

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on : January 12th, 2017

+ CRL.A. 864/2002
MUSA SINGH

..... Appellant

Through: Mr.Krishan Kumar and Mr.S.P. Nangia,
Advocates

versus

STATE

..... Respondent

Through: Mr.Panna Lal Sharma, Additional Public
Prosecutor for the State with Sub-Inspector
Jasmer Singh, Police Station Jahangir Puri,
Delhi.

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

JUDGMENT

P.S.TEJI, J.

1. Aggrieved by the judgment of conviction dated 25.02.2002 passed by the learned Additional Sessions Judge, Delhi convicting the appellant for the offence punishable under Section 392/397 of Indian Penal Code (hereinafter referred to as I.P.C.) and under Section 25/54/59 of Arms Act, and order on sentence dated 25.02.2002, whereby the appellant has been sentenced to undergo rigorous imprisonment for a period of seven years for the offence under Section 397 IPC; to under rigorous imprisonment for seven years for the offence under Section 392 of IPC with fine of Rs.1,000/- and in default of payment of fine the appellant was directed to undergo

imprisonment for a period of one month and to undergo rigorous imprisonment for a period of 3 years under Section 25 of the Arms Act with fine of Rs.1,000/-, in default of payment of fine he shall further undergo imprisonment for one month, the present appeal has been filed.

2. Factual matrix of the instant case is that present case is registered at the instance of injured Sanjay @ Lalit Mohan, who stated in his statement before the SI Ajmer Singh that on 25.04.1999, he alongwith his friend Raju had come from Chandigarh to Delhi to meet his sister living in Rohini. As he misplaced her address slip, and despite best efforts he could not search the house of his sister and to spend the night they came to Azad Pur Subzi Mandi. At about 10.00 PM they slept on the fad of Subzi Mandi in the night. In the morning he alongwith Raju went to nearby Mahindra Park pond, which was near a liquor shop for meeting the call of nature. One boy was also sitting there who came to them and enquired about the place from where they had come. He apprised him that they had come from Chandigarh and were going back the same day. He asked them to give whatever they had to him, otherwise he would tear their abdomen. It is further stated that they told him that they had money only for the bus fare. At about 10 AM of 26.04.1999, he took out knife from the right pocket of his pant and stabbed on complainant's left thigh. He raised noise saying 'bachao-bachao' and thereafter fell down. He took out Rs.300/- from his shirt's pocket. His fellow Raju got frightened. On raising noise, some people came there and addressed the accused as

‘Musa’ and said that ‘Musa had not done good by stabbing him’. Regarding identity of Musa, he stated that the accused had a scar of old injury near his right eye and was of wheatish colour with height of 5 feet 5 inch and well built. It is further stated that he can identify him on seeing.

3. After recording the statement of the injured, rukka (Ex.PW-5/A) was prepared and FIR was registered. During investigation, an information was received that the appellant was present near Punjabi Dhaba. Sub-Inspector Ajmer Singh organized a raid and requested some passersby to join them but they denied. They reached at the place indicated by the informer and at pointing out by complainant Sanjay, apprehended the appellant at about 5.00 PM. He was found to be in possession of spring actuated knife (buttondar). The accused was separately challaned under Section 25/54 & 59 of the Arms Act vide FIR No.238/1999.

4. Charges under Section 394/397/411 IPC in FIR No.237/1999 and under Section 25/54/59 Arms Act in FIR No.238/1999 were framed against the appellant to which he pleaded not guilty and claimed trial.

5. In support of its case, prosecution examined eight witnesses. They are, Sub-Inspector Sumitra (PW-1), Jaiveer Singh (PW-2), Raju (PW-3), Dr. V.P. Sharma (PW-4), Sub-Inspector Ajmer Singh (PW-5), Head Constable Om Prakash (PW-6), Constable Sunder Lal (PW-7), Lalit Mohan @ Sanjay (PW-8).

6. After conclusion of prosecution evidence, all the incriminating evidence against the appellant was put to him. The appellant, in his statement recorded under Section 313 Cr.P.C. claimed innocence.

7. After considering the facts, evidence led and the material placed on record, the learned Additional Sessions Judge held the appellant guilty for an offence punishable under Section 392, 397 of IPC and under Section 25 of Arms Act.

8. The appellant has filed the instant appeal challenging the aforesaid judgment on conviction as well as order on sentence. During pendency of the present appeal, the sentence imposed upon the appellant was suspended vide order dated 27.02.2003.

GROUND OF CHALLENGE

9. The conviction has been challenged mainly on the ground that no such incident had happened. Different versions have been given by the complainant and Raju while deposing in the Court. There are contradictions in their testimony which affects the case of prosecution. The prosecution has not been able to prove its case beyond reasonable doubt against the appellant. No opinion of the doctor on the recovered knife was obtained. It was submitted that the complainant and his friends were drug addicts and under intoxication, they were robbed by some other persons, but the appellant has been falsely implicated in the present case when he went to Azadpur Mandi to purchase lemons. On the quantum of sentence, it is submitted that the appellant is the only bread earner of the family and has two children. The appellant

has already undergone a period of 5 years, 3 months and 26 days and also earned remission for 11 months and 26 days. Since the incident relates back to the year 1999 and the appellant has faced the agony of trial and incarceration, as indicated above, the sentence imposed upon the appellant may be reduced to the period already undergone by him.

10. Per contra, learned Additional Public Prosecutor for the State has vehemently opposed the aforesaid contentions raised on behalf of the appellants and submitted that the judgment and order on sentence as passed by learned Additional Sessions Judge do not suffer from any irregularity or illegality and is passed with a reasoned order. It is further submitted that there is recovery of buttondar knife from the appellant and he has been charged with the offence under Section 392/397 of IPC, therefore, the judgment of conviction and order on sentence are not liable to be interfered with.

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

12. The main star witness of the prosecution in the instant case is injured Lalit Mohan (PW8). He had deposed that on 25.04.1999, he along with his friend Raju came to Delhi to meet his sister at Rohini. When he along with his friend Raju reached Loni, a slip containaing address of his sister misplaced and at about 10 pm they slept at fruit mandi, Azadpur. In the morning, PW8 along with Raju went towards Mahindra Park to ease out. PW8 saw the appellant sitting in the deserted house and the appellant asked PW8 from where he came.

PW8 told the appellant that he came to Delhi from Chandigarh. Appellant-Musa asked him to hand over whatever money he had. Thereafter, appellant took out a knife from his right pocket of trouser and assaulted on the the thigh of PW8. PW8 handed over money to the appellant due to fear. Then he cried for help and the appellant took away Rs.300/- i.e. two currency notes in the denomination of Rs.100/- and two currency notes in the denomination of Rs.50/-. 2-3 persons came there and addressed the appellant as Musa saying that he had not done good and that is how the witness (PW8) came to know about the name of the appellant as Musa. Police recorded his statement Ex.PW1/A. PW8 further deposed that he fell down due to the assault and his friend Raju helped him. In the meanwhile, police officials reached the spot and took him to the hospital where he was medically examined. His statement was recorded in the hospital. Police brought him back to the spot and at his instance, site plan was prepared. An informer came at the spot and informed about the presence of the appellant at some place. Thereafter, PW8 along with Raju and police official accompanied the informer and appellant was found standing at a hotel. The appellant was apprehended and from his search, one knife was recovered from his pocket. Sketch Ex.PW2/A of the knife was prepared and it was seized vide memo Ex.PW2/B. Police took the pant of PW8 into possession vide memo Ex.PW2/C. Money of PW8 which was taken away by the appellant was also recovered from the appellant and the same was seized vide memo Ex.PW2/H. Accused was arrested vide memo Ex.PW2/F.

PW8 identified the button actuated knife as Ex.P3 as the same which was recovered from the possession of the appellant. He also identified his pant as Ex.P-2 which was seized by the police. He identified the currency notes amounting to Rs.300/- as Ex.P-1 which were robbed by the appellant from him. PW8 was cross-examined at length. During cross-examination, he denied that Raju was not accompanying him at the time of incident or that he was alone. He stated that Raju tried to intervene but he was frightened. He denied that the injury sustained by him was minor and simple. He denied that the appellant did not inflict knife blow on him or that appellant was not present at the spot or that site plan was not prepared on his pointing out.

13. Testimony of injured witness (PW8) was duly corroborated by another eye witness Raju (PW3). He had deposed that in the year 1999, he came from Hapur along with Lalit Mohan @ Sanjay. They reached at night. Address of sister of Sanjay was misplaced. They slept at Azad Mandi. At 10 a.m., they went to ease themselves. One person Musa (appellant-herein) came there and asked them as to from where they came. They told the appellant that they came from Chandigarh. PW3 was having Rs.900/- and Sanjay was having Rs.1100/-. The appellant took away that amount and he was having knife at that time. Appellant threatened to kill them and also gave them beating. Appellant was having knife in his pocket. Appellant first gave fist blows and put knife on the abdomen of PW3 and thereafter gave knife blow to Sanjay/Lalit Mohan on his thigh.

Thereafter, the appellant was apprehended. A knife was recovered from the person of the appellant.

This witness (PW3) during his cross-examination by the learned APP for the State stated that the incident took place on 26.04.1999. They raised the alarm at the time of knife assault by the appellant but none came there. Though he denied having stated to the police that Rs.300/- were taken by the appellant from the pocket of Sanjay, but he voluntarily stated that much amount was taken by the appellant.

14. Constable Jaiveer Singh (PW2) had deposed that on the date of incident i.e. 26.04.1990, he alongwith Sub-Inspector Ajmer Singh went to outer gate Fruit Mandi, Near Libra Petrol Pump and came to know that no quarrel took place. When he reached near Talabwala park, Constable Pawan Kumar met him and told about the incident and handed over DD No.14A to investigating officer. When they reached at country wine shop near Mahindra Park, they found several persons gathered there and investigating officer enquired from public and they were told that one boy has been injured with stab injuries and the injured has been taken to HRH Hospital by his colleague. They went to HRH Hospital, MLD of the injured obtained and doctor declared the patient fit for statement. Statement of injured recorded, rukka was prepared and handed over to him for registration of case. He had further deposed that during investigation they came to know through somebody that accused wanted in the case is present in front of Punjabi Dhaba. Thereafter, on pointing out by injured, accused was apprehended by investigating officer and during his formal search one

buttondar knife was recovered from the right side pocket of the pant. Sketch of knife was prepared. It is further deposed that during interrogation of the accused, he made disclosure statement that he had kept the amount of Rs.300/- pertaining to this case in attachie and can get the same recovered. Then the accused took them to his house and got recovered the cash amount of Rs.300/- from his attachie. The two notes were of denomination of Rs.100/- and two of Rs.50/-, the same were collectively exhibited as P1. In his cross-examination, he had deposed that they had received call at 11 am, when they were on patrolling duty at Libra crossing. They reached the place of incident within five minutes and thereafter reached HRH Hospital at 11.45 am. Statement of injured was recorded in his presence. He further deposed in his cross-examination that during patrolling, some informer gave information about the accused. Informer stayed with them for ½ minutes, he did not disclose identity of accused. Thereafter, investigating officer brought injured at spot. He deposed that he had apprehended the accused but despite request, nobody came forward as witness to the recovery.

15. The injured witness Lalit Mohan @ Sanjay (PW8) has duly supported the case of the prosecution. He has specifically stated in his deposition that on the day of incident when he along with his friend Raju (PW3) went to ease out, appellant came there and demanded whatever they had. He has specifically stated that the appellant took out a knife from his pant and gave a blow on the thigh of the injured and then took out Rs.300/- from the pocket of the injured. This

witness duly identified the robbed amount of Rs.300/- in the Court during his deposition which was recovered from the appellant when he was apprehended. He had also identified his pant and the knife which was used by the appellant in assaulting him and which was recovered from the possession of the appellant at the time of his apprehension. Another eye witness of the incident i.e. Raju (PW3) has duly corroborated the testimony of PW8 Lalit Mohan @ Sanjay to the effect that the appellant robbed them on the day of incident and also gave knife blow on the thigh of Lalit Mohan. He had also corroborated that the appellant was arrested from near the spot.

16. The testimony of the injured witness Lalit Mohan @ Sanjay (PW8) is found to be reliable and trustworthy and nothing has been brought on record to raise any doubt on his testimony. Though he was cross-examined at length by the defence, the defence had failed to put any dent on his testimony. He remained stuck to his stand that it was the appellant who robbed him of Rs.300/- on the day of incident after giving knife blow on his thigh. He had also stated that after apprehension of the appellant, robbed money and knife were recovered from him which were seized by the police. The testimony of PW3 Raju is also corroborative in nature and inspires confidence of the Court. Their testimony are found to be natural and trustworthy.

17. From the aforesaid deposition of the material witnesses, i.e., injured (PW-8) and Raju (PW-2), the robbery of sum of Rs.300/- by the appellant, use of deadly weapon i.e. knife at the time of commission of robbery, the recovery of weapon of offence, recovery

of amount of Rs.300/-, causing injury to the injured has been established against the appellant. Though there are minor discrepancies in the timing, etc., but that cannot go to the root of the matter. There are also some contradictions in the testimony of PW3 Raju with regard to amount robbed, but he had admitted that the money was robbed by the appellant from them on the day of incident. It has also been well established that at the time of apprehension of the appellant, button actuated knife was recovered from him which duly covers the case of prosecution against the appellant under Section 25 of the Arms Act.

18. A cumulative consideration of the overall evidence on the facts of the present case, this court does not find any merit in the contentions raised by the appellants and does not find any irregularity or infirmity in the impugned judgment on conviction of the appellant, thereby convicting for the offence punishable under Section 392/397 of IPC and Section 25/54/59 of arms Act and the same deserves to be dismissed.

19. Perusal of order on sentence passed by the trial court shows that the appellant has been sentenced separately for the offences under Section 392 and 397 IPC apart from sentencing him under Section 25 of the Arms Act. In the considered opinion of this Court, there is no need to pass the sentence against the appellant separately under Section 392 IPC when he has been sentenced under Section 397 IPC for the reasons that the punishment for committing robbery is specified in Section 392 IPC, but in a case where an accused uses a

deadly weapon at the time of commission of robbery, he is liable to be punished under Section 397 IPC as it is an aggravated form of Section 392 IPC. Section 397 IPC does not constitute an independent offence inasmuch as it is related to robbery only and for this reason, accused is sentenced under Section 397 IPC where the offender uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person.

20. If the robbery or dacoity is committed by a group of persons and one or any person uses a deadly weapon, the embargo of Section 397 IPC for the award of sentence is not less than seven years under Section 397 IPC would apply. In other words, an accused using a deadly weapon is liable to be sentenced under the charging section of robbery or dacoity but the sentence shall be subject to the embargo of Section 397 IPC of having not less than the minimum sentence of seven years. In the nutshell, Section 397 IPC does not prescribe the sentence separately but it enhances the sentence and fixes the minimum sentence of seven years for the person using a deadly weapon during commission of robbery or dacoity and he is to be sentenced under the sections such as 392, 393, 394, 395 and 396 IPC. In other words, Section 397 IPC is a aiding section to the substantive offence putting the bar on the minimum sentence of not less than seven years.

21. Section 397 IPC is an aiding section for the purpose of converting minimum sentence of not less than of seven years while awarding sentence under the substantive offence of robbery or dacoity

and it does not provide any substantive sentence to be awarded under Section 397 IPC just putting the embargo of minimum sentence of not less than seven years.

22. Keeping in view the above facts and circumstances and the discussion made above, the judgment of conviction is hereby upheld and the order on sentence is modified to the extent that he is to undergo rigorous imprisonment for seven years for the offence under Section 392 read with 397 IPC. Separate sentence under Section 397 IPC is set aside as not sustainable. Remaining order on sentence and imposition of fine is upheld.

23. Appellant is on bail. His bail bond and surety bonds are forfeited. He is directed to surrender before the trial court within fifteen days to serve out remainder of his sentence.

24. A copy of this order be sent to the Trial Court for information and necessary steps.

25. With aforesaid directions, the present appeal is disposed of.

(P.S.TEJI)
JUDGE

JANUARY 12, 2017
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