

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

% *Date of Judgment: 03.09.2015*

+ CRL.A. 1365/2013 & Crl. M.A. No.18554/2014

SALAUDDIN Appellant

Through Mr. Saurabh Kansal and Ms.
Pallavi S. Kansal, Advs.

Versus

STATE NCT OF DELHI Respondent
Through Mr. Kewal Singh Ahuja, APP for
the State

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1 This appeal is directed against the impugned judgment and order on sentence dated 15.02.2011 and 25.02.2011 respectively wherein appellant Salauddin stands convicted under Section 392 read with Section 397, Sections 411/186 and Section 353 read with Section 332 of the IPC. For his conviction under Section 397 read with Section 392 of the IPC, he has been sentenced to undergo RI for a period of 7 years and to pay a fine of Rs. 2,000/- and in default of payment of fine, to undergo Crl. Appeal No.1365/2013

SI for 15 days. For his conviction under Section 186 of the IPC, he has been sentenced to undergo RI for a period of 3 months. For his conviction under Section 353 read with Section 332 of the IPC, he has been sentenced to undergo RI for a period of 2 years and for his conviction under Section 411 of the IPC, he has been sentenced to undergo RI for a period of 1 year. All the sentences were to run concurrently.

2 Nominal roll of the appellant reflects that as on date, he has completed incarceration of about 6 years and 4 months.

3 Learned counsel for the appellant at the outset submits that the conviction of the appellant under Section 397 read with Section 392 of the IPC is ill-founded. Admittedly Section 397 is an individual offence and in the absence of the prosecution having failed to prove its case to the hilt that the “use” of the “deadly weapon” was done by the appellant, his conviction could not have been called for.

4 Attention has been drawn to the record.

5 Record shows that there were four persons who had been apprehended pursuant to the complaint made by Vibhuti Kumar (PW-9).

Version of PW-9 was that on the fateful day i.e. on 19.01.2010 at about
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08:40 pm when he was coming from his factory towards Azad Pur and on reaching near the red light Mahendra Park, four boys aged 20-22 years come towards him and one boy showed him a knife and other boy had a big sword like thing; they snatched his mobile phone. He raised alarm. Boys started to flee. A police officer who was on patrol duty was going on his bike. PW-9 narrated the incident to him (PW-5). PW-5 chased the boys and one was apprehended. As per further version of PW-9, this boy was the person who had caught hold of him by his collar and was the present appellant Salauddin. The other three boys armed with iron rod, danda and baseball bat were also apprehended. One of them hit that policeman on his head (PW-5) as a result of which he fell down. The injured police officer was lifted and taken to the hospital. The statement of PW-9 (Ex.PW-9/A) was recorded. Further version of PW-9 was that four boys were carrying arms; one boy was having a talwar; the other was having a knife; another boy was having a danda and the 4th boy was having a rod. In his cross-examination, he had stated that appellant Salauddin was the boy who had shown him the sword.

6 Constable Sombir (PW-5) was the injured policeman. He has corroborated the version of PW-9 to the extent that PW-9 had told him

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that four boys who had committed robbery upon him were attempting to flee; the first person apprehended by him was one Aslam; out of the four boys, one boy was having danda; the other was having iron rod and third was having sword like object. PCR was called. His statement (Ex.PW-5/A) was recorded.

7 Relevant would it be to note that whereas PW-9 had stated that the person who was first apprehended was appellant Salauddin, PW-5 had stated that he had first apprehended Aslam. The role attributed by PW-9 to Salauddin was that Salauddin had caught hold of him by his collar; in a later part of his deposition, he stated that Salauddin was the person who had shown him the sword. Admittedly the sword has not been recovered. There were three weapons of offence which were recovered and they were one knife, iron rod and danda. The vehement submission of the learned counsel for the appellant is that the role attributed to the appellant is confusing; whereas PW-9 had stated that Salauddin was the person who was first apprehended and caught hold of him by his collar and shown him a sword like object, deposition of PW-5 was to the effect that it was Aslam who had been apprehended first.

Admittedly, the sword like object which was shown by Salauddin was

not recovered.

8 In this context, the following observations of a Bench of this Court in MANU/DE/2866/2013 Dinesh Rai Vs. State are relevant; they read 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 S. 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 S. 397. The accused could be convicted under S. 392.” (emphasis added)”.

9 Reliance by the learned counsel for the appellant on this judgment works in his favour as in the absence of recovery of the weapon on the basis of which the conviction under Section 397 has been founded, calls for a modification of his conviction. This is more so in view of the fact that in the entire judgment passed by the Trial Court, the Court has not discussed even a single line as to what was the special role attributed to the present appellant to convict him under Section 397 whereas all other co-accused have been convicted under Section 392 of the IPC. In fact

the recovery of all the three weapons i.e. danda, iron rod and knife were from three other co-accused and they have been separately convicted under Section 25 of the Arms Act. The sword like object allegedly used by the appellant was never recovered. Moreover in the first part of the version of PW-9, the only role attributed to the appellant was that he had caught hold of him by his collar; as per PW-5 the first person who had been apprehended was Aslam and not Salauddin which is in conflict with the version of PW-9 who had stated that the first person apprehended was Salauddin.

10 Accordingly, benefit of doubt must accrue in favour of the appellant and his conviction under Section 397 is modified to one under Section 392 of the IPC. Noting the above facts as also the nominal roll of the appellant which reflects that he has already undergone incarceration of 6 years and 4 months, the sentence already suffered by the appellant be treated as the sentence imposed upon him. No modification is called for in the fine which has been imposed upon him. Subject to deposit of fine, the appellant be released forthwith, if not required in any other case.

11 With these directions, appeal disposed of.

12 A copy of this order be sent to the Jail Superintendent for intimation to the appellant.

INDERMEET KAUR, J

SEPTEMBER 03, 2015

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