

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 27th March, 2015

+ CRL.A. 317/2012 & CrI.M.B.900/2014 (suspension of sentence)

ASHU SHARMA

..... Appellant

Through: Mr.Subhiksh Vasudev, Advocate

versus

STATE GOVT. OF NCT OF DELHI

..... Respondent

Through: Mr.O.P.Saxena, Additional Public
Prosecutor for the State alongwith SI Alok
Kumar Rajan from Police Station Sarai
Rohilla, Delhi.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. The appellant – Ashu Sharma impugns the judgment dated 30.03.2011 and order on sentence dated 04.04.2011 in case FIR No.115/2010 under Sections 392/394/397/398/411/34 IPC and under Section 25/27/54/59 Arms Act registered at Police Station Sarai Rohilla, Delhi vide which he was convicted under Section 392/397 IPC and under Section 25/27 of Arms Act and was sentenced to undergo rigorous imprisonment for a period of seven (7) years under Section 392 read with Section 397 IPC and to pay a fine of Rs.5,000/-, in default to undergo simple imprisonment for a period of five (5) months. He was further sentenced to undergo rigorous imprisonment for a period of three (3) years under Section 27 of Arms Act and to pay a fine of Rs.5,000/-, in default to undergo simple imprisonment for a term of five (5) months. The substantive sentences of imprisonment were to run concurrently. Benefit of Section 428 Cr.PC was given to the convict.

2. The prosecution case, succinctly stated, is as follows:

3. On 09.04.2010 – Smt. Ritu Verma after performing her duties at rubber seal factory at Anand Parbat, at about 5.45 pm, was passing through Sarai Rohilla bridge. Three boys came on a motorcycle out of whom two boys got down from the motorcycle and one of them snatched her gold chain after showing knife and he started removing her gold bangles while the other boy caught hold of her while holding *desi katta*. In the meanwhile, one person came in Esteem car and tried to help her while the boy who was holding *desi katta* put *katta* on the face of that person, whose name was revealed as Devesh and he was also robbed of his chain and money. Thereafter, the three boys started escaping on the motorcycle. Public persons collected and one boy, namely, Ashu Sharma (appellant herein) was apprehended alongwith her handbag. From Ashu Sharma loaded *desi katta* and one live cartridge from his pocket were recovered.

4. It is further the case of prosecution that on receipt of a PCR call vide DD No.63B, HC Narain Das alongwith Constable Anup Kumar reached on the spot where he met Rita Verma, Devesh, Constable Sandeep Dabas. Constable Sandeep Dabas handed over accused Ashu Sharma, recovered *katta* loaded with live cartridge and one another live cartridge, a lady purse alongwith two mobile phones. He recorded statement of Rita Verma Ex.PW3/A, seized the articles and got the case registered. Both complainant and Devesh were sent to Hindu Rao Hospital for their medical examination. Further investigation was done by ASI Ramphal Singh. He arrested the accused. Exhibits were sent to FSL. After receiving the report of Ballistic expert, sanction under Section 39 Arms Act was obtained. After completion of investigation charge-sheet was submitted against Ashu Sharma/appellant.

5. In order to substantiate its case, prosecution in all examined 12 witnesses. All the incriminating evidence was put to the accused/appellant while recording his statement under Section 313 Cr.PC wherein he denied the case of prosecution. He pleaded his innocence and alleged that HC – Narain Dass demanded bribe of Rs.10,000/- from him in connection with another case in which he was enlarged on bail. When he refused to pay the same he was falsely implicated in this case. He further alleged that the complainant – Smt.Rita Verma was earlier having cordial relationship with him but after PW8 – Devesh

entered she severed relationship from him and got him falsely implicated in this case. Although initially he opted to lead defence evidence, however, no evidence was led by him. After considering the evidence adduced by prosecution and considering the defence taken by the accused/appellant, vide impugned judgment the appellant was convicted and sentenced as mentioned above.

6. Feeling aggrieved, the present appeal has been preferred by the appellant.

7. Assailing the findings of the learned Trial Court, the learned counsel for the appellant submitted that the intention to cause grievous hurt is not proved by the prosecution inasmuch as, as per the opinion of the doctor, the nature of injuries on the persons of PW8 – Devesh and PW3 – Smt Rita Verma are simple. Further, the recovery of *katta* is doubtful as the same was not shown to be recovered in the personal search of the accused/appellant. Even otherwise, as per the report of FSL, the country made pistol was not in working order. Moreover, no reliance can be placed on the testimony of PW3 – Smt Rita Verma as according to her she was hit on her head but as per the opinion of the doctor, there was no injury on her head. Challenge was also made to the mode of arrest of the appellant/accused. As such it was submitted that prosecution has failed to bring home the guilt of accused beyond reasonable doubt as such he is entitled to be acquitted.

8. Rebutting the submissions made by learned counsel for the appellant/accused, learned Additional Public Prosecutor for the State supported the findings of the learned Trial Court and it was submitted that the same does not suffer from any infirmity which calls for any interference as such appeal is liable to be dismissed.

9. PW3 – Smt Rita Verma is the complainant. It has come in her statement that on 09.04.2010 she was coming on foot after finishing her work at rubber seal factory at Anand Parbat and when she reached near Sarai Rohilla Pul footpath at about 5.45 pm three boys came on a motorcycle make Charisma. They stopped the motorcycle, two boys got down and came towards her – one boy snatched her gold chain weighing two tolas from her neck and showed her a knife and forcibly started removing two gold

bangles from her right hand. The other boy was having a *desi katta* in his hand. He caught hold of her. Then both the boys tried to remove her gold bangles from her hand. In the meantime, one *Esteem* car reached there and one person alighted from the said car in order to help her, whose name was revealed as Devesh. Then the boy who was having *desi katta* in his hand put the *katta* on the face of Devesh. They also snatched his gold chain and cash. Thereafter, they started to run, but many public persons gathered there and one of the boys was apprehended by public who was having *katta* in his hand and the remaining two boys succeeded in fleeing away from the spot. She identified – Ashu Sharma as the person who was apprehended by public and was having *katta* in his hand. She further deposed that his two companions also snatched her handbag of brown colour containing her mobile phone, some cash and other articles. Her handbag containing articles was recovered from the possession of accused/appellant – Ashu Sharma. The mobile phone of Devesh was also recovered from him. One *desi katta* was also recovered from the hand of accused/appellant – Ashu besides one live cartridge from his pocket. The remaining two accused fled away from the spot alongwith her gold chain. She further deposed that Ashu Sharma caused injuries on her forehead and head. She was medically examined. Police came at the spot and recorded her statement Ex.PW3/A. The *desi katta* and two live cartridges, her handbag containing various other articles, mobile phone of Devesh were seized vide memo Ex.PW1/B to PW1/D. She identified the countrymade pistol and two live cartridges Ex.P1 and P2. She also identified her handbag Ex.P3 and rest of the articles Ex.P4 and mobile phone Ex.P5 recovered from accused.

10. PW8 – Devesh corroborated her version by deposing that on 09.04.2010 at about 5.30/5.45 pm he was going to his house from the factory at Anand Parbat in his car bearing number DL-3CL-4707. When he reached the middle of bridge of Sarai Rohilla, he saw two boys were scuffling with a lady and snatching her bangles. One boy was armed with a knife and the other boy was having *desi katta* in his hand. He stopped his car and tried to save the lady from the two boys. One of the boys, namely, Ashu Sharma came to him and put the revolver inside his mouth. Then he himself pulled his chain from his neck and threw the same into his car. Accused Ashu Sharma took out his chain from the car and he also threw the key of his car under the bridge. Accused also took out

Rs.5,000/- from pocket of his shirt and snatched his Samsung mobile phone. The third boy was standing with a motorcycle number DL-6SA-4007. Ashu Sharma and the other boys who were snatching articles from the lady, sat on the motorcycle and started running from there, but at a short distance one traffic constable caught hold of accused alongwith revolver, mobile phone and lady purse with the help of public persons. However, two of the accused managed to escape alongwith the chain and cash. One *katta* with cartridge and one more cartridge from the pocket of pant of accused Ashu Sharma alongwith lady purse and his mobile phone were recovered from Ashu Sharma which were seized by the police. He also identified revolver and two cartridges Ex.P1 and P2, ladies purse Ex.P3 and mobile Ex.P5 recovered from accused.

11. Both these witnesses were subjected to lengthy cross-examination, however, nothing material could be elicited to discard their testimony. The testimony of both these witnesses is cogent, clear, reliable and trustworthy. Moreover, their testimony finds corroboration from PW1 – Constable Sandeep who was on duty at Shastri Nagar Chowk point on the relevant day and he has deposed that at about 6 pm, he saw that some persons were shouting ‘*chor chor*’ from the Sarai Rohilla bridge side. He rushed towards the bridge and saw that three boys were coming on bike. One of them who was sitting in the last was having a *katta* and was moving the same in the air. Due to red light, the traffic was slow. He reached near the bike and the boy/ the last pillion rider who was having *katta* in his hand put the *katta* on his neck. He pulled that boy and snatched *katta* from his hand. The name of the boy was revealed as Ashu Sharma. The boy was having a lady bag of brown colour containing ladies articles and one mobile phone, one live cartridge of .12 bore was found in the right pocket of his wearing pant. The *katta* was also loaded with live cartridges. In the meanwhile, PW7 – Head Constable Narayan Das alongwith a constable reached on the spot. He handed over *katta*, cartridge, bag and mobile phone alongwith accused to Head Constable – Narayan Das who took the same into possession vide seizure memos. HC – Narayan Das (PW7) has corroborated his version by deposing that on receipt of PCR call vide DD No.63-B, he alongwith Constable Anup Kumar went to the spot at Shastri Nagar red light near traffic police booth where complainant – Rita Verma and Traffic Constable Sandeep Dabas met him.

Constable Sandeep Dabas handed over the accused Ashu Sharma and also *katta* loaded with live cartridge and another live cartridge beside ladies purse alongwith two mobile phones. He seized the articles; recorded statement of Smt. Rita Verma and got the case registered. He also sent both the injured to HR Hospital. Further investigation was carried out by ASI Ramphal.

12. The submission of learned counsel for the appellant that as per complainant – Rita Verma she had received injuries on her head, however, the same does not find corroboration from the medical opinion as PW4 – Dr Rajvir Singh and PW6 – Dr Anil Kumar Banka deposed that there were blunt injuries on the occipital region. However, this discrepancy is highly negligible inasmuch as it has come in the testimony of Rita Verma that she was not highly educated as she had only studied upto 10th standard. According to her, Ashu Sharma caused injuries on her head and forehead. Even the doctor has deposed that the occipital region is prominent part of back of skull. Since the skull is the part of head, therefore, it cannot be said that it was such a major discrepancy which may cause any dent on her testimony.

13. The further submission of learned counsel for the appellant that mode of arrest was doubtful, same is also devoid of any merit as PW3 has deposed in cross examination that accused/appellant – Ashu Sharma was apprehended by public with the help of traffic police. Devesh has also deposed that accused was caught hold by traffic constable with the help of public persons. To the same effect is the testimony of Constable Sandeep who apprehended the accused/appellant and for the meritorious work done by him he was awarded Rs.3100/- from his department, but for that reason there is no ground to disbelieve his testimony. There is reliable evidence on record to prove that the accused/appellant was apprehended at the spot.

14. As regards the last limb of arguments that the country-made pistol was not a deadly weapon as, as per the report of FSL, it was not in working condition. Same issue came up for consideration before this Court in **Abdul Gani @ Gini v State** [Crl. Appeal No.262/2013] wherein it was observed and held as under:

“44. However, 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.

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; Nagar Singh v. Emperor and Inder Singh v. Emperor 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 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."

45. *The Supreme Court while interpreting Section 397 IPC took notice of the language of Section 398 IPC wherein the words used are —the offender is armed with any deadly weapon. The Supreme Court has observed that, for the purpose of Section 397 IPC actual use of the deadly weapon is not required, even brandishing and showing the deadly weapon so as to instil fear and threat in the mind of the victim so that he does not resist, fearing danger, is sufficient. The Supreme Court has reiterated this view and has further observed in Ashfaq v. State (Govt. of NCT of Delhi) AIR, 2004 SC 1253:*

46. *Thus, from the ratio in Phool Kumar (supra) and Ashfaq (supra), it is clear that in order to sustain conviction under Section 397 IPC it is not essential that the deadly weapon is actually put to use.*

47. *This is further fortified by the fact that the term "fire arm" as defined in Section 2(e) of the Arms Act means:*

“(e) "firearms" means arms of any description designed or adapted to discharge a projectile or projectiles of any kind by the action of any explosive or other forms of energy, and includes,-

(i) artillery, hand-grenades, riot-pistols or weapons of any kind designed or adapted for the discharge of any noxious liquid, gas or other such thing,

(ii) accessories for any such firearm designed or adapted to diminish the noise or flash caused by the firing thereof,

(iii) parts of, and machinery for manufacturing, firearms, and

(iv) carriages, platforms and appliances for mounting, transporting and serving artillery."

48. *The definition of the term "fire arm" includes, cartridges. For the purpose of Section 2 (e) of the Arms Act, pistol or weapon or arm though not working is still a fire-arm if it can be used with some repairs. A fire-arm which is defective or unworkable is a fire-arm within the meaning of Section 2(e) of the Arms Act if it has not lost its specific character and has not ceased to be a fire-arm. In Queen-Empress v. Jayarami Reddi, (1898) ILR 21 Mad 360 the Full Bench opined:*

"1. We think there is no doubt that the revolver in the case is a fire-arm within the meaning of the Act. The question is not so much whether the particular weapon is serviceable as a fire-arm, but whether it has lost its specific character and has so ceased to be a fire-arm. In referring to the serviceable character of the arm we think the decision in The Queen v. Siddappa I.L.R. 6 Mad. 60 was not correct and that the proper test was lost sight of. Whether in any particular case the instrument is a fire-arm or not, is a question of fact to be determined according to circumstances. We answer the question in affirmative."

15. Thus a defective fire arm which can be used after repair and has not lost its character of fire arm is a fire arm within the meaning of Section 2(e) of the Arms Act. Even as per Ballistic report, the countrymade pistol 12 bore recovered from the possession of appellant – Ashu Sharma is designed to fire a standard 12 bore cartridge. It is not in working order in its present condition and requires repair of the fire mechanism to bring it in working order. However, the revolver was loaded with one cartridge which were found to be live one. It has come on record that victims were put in fear of instant hurt when revolver was shown to Ritu Verma while trying to remove her bangles and at the mouth of Devesh by accused/appellant Ashu Sharma and was threatened to part with his belongings. Under the circumstances, it was established that accused/appellant was armed with a deadly weapon which was within the vision of victim so as to be capable of creating a terror in his/her mind. Mere fact that injuries on the person of victims were opined to be simple does not take away the case from the ambit of Section 397 IPC as

causing of injuries simple or grievous is not the sine qua non to attract this Section. As held in Ashfaq (supra),

“Thus, what is essential to satisfy the word “Uses” for the purposes of Section 397 IPC is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of victim and not that it should be further shown to have been actually used for cutting, stabbing, shooting, as the case may be.

16. As such, offence under Section 397 IPC was clearly made out. It seems that such a plea was not taken by accused before the learned Trial Court and is being taken for the first time at the appellate stage. Even if it is so, no fault can be found in this finding of learned Trial Court which warrants interference.

17. As regards the plea that Head Constable – Narayan Das had demanded Rs.10,000/- as bribe from him in connection with another case in which he was enlarged on bail and on his refusal he falsely implicated him in this case, same is devoid of any merit as this defence has seen the light of the day for the first time in the statement of accused recorded under Section 313 Cr.PC and even no suggestion to this effect was given to PW7 – HC Narayan Das when he appeared in the witness box. The further plea that the complainant was known to him from before and was having cordial relations with him but after PW8 – Devesh entered into her life then she severed relationship from the accused/appellant and got him falsely implicated in this case is also not substantiated as the complainant has denied having any acquaintance with the accused/appellant from before. She also denied that PW 8 – Devesh was known to her from before or that on the fateful day she was coming alongwith him in his car and was with him at the time of occurrence. Under the circumstances, the learned Trial Court has rightly convicted the appellant for offence under Section 392/397 IPC. Since the appellant was found in possession of a country-made pistol and live cartridge, after requisite sanction was accorded for his prosecution by PW12 – Mr Pushpinder Kumar, the then Additional DCP / North West, Delhi as such he was rightly convicted under Section 27 Arms Act. As such, the impugned judgment does not call for any interference.

18. Even as regards, quantum of sentence, the appellant has been convicted for offence under Section 397 IPC and the minimum sentence prescribed under this section is seven (7) years which has been awarded to him. Besides that as per the status report furnished by the State the antecedents of the appellant are also not clean and he was shown to be involved in six other cases out of which in three cases he was acquitted and was discharged in one case. However, two cases were still pending trial. Even the nominal roll of the appellant reflects that his conduct is also not satisfactory as various punishments were awarded to him.

19. In view of the foregoing, the appeal is bereft of any merit and the same is accordingly dismissed. Pending applications, if any, also stands disposed of.

The Trial Court record be sent back forthwith alongwith a copy of this judgment.

Appellant be informed through Superintendent Jail.

(SUNITA GUPTA)
JUDGE

MARCH 27, 2015/*rd*