

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 12<sup>th</sup> February, 2015

+ **CRL.A. 338/2012 & CrI. M.A. 972/2014**

ABHISHEK @ PRITAM ..... Appellant

Through: Ms. Anita Abraham, Advocate  
Appellant produced in judicial  
custody.

versus

STATE OF THE NCT OF DELHI ..... Respondent

Through: Mr O.P. Saxena, APP for State  
along with SI Naubat Ram, PS  
Mandir Marg, Delhi.

**CORAM:**

**HON'BLE MS. JUSTICE SUNITA GUPTA**

### **J U D G M E N T**

**: SUNITA GUPTA, J.**

1. This is an appeal u/s 374 (2) Cr.P.C. against the judgment and order dated 23.11.2011 and 26.11.2011 respectively passed by learned Additional Sessions Judge, Patiala House Court in SC No. 16/11 pertaining to FIR No.13/11 u/s392/394/397/411/34 IPC registered with PS Mandir Marg.

2. On 18<sup>th</sup> January, 2011, at about 9:00-9:30 pm, PW8-Dinesh Das was going from Shivaji Stadium to Block No.85, Kalawati Hospital by the side of wall of Lady Harding Medical College. Two boys came from opposite side and hit him. One of the boys pressed his neck with one hand and from another hand started hitting

him with a knife. He caught hold of his hand in which he was holding the knife and twisted the same as a result of which he sustained injuries on both of his hands. By that time, his associate removed his mobile phone from back pocket of his pant and Rs.8000/- from front pocket of the pant. In the meanwhile, some passersby came to his rescue. On seeing them, the boy who was aged about 20-21 years and had removed his mobile and money, ran away. However, the boy who caught his neck was apprehended by him. Some passersby informed the police who reached the spot. The boy who was apprehended at the spot came to be known as Abhishek S/o Shiv Bahadur. On receipt of information, ASI Narender Singh, In charge of PCR No.5498 reached the spot along with PCR staff and found complainant Dinesh and accused Abhishek in injured condition. One razor/ustara was in possession of Abhishek and he was informed by the injured that he was robbed by Abhishek with his other associate who had succeeded to run away from there and he has been robbed of his mobile phone and a sum of Rs.8000/-. ASI Narender Singh removed both the injured to RML Hospital. He came to know that Abhishek was beaten by the public persons. On receipt of call regarding the robbery incident, Head Constable Devender reached the spot where he came to know that injured victim along with accused have been taken to RML Hospital

by PCR, as such, he went to RML Hospital, collected MLCs of Dinesh Prasad, Ex.PW3/A and accused Abhishek, Ex. PW3/C. Both were declared fit for statement by the doctor. As such, he recorded the statement of injured victim Dinesh, Ex.PW7/A, prepared rukka Ex.PW7/B and sent the same through Constable Rajiv for registration of FIR. Further investigation was entrusted to ASI Suraj Bhan. However, when Head Constable Devender came out from the Emergency and went to PCR, RML Hospital where PCR officials handed over one broken razor/ustra. He prepared the sketch of Ustra, Ex.PW1/A and seized the same vide memo Ex.PW1/B. Thereafter he along with accused Abhishek and complainant Dinesh went to the place of incident where accused pointed out the place of incident vide pointing out memo Ex.PW7/C. Accused Abhishek was arrested vide memo Ex.PW7/D. The Investigating Officer lifted the blood, earth control sample, one piece of stone having blood stains, one muffler, blood stained woollen gloves from the spot vide different seizure memos. Search was made for the co-accused who was not traceable. Subsequently, on 4<sup>th</sup> March, 2011, on the basis of secret information, accused Vikaram Thapa was arrested and one mobile phone belonging to the complainant was recovered from right pocket of his pant.

3. During the course of investigation, the pullanda containing razor was produced before the doctor for obtaining his subsequent opinion and it was opined that the weapon of offence was a deadly weapon. After completing investigation, the charge sheet was submitted u/s 392/394/397 IPC against both the accused. Both the accused pleaded not guilty to the charge and claimed trial.

4. In order to substantiate its case, prosecution in all examined 12 witnesses to substantiate the charge. In statement u/s 313 Cr.P.C. the accused persons denied their complicity in the crime and pleaded false implication.

5. On appreciating the evidence and after considering the rival submissions of the parties, the learned Trial Court by impugned judgment dated 23<sup>rd</sup> November, 2011 convicted accused Abhishek u/s 392/394/34 IPC and Section 397 IPC. He was sentenced as under:-

“(a) RI for 5 years and fine of Rs.2000/- u/s 392/394/34 IPC, in default of payment of fine to further undergo SI for two months;

(b) RI for 7 years and fine of Rs.2,000/- u/s 397 IPC, in default of payment of fine to further undergo SI for 3 months.

All the sentences were to run concurrently. Benefit of S.428 Cr.P.C was also given.”

6. Co-accused Vikram Thapa was also convicted u/s 392/394/34 IPC besides Section 411 IPC and sentenced separately. All the sentences were to run concurrently.

7. Being aggrieved and dissatisfied, the present appeal has been preferred by the appellant Abhishek. Assailing the findings of learned Trial Court, Ms. Anita Abraham, Advocate for the appellant submitted that the whole case hinges on the testimony of the complainant, however, there is substantial variation in the initial complaint lodged by him with the evidence as in the initial complaint, there was no mention regarding ustra/razor and only one weapon of offence was shown whereas in his deposition before the Court, he has deposed that both the accused were armed with razor/ustra and knife. Further the person who was armed with knife was alleged to have been apprehended by him at the spot, however, the accused is alleged to have been apprehended at the spot and one razor was recovered from him. Under the circumstances, testimony of this witness is not liable.

8. Furthermore PW1-ASI Narender Singh did not appear for completing his statement in order to identify the ustra which was allegedly handed over to him at the spot. Even no offence u/s 394

IPC is made out as only simple injuries were inflicted on complainant. Even offence u/s 397 IPC is not made out as the size of the knife/razor was not given and it is not a deadly weapon. Under the circumstances, it was submitted that prosecution has failed to bring home the guilt of the accused beyond reasonable doubt. Even otherwise, the accused has remained in custody for more than 4 years, as such, he be released on the period already undergone.

9. Per contra, it was submitted by Sh. O.P. Saxena, learned Additional Public Prosecutor for the State that the accused was apprehended at the spot and razor was recovered from his possession which has been opined to be a deadly weapon by the doctor. There is absolutely no reason to falsely implicate the accused in this case. Under the circumstances, the impugned judgment does not suffer from any infirmity which calls for any interference.

10. The star witness of the prosecution is PW8-Dinesh Dass who has reiterated the averments made by him in his initial complaint Ex.PW7/A. He testified that on 18<sup>th</sup> January, 2011 at about 9:00-9:30 PM, he was going from Shivaji Stadium to Block No. 85 situated in front of Kalawati Hospital by the side of the wall of Lady Harding Medical College. Two persons came. One pressed his neck and another started beating him with fist and the second boy robbed

him of Rs.8000/- and mobile phone make Nokia. At that time, one person was having razor/ustra in his hand while another was having knife in his hand and they caused him injury with ustra and knife. On hearing his alarm, some public persons came to his rescue and one was caught hold by him while the other managed to escape. Some public persons made a call to PCR. He identified the person, who was caught by him at the spot as Abhishek from whom ustra/razor was recovered. Accused was given beatings by the public. As such, he along with the said boy was taken by PCR officials to RML Hospital. From the hospital, he along with the police went to the place of incident where at his instance, site plan was prepared. Police seized blood stained muffler, hand gloves, blood stained soil with leaves from the spot and seized vide separate seizure memos. His statement was recorded by the police. Accused was also arrested. Subsequently, after the arrest of co-accused, he had gone to Tihar Jail for the purpose of identification but the accused refused to participate in the TIP. He got the mobile phone released on *superdari*.

11. Although, it is true that certain variation has appeared in the testimony of this witness regarding the weapons which the accused were having at the time of commission of robbery inasmuch as in the initial complaint, he had mentioned that one of the accused was

armed with knife whereas in his deposition before the Court he has mentioned that one was armed with razor/*ustra* and another was with knife. However, this discrepancy does not go to the substratum of the case keeping in view the fact that accused Abhishek was apprehended at the spot by the public and was given beatings. A call was also made by the public to the police officials with the result ASI Narender Singh reached the spot where complainant and accused were found in injured condition. Razor was in possession of accused Abhishek which was taken into possession and was subsequently, handed over to the police. ASI Narender Singh was initially examined on 18<sup>th</sup> July, 2011 but his statement was deferred for want of case property and thereafter it seems that this witness was not produced for completing his statement. However, that itself is not fatal keeping in view the fact that it has come in the testimony of PW7 Head Constable Devender that on receipt of call regarding an incident of robbery near Jain Happy Public School, he reached the spot and came to know that the injured/victim along with accused has been removed to RML Hospital by PCR. As such, after leaving Constable Rohit at the spot, he went to RML Hospital where he was handed over the broken *ustra* which was taken into possession vide seizure memo Ex.PW1/B. Therefore, not only the fact that accused was apprehended at the spot but even the weapon

of offence was recovered from his possession at the spot. Furthermore, he was given beatings by the public with the result he along with injured were taken to hospital and his MLC Ex.PW3/C was prepared by Dr. Nivedita which was proved by PW3-Sh. S. Mehto, Medical Record Technician, RML Hospital since the doctor has left the hospital. Similarly, Ex.PW3/A-MLC of Dinesh Prasad/ complainant was prepared by Dr. Pomany who had also left the hospital and, therefore, the MLC was proved by Dr. S. Mehto. The factum of apprehension of the accused at the spot coupled with the recovery of weapon of offence at the spot from his possession corroborates the version of complainant. Moreover, although the complainant was subjected to lengthy cross-examination, however, nothing material could be elicited to discredit his testimony. Accused is not alleging any enmity, ill will or grudge against the complainant for which reason he would falsely implicate him in this case. Moreover, the deposition of the complainant that the other accused removed his mobile and a sum of Rs.8000/- finds corroboration from the fact that on 4<sup>th</sup> March, 2011, on the basis of secret information, co-accused Vikram Thapa was apprehended and from his possession, one mobile phone belonging to the complainant was recovered. Besides that, the blood stained muffler and gloves belonging to the complainant and other articles lying at the spot

were seized which were sent to FSL. As per the reports of FSL, Ex. PW11/D and PW11/E given by Dr. Rajender Kumar, Assistant Director, FSL Rohini, Delhi, blood was detected on a piece of stone, pair of gloves, muffler and blood stained earthy material which was of human origin, however, the grouping of the blood could not be given.

12. The submission of learned counsel for the appellant that no case u/s 394 IPC is made out, inasmuch as, as per the MLC, there was only simple injury on the person of complainant, the same is devoid of merit, inasmuch as, Section 394 IPC provides for “voluntarily causing hurt in committing robbery”. This Section reads as under:-

*“394. Voluntarily causing hurt in committing robbery.—If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with 1[imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.”*

13. Section 319 of Indian Penal Code provides for “hurt” and it reads as follows:-

*“319. Hurt.—Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.”*

14. Section 321 provides for “voluntarily causing hurt” which reads as under:-

*“321. Voluntarily causing hurt.—Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge*

*that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt".*

15. The combined reading of these provisions goes to show that causing of grievous hurt is not the *sine qua non* for bringing the offence within the four corners of Section 394. The Section speaks about causing hurt and the same may also be simple. As per the MLC, the complainant/injured sustained CLW 5cm x 1 cm over left palm. Although no final opinion has been obtained but the fact remains that the injuries on the palm of the complainant can be considered to be simple, as such, falling within the four corners of Section 394 IPC.

16. The last limb of argument that Section 397 IPC is not attracted inasmuch as the weapon of offence was not a deadly weapon, the same is also devoid of merit as it has come in the testimony of PW11 SI Suraj Bhan that he produced the pullanda containing razor before the doctor for obtaining subsequent opinion vide application Ex.PW11/B and Dr. Manoj Kumar gave his subsequent opinion Ex.PW11/C opining that the razor was a deadly weapon. That being so, even offence under Section 397 IPC was made out.

17. The result is that the testimony of complainant regarding commission of robbery on the point of razor/ustra by the accused

along with his associate of his mobile phone and Rs.8000/- stands amply proved not only from his own testimony but also from the other circumstances narrated hereinbefore. Under the circumstances, the appellant was rightly convicted of the offences under Section 392/394/397 IPC. No fault can be found with these findings of the learned Trial Court.

18. Even as regards the quantum of sentence, no interference is called for inasmuch as the maximum sentence awarded to the appellant is 7 years and all the substantive sentences were ordered to run concurrently. Minimum sentence prescribed under Section 397 is 7 years. That being so, no discretion is vested in the Court to impose any lesser sentence. As such, appeal being devoid of merit is dismissed.

Trial Court Record along with copy of the judgment be sent back.

**(SUNITA GUPTA)**  
**JUDGE**

**FEBRUARY 12, 2015**  
*rs*