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

+ **CRL.A. 79/2011 and Crl. M. (Bail) No. 511/2014**

Reserved on 13th January, 2015

Delivered on 15th January, 2015

JITENDER @ JEETU Appellant
Through : Mr. S.H. Ansari, Adv.

Versus

STATE (NCT OF DELHI) Respondent
Through :Mr. Yogesh Verma, APP with SI
Amit Rathee, P.S. Model Town

AND

+ **CRL.A. 233/2011**

ZAAKIR Appellant
Through : Mr. Umardeen, Adv.

Versus

STATE NCT OF DELHI Respondent
Through Mr. Yogesh Verma, APP with SI
Amit Rathee, P.S. Model Town

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

1. Both the appeals arise from the same incident, FIR and judgment, thus, are being disposed of together.
2. Appellants have been convicted under Section 392 read with Section

34 of the Indian Penal Code, 1860 (IPC) and sentenced to undergo rigorous imprisonment of two years with fine of ₹2,000/- each and in default of payment of fine to undergo rigorous imprisonment of three months by the trial court vide judgment dated 15th December, 2010 and order on sentence dated 20th December, 2010. Appellant Jitender has also been convicted under Section 397 IPC and sentenced to undergo rigorous imprisonment of seven years with fine of ₹2,000/- and in default of payment of fine to undergo rigorous imprisonment of three months. Benefit of Section 428 of the Code of Criminal Procedure, 1973 (Cr.P.C.) has also been extended to the appellants.

3. Aggrieved by this conviction as also the sentences awarded to them appellants have preferred above appeals. Prosecution story, as unfolded, is that complainant Shri Dheeraj Chand was going from Model Town to his house on 22nd April, 2010 after completing his duty and when he reached near Azadpur Metro Station at about 10 pm, appellants, namely, Jitender and Zaakir caught hold of him. Jitender took out a knife from his pocket and showed it to complainant, while Zaakir took out the purse from the pocket of complainant. Purse contained ₹20/-, passport size photograph of complainant and some visiting cards. After removing purse from the pocket

of complainant, Jitender and Zaakir started running towards Azadpur. Complainant chased them and also raised alarm “pakdo pakdo”. Constable Sachin who was coming from the opposite direction, apprehended Zaakir. In the meanwhile, one or two passersby also arrived there. Zaakir was searched and purse of complainant was recovered from him. Someone informed the police at no.100, pursuant whereof DD no. 27A was recorded at police station Kingsway Camp/Model Town and handed over to ASI Jaivir Singh, who along with Constable Mahrajuddin reached the spot and recorded statement of complainant Shri Dheeraj Chand Ex. PW3/A. ASI Jaivir Singh wrote rukka Ex. PW5/A, pursuant whereof FIR No.154/2010 Ex. (PW1/A) was registered in the Police Station Kingsway Camp/Model Town, New Delhi. ASI Jaivir Singh prepared site plan Ex. PW5/B and also arrested Zaakir vide personal search memo Ex. PW3/D and arrest memo Ex. PW3/C. Purse, ₹20/-, photograph and visiting cards were taken in possession vide seizure memo Ex. PW3/B. Disclosure statement Ex. PW4/A of Zaakir was recorded, wherein he disclosed the name of his accomplice as Jitender @ Jeetu.

4. On 25th April, 2010 Zaakir led the police party to the house of Jitender, bearing no. 487, Village Azadpur, Delhi. Jitender was arrested

vide personal search memo Ex. PW5/D and arrest memo Ex. PW5/C. Knife could not be recovered as Jitender stated that he had thrown the same in a naala. On 29th April, 2010 Test Identification Parade (TIP) of Jitender was fixed but he refused to participate in the TIP. He made a statement in this regard before Shri G.K. Nirman, Metropolitan Magistrate.

5. After completion of investigation, charge-sheet was filed in the court of Metropolitan Magistrate, Delhi, who after making compliances under Section 207 Cr.P.C., committed the case to Sessions Court since offence under Section 397 IPC was triable by the Sessions Court.

6. Charges under Sections 392/34 IPC were framed against Zaakir and Jitender on 18th August, 2010 to which they pleaded not guilty and claimed trial. Separate charge under Section 397 IPC was framed against Jitender to which he pleaded not guilty and claimed trial. Prosecution examined six witnesses in all before the trial court. Duty Officer/Head Constable Shiv Kumar was examined as PW1. He deposed about recording of DD no. 27-A on receipt of information on phone about the incident. He further deposed that DD no. 27-A was assigned to ASI Jaivir Singh for investigation. He proved copy of the FIR as Ex. PW1/A. His testimony has remained unchallenged on the material points. Shri G.K. Nirman, Metropolitan

Magistrate, Delhi was examined as PW2, and has proved the application for TIP as Ex. PW2/A, statement of Jitender recorded by him as Ex. PW2/B and the TIP proceedings as Ex. PW2/C. He deposed that Jitender refused to join the TIP proceedings. His testimony has also remained unchallenged. Complainant Dheeraj Chand was examined as PW3. He supported the prosecution story as narrated in the preceding paras hereinabove. Constable Sachin Kumar was examined as PW4. He has also corroborated the version of PW3 as regards to apprehension of Zaakir at the spot. ASI Jaivir Singh was examined as PW5, who deposed about the investigations conducted by him. Constable Mahrajuddin was examined as PW6. He has also corroborated the proceedings conducted by PW5 ASI Jaivir Singh during the investigation. Their statements have remained unshattered in their cross-examinations on material points. Trial court has rightly found their testimonies to be trustworthy and reliable so as to conclude that Zaakir and Jitender had waylaid PW3 Dheeraj Chand near Azadpur Metro Station on 22nd April, 2010 and robbed his purse. PW3 has identified Zaakir as well as Jitender as the same persons, who had robbed his purse containing ₹20/-, one passport size photograph of complainant and some visiting cards. Zaakir was apprehended at the spot itself by PW4 Constable Sachin Kumar

in presence of PW3 Dheeraj Chand. He was apprehended immediately after the incident, inasmuch as robbed purse was also recovered from him. PW3 has correctly identified his purse and the articles as contained therein. PW-3 and PW-4 are material witnesses to prove the incident as also apprehension of Zaakir at the spot. Their testimonies on material points have remained unshattered in their cross-examination. Accordingly, I am of the view that trial court has rightly accepted their testimonies to conclude that prosecution had succeeded in proving beyond the shadow of reasonable doubt that appellants had robbed Shri Dheeraj Chand of his purse containing ₹20/- and certain other articles as detailed hereinabove.

7. Learned counsels for the appellants have vehemently contended that no public person was joined in the investigation despite the fact that PW3 has admitted in the FIR that some passersby had gathered at the spot after the incident. It is contended that non-joining of any independent public witness makes the whole prosecution story doubtful and suspicious. I do not find any force in this contention of learned counsel for the appellants. Judicial notice of the fact can be taken that public persons avoid to join the investigation in order to avoid their subsequent harassment by the accused persons and also to avoid inconvenience of subsequent appearance in Court

as witnesses. Apathy of public persons to join the investigation in the metropolitan town like Delhi is not unknown. Accordingly, merely because no public person came forward to join investigation regarding apprehension and arrest of Zaakir and recovery of robbed articles from him will by itself, be not sufficient to disbelieve PW-3 and PW-4. There is no reason to discard trustworthy and reliable testimonies of PW3 Shri Dheeraj Chand, which has been duly corroborated by PW4 to PW6. It may further be noted that Zaakir and Jitender were not known to PW3 Shri Dheeraj Chand. They were strangers to complainant. There was no past enmity between them. Accordingly, there is no reason as to why PW3 would have falsely implicated Zaakir and Jitender, had they not robbed him on the fateful day.

8. For the foregoing reasons, conviction of the appellants under Sections 392/34 IPC is upheld. Section 392 IPC envisages rigorous imprisonment for a term which may extend to 10 years, in case robbery is not committed on the highway between sunset and sunrise. In case robbery is committed on the highway between sunset and sunrise, imprisonment may extend to 14 years. Admittedly, in this case robbery has not been committed on the highway. In this case, trial court has already taken a lenient view and has awarded only sentence of two years, which requires no interference.

9. Next question which needs attention is as to whether, ingredients of offence under Section 397 IPC are made out against Jitender, in the facts and circumstances of this case. Section 397 IPC reads as under:-

“Section 397, Robbery, or dacoity, with attempt to cause death or grievous hurt- If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, 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.”

10. A perusal of the afore-quoted provision makes it clear that if an accused, at the time of committing robbery or dacoity, uses any “deadly weapon” or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person, the imprisonment with which such an accused shall be punished, shall not be less than seven years. The aforesaid provision envisages a minimum sentence to be awarded to an accused, who uses any “deadly weapon” or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person at the time of committing robbery or dacoity. In this case, admittedly, no grievous hurt has been caused to the complainant Shri Dheeraj Chand by Jitender while committing robbery nor any evidence has come that Jitender had attempted to cause death or grievous hurt to the complainant Shri Dheeraj Chand by using any

“deadly weapon”.

11. Before fastening the punishment under Section 397 IPC on an accused, prosecution has to prove that the accused had used “deadly weapon”. PW3 has simply deposed that Jitender had taken out a knife from his pocket and pointed at him. Shape and size of the knife was not disclosed, inasmuch as no such knife was recovered so as to show that same was a “deadly weapon”. There are knives of hundreds of types available of different length and width. Each and every knife cannot be said to be a “deadly weapon” within the meaning of Section 397 IPC. What would make a knife deadly is its design or the method of its use such as is calculated to or is likely to cause death; it is, therefore, a question of fact to be proved by the prosecution that the knife used 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 IPC.

12. 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 S.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 S.397. The accused could be convicted under S.392.”

13. Accordingly, conviction of appellant Jitender under Section 397 IPC is set aside. Consequently, sentence awarded to Jitender under Section 397 IPC also goes. Appellant Jitender is in Jail and has completed more than two years, thus, he be released forthwith, if not wanted in any other case.

14. Appellant Zaakir, is on bail. His bail bond and surety bond are cancelled. He shall surrender before the Jail Superintendent forthwith to undergo his remainder sentence. In case he fails to surrender, he be taken into custody by the trial court and sent to jail for serving the remainder sentence.

15. Both the appeals are disposed of in the above terms.

A.K. PATHAK, J.

JANUARY 15, 2015

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