

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

Judgment Reserved on: May 26, 2016

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Judgment Delivered on: May 27, 2016

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CRL.A. 626/2015

ALLU @ MUSHARAFF

..... Appellant

Represented by: Mr.Salman Khurshid, Sr.Adv.
instructed by Mr.Imtiaz
Ahmed, Mrs.Naghma Imtiaz,
Ms.Amra Moosavi, Advs.

versus

STATE NCT OF DELHI

..... Respondent

Represented by: Mr.Ravi Nayak, APP with SI
Vivek Sharma, PS Gokulpuri.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By the present appeal the appellant challenges the impugned judgment dated 21st March, 2015 convicting him for the offences punishable under Sections 392/397/411 IPC and Sections 25/27 Arms Act, 1959 in FIR No.14/2010 registered at PS Jafrabad and the order on sentence dated 27th March, 2015 directing him to undergo rigorous imprisonment for a period of five years and to pay a fine of ₹3,000/-; in default to undergo simple imprisonment for a period of three months for the offence punishable under Section 392 IPC; rigorous imprisonment for a period of seven years for offence punishable under Section 397 IPC; rigorous imprisonment for a period of three years and to pay a fine of ₹1,000/-; in default to undergo simple imprisonment for a period of one months for the offence punishable under Section 411 IPC and rigorous imprisonment for a period of three years and to pay a fine of ₹1,000/-; in default to undergo simple imprisonment for

a period of one month for the offence punishable under Sections 25/27 Arms Act. A compensation of ₹2,000/- was directed to be paid to the victim which was paid by the appellant.

2. The brief facts of prosecution case are that on 19th January, 2010 at 8.35 PM the complainant Munni Lal PW-1 was talking over the mobile phone while crossing the Tentwala School near Ayana Restaurant, Nehar Bazar, 66 Foota Road, Western Carriageway when suddenly three boys surrounded him and snatched his mobile phone. One of the boys took ₹1,000/- from his pocket. When he asked them to return his mobile phone and money, two boys took out knife and threatened to kill him and cause injury and told him to run away. However, when he raised alarm two boys ran away but one boy, who had the knife was apprehended by SI Ashish Kumar, PW-4 who was on patrolling duty with other police staff. On inquiry the name of the boy who was apprehended was revealed as Allu@ Musharraf and on further inquiry the names of other two boys were revealed as Tannu and Annu by the appellant. During search the police recovered a knife and a Nokia Mobile Phone 1209 from the right side pocket of his jeans pant. On the basis of this statement Ex.PW-1/C, FIR was registered under Sections 382/34/411 IPC and Section 27 of Arms Act, 1959. The appellant was arrested by SI Vivek Sharma, PW-7 to whom further investigation was handed over by SI Ashish Kumar, PW-4. Thereafter charge sheet was filed and charges were framed against the appellant under Sections 392/397/34/411 IPC and Section 25/27 of Arms Act, 1959.

3. Learned senior counsel for the appellant contends that the prosecution failed to prove that at the time of the alleged incident, the appellant was holding any knife. Furthermore, the knife alleged to have been recovered

from the possession of the appellant was not sent to the laboratory to seek forensic expert opinion about the finger prints which ought to have been found on the said knife. There are contradictions in the testimonies of the complainant PW-1 and Ct.Mohd.Rahman PW-3. PW-1 deposed that the police reached the spot in Gypsy whereas PW-3 deposed that they were all on foot.

4. Learned senior counsel for the appellant further contends that there is a contradiction in the statement of the complainant PW-1 made before the police and the Court as in the statement recorded before the police he stated that on demanding back the money and the mobile phone, the appellant along with other boys showed him the knife however, before the Court the complainant deposed that one of the boys put knife on his stomach and snatched his mobile phone and purse containing ₹1,000/-. The Learned Trial Court failed to appreciate that no independent witness or any public witness was examined in this case despite the fact that the alleged incident was committed at a public place and the appellant was convicted solely on the basis of the testimony of the complainant and police witnesses.

5. Learned APP for the State on the other hand contends that since the complainant was examined after a period of 2½ years variations in his testimony are bound to take place. However, there are no material contradictions. The appellant was apprehended at the spot by the patrolling party. Thus no Test Identification Parade was required nor any finger prints were required to be taken on the knife which was seized by the police at the spot. The version of Munni Lal, PW-1, the complainant is duly corroborated by the police witnesses who cannot be discarded as interested witnesses. There being no material contradictions, even if the other two accused who

ran away could not be arrested, the appellant is not absolved of the offence committed by him.

6. Before Court Munni Lal deposed in sync with his statement on the basis of which the FIR was registered except for two variations. Firstly in his deposition before the Court he stated that at about 8.35 PM when he was attending his mobile phone three boys came there and one of them put knife on his stomach and they snatched his mobile phone from his hand and removed his purse from the back pocket of his pant containing ₹1,000/-. He objected and raised alarm, hearing which one police Gypsy came there and the four police officials in the Gypsy apprehended the accused however, the two of them succeeded in running away. The knife was recovered from the hand of the appellant who was apprehended at the spot and mobile phone from his formal search. The second variation is that the four police officials came on the Gypsy whereas in the Rukka he stated that they were patrolling on foot. The second variation is not material and has also been deposed by PW-4 SI Ashish Kumar, PW-2, Constable Shive Kumar and PW-3 Constable Mohd. Rahman that they were patrolling on foot. However, the first variation as noted above is material and impacts the offence committed. As per the Rukka after mobile phone and purse were snatched when Munni Lal asked for the return of the two items, the appellant herein showed the knife. Thus the fact that knife was shown before robbing and not after robbing is a material improvement and this part of the testimony of Munni Lal is required to be ignored. Since no weapon of offence was used when the robbery took place, the ingredients of Section 397 IPC are not made out and the offence committed by the appellant would fall under Section 392 IPC.

7. Rest of the version of the appellant is corroborated by the two police witnesses who were on patrolling duty. Merely because they did not produce the DD entry of their departure from the Police Station or they did not associate the public witnesses at the time of recovery their version cannot be belied. Moreover, it is a case where on hearing the alarm of Munni Lal, the police officers ran instantly and apprehended the appellant at the spot with knife and mobile phone was recovered. It would be too unnatural to expect that when they were apprehending the appellant, they must first join the public witnesses and then seize the knife from the appellant. Finger prints on the knife or the mobile phone call records would have only lend corroboration to the testimony of complainant Munni Lal which is otherwise corroborated by the testimony of the two other police witnesses Constable Mohd.Rahman, PW-2 and Constable Shri Bhagwan, PW-5. In the cross-examination of the three police witnesses nothing material could be elicited. Hence version of Munni Lal does not require further corroboration from the finger print expert report or CDR.

8. Considering the evidence on record setting aside the conviction of the appellant Allu @ Musharaff for offence punishable under Section 397 IPC, his conviction for offences punishable under Sections 392/411 IPC and Sections 25/27 Arms Act is maintained. Since the appellant has no previous involvement and is a first time offender, maintaining the sentence for offence punishable under Section 411 IPC and Sections 25/27 Arms Act as awarded by the learned Trial Court, the sentence for offence punishable under Section 392 IPC is modified to a period of three years' rigorous imprisonment and a fine of ₹3,000/-; in default whereof to undergo simple imprisonment for a period of one month.

9. Appeal is disposed of. The appellant will undergo the remaining sentence.
10. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.
11. TCR be returned.

(MUKTA GUPTA)
JUDGE

MAY 27, 2016
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