

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

Date of Decision : March 08th, 2017

+ CRL.A. 200/2002

SUSHIL KUMAR SHARMA Appellant
Through Mr.K.B. Andley, Adv. with Mr.M.
Shamikh , Adv. & Mr.M.L. Yadav,
Adv.

versus

STATE OF DELHI Respondent
Through Mr.Sudershan Joon, APP for the
State.

CORAM:
HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT

P.S.TEJI, J

1. The present appeal has been filed being aggrieved by the judgment of conviction dated 27.02.2002 convicting the appellant under Section 392 read with 397 IPC and order on sentence dated 28.02.2002 vide which the appellant was sentenced to undergo seven years rigorous imprisonment with fine of Rs.2,000/- for the offence under Section 392 read with 397 IPC. In default of payment of fine, the appellant has been ordered to further undergo simple imprisonment for one month.

2. The factual matrix emerging from the record is that on 13.07.1997, an information was received in the police station vide

DD No.28A regarding a robbery. On receipt of the said information, police reached the spot where complainant Aman Bagga met them who stated that he was dealing in lottery business. On 13.07.1997, he along with Mahender Singh and Ram Baksh were counting the payment of lotteries along with prize winning tickets of Haryana, Rajasthan, Nagaland, Manipur and Gujarat States. At about 10.45 p.m. three persons came at the business centre-cum- residence of the complainant. One boy was of fair complexion whereas two others were of wheatish complexion. The boy who was of fair complexion was holding country made pistol in his hand while others had knives. Those persons asked the complainant and his companions not to move, disconnected telephone connection, put them in a bathroom on the point of arms and took the lottery tickets in a bag alongwith cash of Rs.1 lakh. Thereafter, they went away. The complainant broke open the door of the bathroom and came out.

3. On the basis of statement made by the complainant, FIR of the instant case was registered under Section 392/34 IPC. During investigation, it was revealed that one motorcycle bearing no.DL 7SF 2244 was found roaming in the street. Accused Sanjay Kumar, owner of the said motorcycle was apprehended who disclosed the names of other accused persons i.e. Manoj, Virender

Singh, Sushil Kumar Sharma, Ajay, Diwan and Vinod in the conspiracy hatched by accused Manoj and Virender. On 17.07.1997, accused Sanjay was arrested. Thereafter, accused Diwan Singh @ Bablu and Vinod were arrested. Accused Sushil Kumar Sharma was also arrested and at his instance, looted cash, lottery tickets and a knife were recovered. He also got recovered the looted cash and lottery tickets and a knife from his shop. Thereafter, accused Manoj was arrested. After completion of investigation, charge sheet under Sections 395/397/398/412 IPC and Section 25 of the Arms Act was filed in the Court. A supplementary charge sheet was filed against accused Virender for the offence under Sections 395/397/120-B IPC.

4. All the accused persons were charged under Sections 395/397 IPC. Accused Sanjay Kumar Pandey, Sushil Kumar Sharma and Manoj were charged under Section 412 IPC. Accused Sushil Kumar Sharma, Ajay, Vinod and Diwan Singh were also charged under Sections 25/27/54 Arms Act. The charge was thereafter amended and all the accused persons were charged under Section 395 IPC including accused Virender against whom supplementary charge sheet was filed. Accused Diwan Singh, Sushil Kumar Sharm and Vinod were separately charged under Section 395 read with 397 IPC. Accused Virender @ Veeru was

separately charged under Section 120-B IPC. All the accused persons pleaded not guilty and claimed trial.

5. The prosecution had examined 20 in support of its case, namely PW1 Aman, PW2 Mahinder Singh, PW3 HC Shiv Kumar, PW4 Ct.Devender Singh, PW5 HC Suresh Kumar, PW6 HC Rambir Singh, PW7 Insp. P.K. Bhardwaj, PW8 Sh.Atul Kumar Garg, PW9 Dalip Mishra, PW10 Ct.Khursheed Alam, PW11 HC Vijender Singh, PW12 K.K. Upadhyay, PW13 SI Rakesh Chand, PW14 Ram Baksh, PW15 SI Dharam Singh, PW16 Hari Kishan Banga, PW17 SI Chander Pal Singh, PW18 Amit Kumar, PW19 SI Virender Kadyan and PW20 Jagwant Singh.

6. After completion of prosecution evidence, the statements of the accused persons were recorded under Section 313 of the Cr.P.C. The appellant had examined one witness DW-1 Sunil in his defence.

7. The appellant was held guilty by the learned Additional Sessions Judge vide judgment of conviction dated 27.02.2002 and passed the order on sentence on 28.02.2002.

8. Argument advanced by the learned counsel for the appellant is that the appellant was neither named in the FIR nor was he arrested at the spot. It is submitted that the Investigating Officer of the case had shown the photographs of the appellant to the

witnesses, therefore, there was no necessity to hold his Test Identification Parade and the identification of the appellant first time in the Court was of no value. It is further submitted that there is no allegation against the appellant that he had used any knife or any other weapon at the time of alleged offence, therefore, he cannot be convicted under Section 397 IPC. The recovery affected at the instance of the appellant is planted. It is further submitted that the appellant has been acquitted of charge under Section 25 of the Arms Act and as such his conviction under Section 397 IPC is not sustainable. It is further submitted that the testimony of PW1 is full of contradictions and there are material improvements in his testimony which have been ignored.

9. Per contra, argument advanced by learned Additional Public Prosecutor for the State is that the appellant has been rightly held guilty under Section 392 read with Section 397 IPC by the trial court. The complainant and other public witnesses have deposed against the appellant and narrated the role played by him at the time of commission of robbery. There is sufficient evidence against the appellant to hold him guilty and there is no infirmity in the judgment of conviction.

10. Arguments advanced by the counsel for the appellant as well as learned APP for the State were heard.

11. It is apparent from the record that after filing of the present appeal, the sentence awarded to the appellant was suspended vide order dated 30.10.2002.

12. To appreciate the arguments advanced by both the sides, I have gone through their submissions and material available on record meticulously.

13. The complainant in the present case is PW1 Aman Banga. In his testimony, PW1 had deposed that the value of prize winning lottery tickets was about Rs.15-16 lakhs. He deposed that accused Vinod had pointed out a country made pistol on his person and had taken out a purse from the pocket of pant of PW1. He identified the appellant Sushil Kumar Sharma and co-accused Diwan as the one who had entered his premises with co-accused Vinod. He further deposed that they were asked to raise their hands and then the accused persons put them in a bathroom on the point of country made pistol with which he was given blow on his head. While leaving the shop, accused persons had closed the outer gate of the shop and on coming out from the bathroom, they shouted and raised an alarm and then they intimated the police on no.100. Police arrived at the spot and his statement was recorded. He further deposed that the next day, he had informed Haryana State Office about the stolen lottery tickets. He also informed about the

stealing of lottery tickets to Nirmal Agency and Lottery Market. On 15.07.1997, he had given the details of the stolen lottery tickets to the Investigating Officer vide memo Ex.PW1/B to Ex.PW1/J which were seized vide memo Ex.PW1/K. He proved the writing about valuation of the tickets as Ex.PW1/L. He further deposed that the original prize winning tickets were released to him as the same were required to be deposited with the concerned agencies.

14. The other eye witness to the incident is PW2 Mahinder Singh. He had corroborated the testimony of complainant (PW1). PW2 had deposed that on the day of incident, three persons entered the shop/office of the complainant, whereas two persons stood outside. He identified accused Ajay as the one who was holding a knife in his hand and was amongst the boys who stood away from the place where they were sitting with Aman Banga. He also identified accused Sanjay Pandey who was with accused Ajay. This witness deposed that both these accused persons had stood in the room adjoining the room where he was sitting with Aman Banga. PW2 identified accused Sushil Kumar Sharma, Diwan Singh and Vinod as the ones who were carrying knives and country made pistol and had reached to Aman Banga in the room where he was also sitting. He further deposed that on 01.08.1997, he came to the Court and identified the accused Diwan, Sushil Kumar

Sharma and Vinod. He had also identified the looted lottery tickets. He further stated that on 27.07.1997, Aman Banga was handed over the prize winning tickets in original which were robbed by the accused persons.

15. PW14 Ram Baksh, another eye witness to the incident, has also corroborated the testimony of the complainant Aman Banga (PW1) and Mahinder Singh (PW2). PW14 had identified accused Vinod, Sushil Kumar Sharm and Vinod as the robbers, but he could not identify the other accused persons. He categorically deposed that accused Diwan and Sushil were holding knives whereas accused Vinod was holding country made pistol in his hand at the time of incident and accused Diwan had also caught hold of his collar and showed him the knife.

16. From the testimony of the complainant Aman Banga (PW1) and other eye witnesses of the incident, namely, Mahinder Singh (PW2) and Ram Baksh (PW14), it has duly been established that on the day of the incident, appellant Sushil Kumar Sharma along with co-accused persons robbed the complainant of cash worth Rs.1 lakh and the lottery tickets. All three public witnesses duly identified the appellant as one of the robbers and have also stated that he was armed with knife at the relevant time. There is nothing to disbelieve the testimony of these witnesses. The defence had

cross-examined these witnesses at length, but failed to put any dent to their testimony.

17. From the testimony of the above mentioned three public witnesses, it has duly been established beyond any reasonable doubt that on the day of the incident, the appellant along with co-accused persons has committed the robbery of cash worth Rs.1 lakh and lottery tickets from the office of the complainant. It has also been established beyond reasonable doubt that the part of the robbed articles was recovered from the house of the appellant and from his shop. Thus, the offence under Section 392 IPC is duly proved against the appellant and his conviction under Section 392 IPC needs to be upheld.

18. Apart from commission of robbery, the appellant has also been convicted under Section 397 IPC i.e. for using a deadly weapon i.e. knife at the time of commission of robbery.

19. Case of the prosecution is that at the time of robbery, the appellant was armed with a knife and the same was recovered at his instance from his house. To prove the recovery of knife, PW19 SI Virender Kadyan, Investigating Officer of the case had deposed that at the instance of co-accused Sanjay, accused Ajay and Sushil were found present in their house and they were apprehended. Accused Sushil in pursuance of his disclosure statement led us to a

shop and from there, cash of Rs.4800/-, lottery tickets worth Rs.50,000/- and one button operated knife were recovered. Sketch Ex.PW6/U of the knife was prepared and it was seized vide memo Ex.PW6/B. He identified the knife as Ex.P-14 which was allegedly recovered at the instance of accused Sushil Kumar Sharma.

20. From the perusal of testimony of the complainant (PW1) and other eye witnesses (PW2 and PW14), it is apparent that the knife allegedly recovered at the instance of the appellant was not put to them during their examination in the Court to get it identified from them as the one which was allegedly used by the appellant at the time of commission of robbery. Apart from the investigating officer, only the police officials identified the said knife allegedly recovered at the instance of the appellant. The said knife was never put to any public witness to substantiate its case by the prosecution, that it was the same knife which was used by the appellant at the time of incident. No justifiable explanation has come on record from the side of prosecution as to why the knife allegedly recovered at the instance of the appellant was not put to the complainant and other eye witnesses of the incident during their deposition in the Court. It creates a doubt about the story put forth by the prosecution about the manner in which the knife was recovered.

21. As discussed above, this Court is of the considered opinion that the prosecution has failed to prove beyond reasonable doubt that the accused was armed with any weapon what to say deadly weapon at the time of commission of robbery to cover its case under Section 397 IPC. Therefore, the appellant is entitled to be acquitted under Section 397 IPC.

22. From the totality of the discussion made above, this Court is of the considered opinion that the prosecution has successfully established its case against the appellant for the offence under Section 392 IPC. However, it has failed to establish beyond reasonable doubt the offence under Section 397 IPC against the appellant. Consequently, the conviction of the appellant under Section 392 IPC is upheld, however his conviction under Section 397 IPC is set aside.

23. So far as the quantum of sentence is concerned, it is apparent from the record that the incident of the present case took place on 13.07.1997; the appellant was arrested in the year 1997; charge was framed on 22.05.1998; judgment of conviction was passed on 27.02.2002; order on sentence was passed on 28.02.2002; present appeal was filed on 18.03.2002 and now we are in the year 2017. It is apparent from the nominal roll of the appellant that he has already remained incarcerated for more than 5 years in the present

case.

24. Keeping in view the fact that the appellant has been acquitted for the offence under Section 397 IPC and his conviction has been upheld under Section 392 IPC wherein no minimum sentence has been prescribed, it would be in the interest of justice to release the appellant for the period already undergone by him in the present case. The sentence awarded to the appellant is modified accordingly.

25. Appellant is on bail. His personal bond and surety bond are discharged.

26. With the above observations, the present appeal stands disposed of.

(P.S.TEJI)
JUDGE

MARCH 08, 2017
dd