

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

% *Judgment reserved on : 13.08.2015*
Judgment delivered on: 20.08.2015

+ CRL.A. 883/2012
ASLAM

..... Appellant
Through Mr. Rajat Mathur, Adv.

versus

STATE

..... Respondent
Through Mr. Kewal Singh Ahuja, APP

+ CRL.A. 284/2015
GULZAR

..... Appellant
Through Mr. Sitab Ali Chaudhary, Adv.

versus

STATE

..... Respondent
Through Mr. Kewal Singh Ahuja, APP

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 These are two appeals preferred by appellant Gulzar and appellant Aslam. Appellant Gulzar has been convicted under Sections 392/397 of the IPC and has been sentenced to undergo RI for a period of 7 years and to pay a fine of Rs. 5000/- and in default of payment of fine to

undergo SI for 6 months. For his convictions under Section 394 of the IPC he has been sentenced to undergo RI for a period of 7 years and to pay a fine of Rs. 5000/- and in default of payment of fine to undergo SI for 6 months. Appellant Aslam, has been convicted under Sections 392/394/34 of the IPC and has been sentenced to undergo RI for a period of 5 years and also to pay a fine of Rs. 5000/-; in default of payment of fine to undergo SI for 6 months. The sentences were to run concurrently.

2 The version of the prosecution is that on 04.04.2009 at about 10.10 pm, the complainant Utkarsh (PW-4) had hired a TSR from Seemapuri. One boy was already sitting on the rear seat of the TSR. PW-4 sat on the TSR and another boy sat next to him. After crossing 10-15 yards, another boy sat next to the driver. After crossing Seemapuri both the boys sitting with PW-4 started beating him. One of the boys pressed his neck and the other stabbed him with a sharp weapon. When PW-4 tried to save himself, the second boy gave him a fist blow. Thereafter, PW-4 was robbed of his cash amounting to Rs. 3990/-, a Motorola Mobile, driving licence, SBI ATM card. PW-4 was then thrown out of the TSR. PW-4 who had suffered injuries went to the

CrI. Appeal No. 883/2012 & 284/2015

hospital and got his injuries dressed. On the following date, i.e. on 05-04-2009 he made a complaint to the police station and the present FIR was registered. Accused Gulzar and Aslam were arrested vide DD No. 7A where they had made a disclosure statement regarding their involvement in the present case. They were formally arrested in this case on 19.04.2009. Both the accused were identified in TIP proceedings by the complainant. The mobile phone was also recovered from accused Aslam. The weapon of offence i.e. the knife, was however not recovered.

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

4 The star witness of the prosecution was the complainant, PW-4. PW-4 has on oath deposed that he was working as a fashion designer at the date of the accident, 04-04-2009 and at about 9.15 pm, PW-4 left his sister's house and on reaching Dilshad Garden, at 9.30 pm, he boarded an auto for going to Anand Vihar. One passenger was already sitting on the rear side; he was told that the auto driver will charge only Rs. 10/- for dropping him at Anand Vihar and accordingly, PW-4 sat on that

auto. The auto had only covered a distance of 10 feet, when the auto driver took another passenger who also sat on the rear seat. After another 10 feet, one more passenger came and sat on the front seat. PW-4 was sandwiched between two people on the rear seat. After a few minutes, the boy sitting on the right of PW-4, put his arm around his neck and started beating him. The said boy showed him a knife and said 'shor mat machana'. The boy sitting with the driver also started giving him fist blows on his face. The boy sitting on his left also started beating him and started taking out his belongings which included his black colour Motorola MING having sim number 9987323868, his wallet having cash worth Rs. 3900/-, his ATM Card, driving licence, Metro Pass etc. PW-4 resisted the attack. He was beaten by the boys, as a result of which he sustained injuries on his chest, right arm and on the left side of his upper lip. Later, the auto slowed and PW-4 was pushed out. PW-4 noted that the auto number was covered by a polythene. The auto then ran away from the spot. PW-4 met a police man who took him to Hedgewar Hospital and went home afterwards he made a complaint at police station Vivek Vihar on the next day. Since his T-shirt got torn from various places and was stained with blood, he threw it; it was

blood stained. He has further deposed that in the month of May he had gone to Tihar Jail to identify the culprits where he identified both the appellants namely, Gulzar and Aslam. He also identified his mobile phone which had been recovered a black Motorola Ming proved as Ex. P-1. PW-4 was subjected to a lengthy cross examination. He stated that his statement was recorded in the police station. He stuck to his statement. He denied the suggestion that on 04.04.2009, he was drunk and was coming from a party and he had a quarrel with his friend as a result of which he sustained injuries. He denied the suggestion that he has falsely implicated the accused persons. He also denied the suggestion that he did not identify the accused persons in Tihar Jail.

5 SI Veerpal Singh, (PW-7) posted in the special staff, deposed that on 18.04.2009 he had received a secret information that two boys, Aslam and Gulzar, who were involved in a case of robbery registered at PS Vivek Vihar, would come at bus stand Zakhira, Chara Mandi, Najafgarh road at 5.00 pm to sell a stolen mobile. Information was reduced into writing vide DD no. 10A. A raiding party was thus, organized and the accused persons were apprehended. They could not give any satisfactory answer to the queries put to them. Accused Aslam

had produced the Motorola mobile phone which was seized vide memo Ex. PW-1/A. Accused Gulzar also produced a mobile phone of Sony Ericson (not related to this case). This was also seized vide memo Ex. PW-1/B. They disclosed their involvement in the present case pursuant to which the information had been marked to PW-9, who had formally arrested the appellants in the instant case.

6 The Investigating Officer, ASI Pritam Singh was examined as PW-9. He deposed that on 19.04.2009, on the receipt of DD no. 10-A, he reached the office of Special Staff where the disclosure statements of the accused persons were recorded in those proceedings i.e. Kalandra were given to him wherein accused Aslam and Gulzar had disclosed their involvement in the present case. They were formally arrested vide memos Ex. PW-9/B and Ex. PW-9/C. They were put to TIP on 02.05.2009 in Tihar Jail.

7 TIP proceedings were conducted by Ms Sunaina Sharma (PW-10), the learned Magistrate and her proceeding sheets Ex. PW-10/A and Ex. PW-10/B have been proved. These proceeding sheets reflect that the witness/complainant (PW-4) identified accused Aslam and Gulzar correctly.

8 The main thrust of the argument of the learned amicus curiae for convict Gulzar is that the conviction under Section 397 of the IPC is not called for; the admitted fact being that the weapon of offence was not recovered and as such its user could not be proved and thus the conviction under Section 397 of the IPC is ill founded. Reliance has been placed on the judgment of the Apex Court Samiuddin @ Chotu Vs. State 175 (2010) DLT 27 to support this submission. Submission being that in circumstances where the weapon of offence could not be recovered, the conviction under Section 397 of IPC was modified to one under Section 392 of the IPC, which has also been prayed for in the instant case. This Court has examined this case in the aforementioned perspective.

9 In the judgment of Samiuddin @ Chotu (supra), a Bench of this Court had noted that where the knife in question has not been recovered, it was held that the conviction of the appellant under Section 397 of the IPC was not called for and it was accordingly modified to one under Section 392 of the IPC; the period of sentence already undergone by him was treated as the sentence upon him.

10 In this context, the observations of a Bench of this Court in
Crl. Appeal No. 883/2012 & 284/2015

Charan Singh Vs State, reported as 1988 CrL. L.J. NOC 28 (Delhi)

which are relevant and are extracted 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 an 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”.

11 This Court is of the considered view that in this factual matrix, it would be appropriate to convict the accused Gulzar under Section 392 of the IPC. Accordingly, the conviction of accused Gulzar is modified from Section 397 to one under Section 392 of the IPC.

12 Accused Gulzar has already undergone incarceration of 4-½ years.

13 Accused Aslam has already undergone 3 years and 9 months of incarceration. Conviction of Aslam is not assailed. Prayer is that he

should be let off on the period already undergone by him.

14 Both the appellants were young in years on the date of the offence. Accused Gulzar was aged about 23 years and accused Aslam was aged about 25 years. They have already suffered agony of long protracted trial. Their jail conduct has been satisfactory.

15 Keeping in view the aforementioned factual matrix, this Court deems it fit to hold that the period of sentence already undergone by both the appellants be the sentenced imposed upon them. They be released forthwith, if not required in any other case.

16 Appeals disposed of in the above terms.

INDERMEET KAUR, J

AUGUST 20, 2015

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