 14 years of rigorous imprisonment when robbery is committed on highway between sunset and sunrise. The punishment prescribed is stringent. For a case to fall under Section 392 IPC in case of theft amounting to robbery, actual theft as defined in Section 378 IPC should be committed. For Section 392 IPC to apply, the prosecution has to establish that during the course of commission of the offence of theft, the offender had caused or had intended to cause threat of death or hurt or to wrongful restrain (Malkhan Singh vs

State of Haryana 1994 SCC (Cri) 1422). Section 393 IPC applies when an accused attempts to commit robbery but the same is not actually committed. Under Section 393 IPC, the maximum punishment prescribed is 7 years rigorous imprisonment with fine. Again, the punishment prescribed is stringent. However, no minimum punishment has been prescribed in Sections 392 and 393 IPC.

13. Sections 397 and 398 IPC are not substantive sections but prescribe a minimum sentence for the offence of robbery or dacoity or attempt to commit robbery or dacoity once the aggravating circumstances stated in the said Sections are satisfied. Section 397 applies when offence of dacoity/ robbery has actually been committed. Section 398 IPC on the other hand, has no application when robbery or dacoity has been completed /concluded but applies to cases of attempt to commit robbery or dacoity. The expression “offender uses any deadly weapon” used in Section 397 IPC was examined by the Supreme Court in Phool Kumar versus Delhi Administration AIR 1975 SC 905 and it was observed as under:-

“6. Section 398 uses the expression —armed with any deadly weapon and the minimum punishment provided therein is also seven 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 seven 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.”

14. 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 overawe 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 Boh. 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.

15. Substantially similar question arose in *Rakesh vs. State of NCT of Delhi*, Manu/DE/1753/2010 where it was held observed as under:

“13. ...For sentencing a person under Section 398 IPC the offender at the time should be armed with deadly weapon when he attempted robbery or dacoity. A person is said to have a deadly weapon with him when he carries the weapon at the time when he attempted robbery or dacoity. For the purpose of Section 398 IPC, mere possession of the deadly weapon is sufficient and it is not necessary that the victim should know or be aware of possession of the weapon by the attacker. The term —deadly weapon therefore has to be interpreted keeping in mind the language of the aforesaid Section and has to be interpreted keeping in mind the object and purpose of the section and to effectuate the same.

14. The term —deadly weapon has been defined in Black's Law Dictionary, 6th edition at page 398 to mean;

“any fire arm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury. Such weapons or instruments are made and designed for offensive or defensive purposes or for destruction of life or inflation of injury, one which, from the manner used, is calculated or likely to produce death or serious bodily injury”.

15. In *Balak Ram versus State*, 1983 Crl.LJ 1438, a single Judge of this Court has observed as under:-

“What is a deadly weapon is not defined in Code, It must, I think, therefore, be a weapon which is used was likely to cause death. In Lakshmi-ammal v. Saniappa Gounder, AIR 1968 Mad 310 : (1968 Cri LJ 1084), weapons like knife, hammer, crowbar and spades were held undoubtedly to be deadly weapons, but in Mir Bayyan Khan v. Emperor, AIR 1935 Pesh 65(2) : (36 Cri LJ 933), it was said that a crow-bar or spade may well be a deadly weapon if used as a weapon of offence, but not if used for destroying a bridge (that is I think, for peaceful purposes). Knives are weapons available in various sizes and may just cause little hurt or may be the deadliest. They are not deadly weapons per se such as would ordinarily result in death by their use. What would make a knife deadly is its design or the manner of its use such as is calculated to or is likely to produce death. It is, therefore, a question of fact to be proved and prosecution should prove that the knife used by the accused was a deadly one.”

16. Reverting to the case in hand, learned counsel for the appellant, however, relied upon *Mohan Singh* (supra); *Balak Ram* (supra); and *Jitender* (supra). *Mohan Singh and Jitender* (supra) has no application to the facts of the case in hand as in those cases weapon of offence was not recovered. It was held that in the absence of recovery of weapon of offence, the prosecution failed to prove that the accused had used deadly weapon. What would make a knife deadly is its design or the manner of its use such as is calculated to or is likely to produce death. It is a question of fact to be proved by prosecution. Therefore, in the absence of recovery of weapon of offence, the accused were granted benefit of Section 397 IPC. In *Balak Ram* (supra), the accused was granted benefit as the weapon which was recovered from the accused was not shown to the victim in order to establish that what was recovered from the accused was the same knife which was used in the commission of crime.

17. Things are entirely different in the instant case as the knife which was recovered from the possession of accused Martin was duly shown to the victim and he identified the same as Ex.P1. PW1, PW4, PW5 and PW6 also identified the knife which was recovered from the accused at the spot. As stated above, the appellant was armed with

this knife at the time of attempting to commit robbery. It was not an ordinary pen knife or kitchen knife. It was a button actuated knife and in contravention of the notification and, therefore, it can be safely be said that it was a 'deadly weapon' with which the appellant was armed with at the time of attempt to commit robbery.. That being so, learned Additional Sessions Judge was justified in convicting the appellant for offence under Section 398 IPC as well.

18. As regards quantum of sentence, minimum sentence prescribed under Section 398 IPC is seven years. However, this section does not provide for imposition of any fine. That being so, sentence regarding imposition of Rs.3000/- as fine is set aside while maintaining the substantive sentence under Section 393/34 / 398 IPC and under Section 25 of Arms Act. The Trial Court has already granted benefit of Section 428 Cr.PC to the convict and all the sentences were to run concurrently.

19. Moreover, as per the status report, the appellant was involved in following five cases as detailed in the status report:

- (i) Case FIR No.680/08 u/s 411 IPC and 41/102 Cr.PC Police Station Pilakhawa
- (ii) Case FIR No.22/09 u/s 4/25 Arms Act Police Station Pilakhawa
- (iii) Case 35/11 u/s 457/380 IPC Police Station Sodhala Rajasthan
- (iv) Case 302/05 u/s 457/380 IPC Police Station Sodhala Rajasthan
- (v) Case FIR No.141/2006 u/s 379 IPC Police Station Chanakya Puri, New Delhi

That being so, even otherwise he does not deserve any leniency.

20. The appeal is accordingly disposed of with this modification. Pending applications, if any, also stand disposed of.

21. The sentence of the appellant was suspended vide order dated 28.04.2014. As per nominal roll, he was released on bail on 07.05.2014 as such he has so far undergone a period of three years, three months twenty days besides earning remission of eleven months twenty five days. The unexpired portion of sentence of the appellant is two years, eight months and fifteen days. As such, the appellant is directed to surrender before the concerned Additional Sessions Judge on 22nd February, 2016, failing which

learned Additional Sessions Judge to take appropriate steps to get the appellant arrested for serving the remainder sentence.

Trial Court record be sent back forthwith along with a copy of this judgment.

(SUNITA GUPTA)
JUDGE

FEBRUARY 16, 2016/rd