

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

Date of Decision: 29 January, 2016

+ CRL.A. 1244/2011

HARISH ARORA

..... Appellant

Through: Mr. Azhar Qayum & Mr. Munazir Hasan,
Advocates

versus

STATE

..... Respondent

Through: Mr. M.P. Singh, APP for the State.

+ CRL.A. 1391/2013

KULDEEP @ FIRKANCY

..... Appellant

Through: Mr. Azhar Qayum & Mr. Munazir Hasan,
Advocates

versus

STATE

.... Respondent

Through: Mr. M.P. Singh, APP for the State.

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J. (ORAL)

1. Harish Arora (A-1) and Kuldeep (A-2) challenged the judgment dated 23.07.2011 of learned Additional Sessions Judge in Sessions Case No. 1184/2011 arising out of FIR No. 334/2009 under Section 392/397/34 Indian Penal Code, Police Station Model Town vide which they were convicted under Section 392 read with Section 397/34 IPC and the order dated 03.08.2011 vide which they were sentenced to undergo rigorous imprisonment for a period of seven years and fine to the tune of Rs.5,000/- in default to undergo simple imprisonment for one week by filing separate appeals bearing Criminal Appeal Nos. 1244/2011 & 1391/2013.

2. Since both the appeals are arising out of the common judgement as such, they are taken up together.

3. The allegations against A-1 and A-2 are that on 06.10.2009 at about 10:45 pm opposite Sant Kripal Ashram, they committed robbery of a purse containing Rs.15,000/- Credit Card, PAN Card along with other important papers, Bracelet, one chain, one ring and one mobile phone make Nokia 6630 bearing No. 9899923410 belonging to Rajesh

Khanna at the point of knife. Investigating Officer lodged first information report after recording his statement Ex.PW-2/A. The number of mobile phone was placed on CDR to trace its location and on 15.10.2009 it was found that the mobile was working in the area of Nangloi at the address of 40, Camp No. 2, Nangloi, opposite Lokesh Cinema. On 27.10.2009, the police party went to the shop of PW-Raj (PW-5) at Jwalaheri Market where he produced the stolen mobile and informed the police that he had purchased the said mobile from one Kamal Kumar Sharma (PW-1) for a sum of Rs.(1500) and also produced the receipt Ex. PW-5/A. Kamal Kumar Sharma informed the police that he had purchased the said mobile phone from one Dada whom he identified as accused Harish for a sum of Rs.1,000/-. Kamal Kumar Sharma led the police party to Kanhaiya Nagar Metro Station where accused Harish was called. Both accused Harish and Kuldeep came and were apprehended at his instance. They were arrested vide arrest memo Ex. PW-6/A and PW-6/D. An application for conducting Test Identification Parade of both the accused was moved by the Investigating Officer of the case, however, both the accused refused to join the proceedings vide Ex. PW-3/A and Ex. PW-3/B on the ground that they were shown to the witness in the Police station. The third accused involved in the case could not be arrested. After completing investigation, charge-sheet was submitted against both the accused for committing offence under Section 392/397/34 IPC. In order to substantiate its case, prosecution examined as many as eight witnesses. In their statement recorded under Section 313 Cr.PC, they denied the allegations and pleaded false implications. Harish Arora also examined DW-1, his father who deposed that his son Harish Arora was taken by police from his house. Vide the impugned judgment A-1 and A-2 were held guilty and sentenced as mentioned hereinbefore. Being aggrieved, they have preferred the present appeals.

4. During the course of arguments, on instructions, counsel for the appellants, states that the appellants opted not to challenge the findings of the Trial Court for conviction under Section 392 IPC. However, counsel submits that Section 397 IPC is not attracted and conviction therein is untenable. It is further submitted that as regards the appellant – Kuldeep is concerned, he has served the entire sentence and has since been released from jail and as regards the appellant – Harish Arora is concerned, prayer has been made to release him on the period already undergone by him in custody.

5. Since both the appellants have opted not to challenge their conviction under Section 392 IPC and there is overwhelming evidence against them in the form of testimony of PW2 – Rajesh Khanna coupled with the recovery of mobile phone, their conviction under Section 392/34 IPC is confirmed.

6. As regards Section 397 IPC is concerned, learned counsel for the appellants relied upon *Kayum @ Sunil v. State of Delhi*, 2013[3] JCC 1881 for submitting that in that case also the weapon of offence was not recovered, the appellants were ordered to be released on the period already undergone. It will be useful to reproduce the relevant portion of the aforesaid judgment, which is extracted as under:

“5. Under Section 397 IPC, it is to be proved that ‘deadly’ weapon was used at the time of committing robbery or dacoity or grievous hurt was caused to any person. The assailant who actually uses the ‘deadly’ weapon is liable for minimum punishment with the aid of Section 397. The provisions of Section 397 do not create new substantive offence but merely serve as complementary to Section 392 and 395 by regulating the punishment already prescribed.....

6. Section 397 fixes a minimum term of imprisonment. It is imperative for the Trial Court to return specific findings that the ‘assailants’ were armed with ‘deadly’ weapons and it were used by them before convicting them with the aid of Section 397. In the instant case, the evidence is lacking on this aspect and benefit of doubt is to be given to A-1.

7. In Crl.A.515/2010 ‘Gulab @ Bablu vs. The State (NCT of Delhi)’, this court held:

“8. A perusal of the aforesaid provision makes it clear that if an offender at the time of committing robbery or dacoity, uses any deadly weapon or causes grievous hurt or attempts to cause death or grievous hurt to any person the imprisonment with which such offender shall be punished shall not be less than seven years. This provision prescribes minimum sentence which shall be handed down to such an offender. In this case neither the victim has sustained grievous hurt nor there is an evidence that attempt was made to cause death or grievous hurt to the victim nor is there any evidence to show that the knife used at the time of committing robbery was a „deadly weapon“. Simple injuries have been sustained by the victim on his thigh.

9. In „Charan Singh vs. The State“, 1988 Crl.L.J. NOC 28(Delhi), Single Judge has held 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 use 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.”

10. In „Samiuddin @ Chotu vs. State of NCT of Delhi”, 175 (2010) Delhi Law Times 27, a Bench of co-ordinate jurisdiction has held that when a knife used in the commission of crime is not recovered the offence would not fall within the ambit of Section 397 IPC. In „Rakesh Kumar vs. The State of NCT of Delhi 2005 (1) JCC 334 and Sunil @ Munna vs. The State (Govt. of NCT), 2010 (1) JCC 388, it was observed that in the absence of recovery of the knife used by the appellant at the time of commission of robbery charge under Section 397 IPC cannot be established.

11. In the present case, indubitably the knife used for commission of crime was not recovered. Accordingly, in my view, appellant could not have been sentenced under Section 397 IPC and Trial Court has erred on this point.”

7. Reverting to the case in hand, DD No. 46-A [Ex.PW-7/A] was recorded at Police Station Model Town, Delhi by PW-7, ASI Jai Veer Singh, Investigating Officer of the case, who alongwith Constable Ram Kumar reached at Sant Kripal Ashram, Sant Kripal Marg where complainant – Rajesh Khanna met them and gave his statement Ex.PW2/A alleging inter alia that on 06.10.2009 when he was coming back to his house from his uncle’s house on motorcycle No. DL 85AN 5525 and at about 10:30/10:45 pm reached near Kripal Bagh Ashram, he stopped there and was calling to his sister on the mobile. In the meantime, three boys came on black colour pulsar motorcycle and robbed him of his mobile phone, ring, chain, bracelet, cash, purse containing licence, pan card, voter card etc on the point of knife. On the basis of his statement, FIR was registered. However, the accused persons could not be traced. The mobile phone number was got placed to CDR to trace the location of the said mobile which revealed that it was running in the area of Nangloi, Delhi. Thereupon, police party went to the shop of PW5

– Raj, who produced the mobile phone make Nokia – 6630 and informed that he had purchased the said mobile phone from PW1- Kamal Kumar Sharma for a sum of Rs.1500/- vide receipt Ex.PW5/A. Thereafter, he took the police party to the shop of PW1 – Kamal Kumar Sharma who admitted having purchased the said mobile phone from one Dada whom he identified as accused Harish Arora for a sum of Rs.1,000/-. Thereafter, PW1 – Kamal Kumar alongwith Investigating Officer went to Kanhaiya Nagar Metro Station. Accused Harish and Kuldeep came on a motorcycle and on identification of PW1 – Kamal Kumar, both the accused were apprehended and arrested in this case. Both the accused were identified by the complainant in the Police Station. The Investigating Officer arranged for test identification of both the accused wherein they refused to join the proceedings on the ground that they were shown to the witness in the Police Station. The complainant – Rajesh Khanna deposed that accused Harish was the main accused who had come first and pointed the knife at him. However, the Investigating Officer of the case in his cross examination stated that the complainant disclosed to him in his statement that accused Harish Arora remained standing with his motorcycle at a distance of 5/6 ft from him and he did not show any knife to him and did not come close to the complainant in order to snatch anything from him. In view of this discrepancy appearing in the testimony of the complainant as well as Investigating Officer of the case, coupled with the fact that the knife has not been recovered from the appellants’ possession or at their instance, the victim did not sustain any injury nor he had not given description or dimension of the knife used in the incident, it is not established beyond reasonable doubt as to which accused showed knife to the victim while committing robbery. The prosecution, thus, could not establish beyond reasonable doubt which of the appellants was in possession of knife or it was a “deadly weapon” used at the time of commission of offence.

8. In order to return a finding under Section 397 IPC, it is imperative for the Trial Court to return a specific finding that the assailants were armed with “deadly weapon” and it was used by them before convicting them with the aid of Section 397 IPC. In the instant case, finding is lacking on this aspect and benefit of doubt is to be given to them.

9. For the foregoing reasons, while upholding the conviction of the appellants under Section 392 IPC, their conviction under Section 397 IPC is set aside.

10. The Trial Court sentenced the appellants to undergo rigorous imprisonment for a period of seven years and fine to the tune of Rs.5,000/-; in default to undergo simple imprisonment for a period of one week. As per the nominal roll, the appellant – Kuldeep has served the entire sentence and therefore he was released from jail on 26.01.2016.

11. As regards the appellant – Harish Arora is concerned, it was alleged that he was involved in four other cases. However, in the judgment itself it has been noted that he has been acquitted in three cases. However, one case is pending. As per nominal roll dated 25.01.2016, he remained in jail for a period of three years and one month besides earning remission of five months and eight days before his sentence was suspended and he was released on bail on 29.01.2013.

12. Taking into consideration the period of substantive sentence already undergone by the appellant – Harish Arora, his sentence is modified and he is sentenced to the period already undergone by him in this case, while enhancing the quantum of fine to Rs.30,000/-. He is granted four weeks time to deposit fine with the learned Trial Court failing which he is directed to undergo simple imprisonment for a period of two months. Out of fine, if realised, a sum of Rs.25,000/- be paid as compensation to the complainant Rajesh Khanna by learned Trial Court.

13. So far as the appellant – Kuldeep is concerned, since he has already served the entire sentence, no orders qua him are required to be passed.

14. Both the appeals stand disposed of accordingly.

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

(SUNITA GUPTA)
JUDGE

JANUARY 29, 2016/rd