

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

% *Date of Judgment :21.09.2015*

+ CRL.A. 166/2013
MOHD. GUDDU SHAH

..... Appellant
Through Mr. Krishan Kumar, Adv.

versus

STATE NCT OF DELHI

..... Respondent
Through Ms. Meenakshi Dahiya, APP

+ CRL.A. 717/2014
ASHOK PATEL @ LAMBU

..... Appellant
Through Ms. Meera Bhariok, Adv.

versus

STATE NCT OF DELHI

..... Respondent
Through Ms. Meenakshi Dahiya, APP

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1 These appeals are directed against the impugned judgment and order on sentence dated 27.09.2012 and 28.09.2012 respectively wherein both the appellants i.e. Mohd. Guddu Shah and Ashok Patel had

been convicted under Section 392 read with Section 397/34 of the IPC. Each of them had been sentenced to undergo RI for a period of 7 years and to pay a fine of Rs.20,000/- and in default of payment of fine to undergo SI for 6 months. Benefit of Section 428 of the Cr.PC had been granted to the appellants.

2 Nominal rolls of the appellants have been requisitioned. Nominal roll of appellant Mohd Guddu Shah reflects that as on date, he has undergone incarceration of 5 years and 3 months which includes the period of remission. Nominal roll of appellant Ashok Patel also reflects that he has undergone incarceration of about the same period i.e. 5 years and 3 months. Their jail conduct is also satisfactory.

3 The version of the prosecution is that on 19.05.2011 at about 07:00 am, a complaint (Ex.PW-1/A) was received in the local police station which was to the effect that four persons were going by train from Hazrat Nizammuddin railway station towards Khurja and just when the train was about to leave, four persons aged 20-25 years entered a boggie of the train and started quarrelling with each other; they asked the passengers sitting in the boggie to vacate the seats; they took out their knives and asked all the passengers to give their valuables or else

they would be stabbed. The complaint was lodged. The complainant was Sonu (PW-1). His co-passenger Deva was examined as PW-2. Two other persons were also travelling along with them in the train namely Jagdev Prasad (PW-3) and Roopa Devi (PW-6). Accused persons however managed to flee. The present two accused (out of four) were arrested on 11.06.2011 i.e. after a gap of almost more than three weeks. The weapon of offence could not be recovered. The mangalsutra belonging to PW-6 was recovered from accused Ashok Patel.

4 On the basis of the aforementioned evidence, both oral and documentary, collected by the prosecution, the accused persons were convicted and sentenced as aforementioned.

5 On behalf of the appellants, the learned amicus curiae has argued that the offence under Section 397 of the IPC is not made out as admittedly the weapon of offence was not recovered and in the absence of which it cannot be established whether it was a 'deadly weapon' or not within the meaning of Section 397 of the IPC. His second submission being that the offence under Section 392 of the IPC is also not made out as there are contrary version given by PW-1, PW-2, PW-3 and PW-6; it is not clear as to where exactly the offence had taken place

whether it was at railway platform or after the train had started moving; there is discrepancy in the train number; who had shown the knife to whom is also not clear and the conflicting version of the aforementioned alleged eye-witnesses throws doubt on the veracity of the version of the prosecution. Accused persons are entitled to an acquittal.

6 Needless to state that the learned Public Prosecutor has refuted these submissions.

7 PW-1 was the complainant. He has on oath deposed that on the fateful day when he along with his friend Deva (PW-2) come to Nizamuddin Railway Station to go to Khurja; they were in the general coach and they had boarded the train; four persons entered their boggie; took out their knives and at the point of their knives asked all the passengers to give their valuables; Ashok Patel had pointed the knife on PW-1 and searched his pocket. Mangalsutra of his co-passenger Roopa (PW-6) and mobile phone of Deva (PW-2) were also taken away.

8 In his cross-examination, he stuck to his stand stating that the other co-passengers whose mangalsutra was robbed (PW-6) was sitting in the same coach and he had not seen the incident; he denied the suggestion that he is deposing falsely.

9 PW-2 (Deva) was the friend of PW-1 who has accompanied him in the same boggie. PW-2 deposed that on the fateful day when he along with PW-1 were at the railway station and had boarded the train to Khurja and while in the general coach, four persons between 20-25 years of age came to their boggie armed with knives, they threatened PW-2 and his co-passenger as also other passengers sitting in the coach. PW-2 pointed out towards Guddu who had pointed out the knife towards him. His mobile phone of Nokia make was also robbed. The mangalsutra of their co-passenger was also taken away. In his cross-examination, he admitted that there was light in the compartment but he could not see the knife in the hand of accused Ashok Patel. He denied the suggestion that he was deposing falsely.

10 PW-3 was another co-passenger and the husband of PW-6. He was in different boggie. He has also deposed that four persons entered their coach armed with knives, one of them placed knife on his neck and took away his bag; he pointed towards accused Mohd. Guddu Shah. His wife's mangalsutra was also stolen. In his cross-examination, this witness stuck to his stand.

11 PW-6 was the wife of PW-3. She has deposed that 3-4 persons

have entered the train and they started snatching their goods; her husband's briefcase and her mangalsutra was taken away. She identified the mangalsutra which was shown to her as her own mangalsutra. TIP proceedings of the said mangalsutra conducted before the concerned Magistrate were proved as Ex.PW-6/A.

12 Testimony of the aforementioned witnesses clearly show that four persons had entered their boggie (two persons arrested and two not arrested) armed with knives they had attacked PW-1, PW-2, PW-3 & PW-6 and their co-passengers. The accused persons had admittedly robbed PW-3 of his briefcase and mangalsutra of PW-6. The Nokia phone of PW-2 was also robbed. The accused persons were admittedly arrested on 11.06.2011 and their refusal to join TIP for un-justifiable reason lead the Court to rightly draw an adverse inference against the accused persons.

13 The second Investigating Officer was examined as PW-18 namely Inspector Ram Mehar Singh and it was in the course of his investigation that the mangalsutra had been recovered pursuant to the disclosure statement of accused Ashok Patel. The recovery was witnessed by an independent witness namely PW-13.

14 However, the weapon of offence was not recovered and as such whether the weapon i.e. the knife which was used in the commission of crime was a “deadly weapon” within the meaning of Section 397 of the IPC does not stand established. There is no gain saying that every knife is a deadly weapon; its design, diameter, size, width, breadth and length would all be the essential factors which have to be taken into account to arrive at such a fact finding; thus where the weapon of offence was not recovered, the plea of the prosecution that the weapon was indeed a deadly weapon did not stand established and in this regard, relevant extract of the judgment of a coordinate Bench of this Court reported as Rajender Yadav vs. State of NCT of Delhi 2013 VII AD Delhi 359 reads herein 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 used by the accused was a deadly weapon. In the absence of such 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.

15 The factual matrix as narrated above persuades this Court to hold that the conviction of the appellants under Section 397 of the IPC requires a modification as the prosecution has failed to show that what was used by the offender was in fact a deadly weapon. The conviction of the appellants is accordingly modified from Section 397 to one under Section 392 of the IPC.

16 This Court also notes that both the appellants have already suffered a substantive period of incarceration i.e. 5 years and 3 months which in view of this Court would be the sufficient sentence for their conviction under Section 392/34 of the IPC. Thus the incarceration undergone may accordingly be treated as the sentence imposed upon them. Both the appellants be released forthwith, if not required in any other case.

17 Appeals disposed of in the above terms.

INDERMEET KAUR, J

SEPTEMBER 21, 2015

A