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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**  
+ **CRL.A. 868/2011**

Decided on 19<sup>th</sup> March, 2015

SHAHJAD

..... Appellant

Through: Mr. A.K. Sharma, Adv.

versus

STATE

..... Respondent

Through: Mr. Yogesh Verma, APP for State  
with SI Vipin Kumar, P.S. Ashok  
Vihar.

**CORAM:**  
**HON'BLE MR. JUSTICE A.K. PATHAK**

**A.K. PATHAK, J.(ORAL)**

1. Vide judgment dated 29<sup>th</sup> March, 2011, trial court has convicted the appellant under Sections 392/397 IPC and under Sections 25/27 of the Arms Act. Vide order on sentence dated 29<sup>th</sup> March, 2011, appellant has been sentenced to undergo rigorous imprisonment for three years with fine of ₹1000/- for the offence punishable under Section 392/34 IPC; sentenced to undergo seven years rigorous imprisonment with fine of ₹1000/- for the offence punishable under Section 397 IPC and rigorous imprisonment for one year with fine of ₹1000/- for the offence punishable under Section 25 of

the Arms Act. All the sentences have been directed to run concurrently. Benefit of Section 428 Cr.P.C. has also given to appellant. Aggrieved by his conviction as also the sentences awarded to him, appellant has preferred this appeal.

2. Prosecution story, as unfolded is that Smt. Shashi (PW5) was going to Kanhiya Nagar Market along with her daughter Ms. Shalu (PW6) and when they reached near Haryana Canal, appellant along with his accomplices Channa Swami and Raj Kumar @ Sonu intercepted them; Appellant took out a knife and kept it on the abdomen of Smt. Shashi while his accomplices snatched gold chain and ear rings from her. After robbing them, appellant and his accomplices started running towards E-Block. Smt. Shashi along with her daughter chased them. ASI Daya Kishan, who was coming along with Head Const. Madan Lal from the opposite direction, apprehended the appellant with an open knife in his hand. Name of appellant was disclosed after his apprehension.

3. In the FIR, PW5 Smt. Shashi narrated the incident in the manner as has been described in the preceding para hereinabove. PW5 further stated that she can identify the appellant's accomplices if brought before her.

4. Channa Swami and Raj Kumar @ Sonu were apprehended

subsequently. They refused to participate in TIP.

5. As per the prosecution, sketch of the knife recovered from the appellant was prepared at the spot and thereafter it was seized vide (Seizure Memo) Ex.PW2/B.

6. After completion of investigation, appellant along with Channa Swami and Raj Kumar was sent to face trial by filing a charge-sheet in the Court of Metropolitan Magistrate, Delhi who committed the case to Sessions Court since offence under Section 397 IPC is exclusively triable by the Sessions Court.

7. Charges under Section 392/34 were framed against the appellant and his accomplices on 2<sup>nd</sup> March, 2007 to which they pleaded not guilty and claimed trial. Separate charges under Section 397 IPC and Section 25 of the Arms Act were framed against the appellant on the same day to which he pleaded not guilty and claimed trial.

8. Prosecution examined seven witnesses in all. However, material witnesses in this case are PW2 HC Madan Lal, PW5 Shashi, PW6 Shalu and PW7 ASI Daya Kishan. It may be noted that appellant was granted bail during the trial and he participated in the proceedings till 18<sup>th</sup> September, 2009. By that date statements of PW1 to PW6 were completed. His counsel

had cross-examined them at length. Statement of PW7 in examination-in-chief was recorded on 18<sup>th</sup> September, 2009 but his cross-examination was deferred for 13<sup>th</sup> October, 2009. Appellant jumped the bail and did not appear in court on 13<sup>th</sup> October, 2009, consequently, non bailable warrants were issued against him. Since non bailable warrants remained unexecuted, proceedings under Section 82/83 Cr.P.C were initiated against the appellant and ultimately he was declared proclaimed offender vide order dated 24<sup>th</sup> February, 2010.

9. Statements of Channa Swami and Raj Kumar @ Sonu were recorded under Section 313 Cr.P.C. on 16<sup>th</sup> March, 2010. Vide judgment dated 3<sup>rd</sup> April, 2010, trial court acquitted Channa Swami and Raj Kumar @ Sonu by holding that prosecution had failed to prove the case against them beyond the shadow of reasonable doubt. This finding was returned in view of the material contradictions in the statements of PW5, PW6 and PW7. Trial court disbelieved the said witnesses. No appeal was preferred by the State or the complainant against the acquittal of Channa Swami and Raj Kumar @ Sonu.

10. Subsequently, appellant was arrested on 10<sup>th</sup> February, 2011. He was produced before the trial court on 4<sup>th</sup> March, 2011, accordingly, trial revived

against the appellant. PW7 was recalled for his cross-examination. Thereafter, statement of appellant was recorded under Section 313 Cr.P.C. on 22<sup>nd</sup> March, 2011. Appellant denied his complicity in the offence and stated that he was innocent and had been falsely implicated. He alleged that nothing was recovered from his possession. However, he did not lead any evidence in his defence.

11. After affording opportunity of hearing to learned APP and appellant's counsel, Trial Court vide the judgment, impugned in this appeal has convicted the appellant under Sections 392/397 IPC and Section 25 of Arms Act, on the same set of evidence on which Channa Swami and Raj Kumar @ Sonu had been acquitted. Trial court has accepted the statements of PW5, PW6 and PW7 as trustworthy and reliable by holding that contradictions and improvements as were appearing in their statements, were minor in nature; even though in the judgment dated 3<sup>rd</sup> April, 2010 relating to Channa Swami and Raj Kumar @ Sonu it was held that there were material contradictions in the statements of PW5, PW6 and PW7 with regard to the manner in which incident took place and also the apprehension of the accused persons.

12. I have heard learned APP for the State, learned counsel for the appellant and perused the trial court record carefully and am of the view that

trial court was not right in accepting the statements of PW5, PW6 and PW7 to be trustworthy and reliable. Trial Court could not have accepted the statements of PW5, PW6 and PW7 to be trustworthy in view of the material contradictions and infirmities as detailed in the judgment dated 3<sup>rd</sup> April, 2010.

13. I have carefully perused the statements of PW5, PW6 and PW7 recorded on oath and do not find them to be trustworthy and reliable as regard to complicity of the appellant in the offence of robbery. In the FIR, PW5 had stated that after robbing her, appellant and his accomplices ran towards E-Block when they were given a chase by her and PW6 Shalu. She further stated that PW7 ASI Daya Kishan, was coming with one constable from the opposite direction and he apprehended the appellant with an open knife in his hand. However, PW5 has not supported her this statement recorded in the FIR while deposing in court. PW5 has deposed that accused persons had fled away after robbing her. She further deposed that police official were seen coming in a vehicle and accused Mohd. Shahjad (appellant) was already apprehended by them. As against this, in her cross-examination, she stated that police brought Shahjad with them within 10 to 15 minutes from the incident. She further deposed that there were 2 or 3

police officials in uniform in the PCR Van. However, her this version is not in line with her statement recorded in the FIR, according to which while she was chasing the appellant, police officials apprehended the appellant and at that time appellant was having an open knife in his hand.

14. As regards recovery of knife, in the FIR she stated that appellant was having the same in his hand when he was apprehended. However, in her cross-examination she has taken a different stand. She stated that police recovered the knife from the pant of appellant. In the FIR she stated that police officials apprehended the appellant in her presence immediately after the incident. However, in her cross-examination she stated that PCR Van brought the appellant. Admittedly ASI Daya Kishan and HC Madan Lal were not on duty on any PCR Van. They were posted in the local police station and were on patrolling duty.

15. PW6 Shalu has given altogether different version. According to her, accused persons had fled away after robbing them and after some time one police official had brought one of them. Her this statement also shows that appellant was not apprehended at the spot. As per PW6 Shalu, Channa Swami and Raj Kumar @ Sonu were also apprehended immediately after the incident and were brought near the canal. However, her this statement is

not in line with the prosecution story, according to which Channa Swami and Raj Kumar @ Sonu were arrested after about three days. As against this, PW7 Daya Kishan has stated that he apprehended the appellant along with an open knife in his hand in presence of PW5 Shashi. His this statement is contrary to what has been stated by the PW5 in the witness box.

16. For the foregoing reasons, appellant is entitled to acquittal. Accordingly, impugned judgment and order on sentence are set aside. Appellant is in jail. He be released forthwith if not wanted in any other case.

17. Appeal is disposed of in the above terms.

**A.K. PATHAK, J.**

**MARCH 19, 2015**

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