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

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Date of Decision: September 15, 2017

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CRL.A. 944/2001

SHYAM SUNDER

..... Appellant

Through: Mr.Awnesh Madhukar, Adv.

Versus

STATE

..... Respondent

Through: Mr.Kewal Singh Ahuja, APP
for the State with SI Om
Prakash, PS Parliament Street

PRATIBHA RANI, J. (Oral)

1. The appellant Shyam Sunder has been convicted by the learned Trial Court for the offence punishable under Section 397 IPC for committing the robbery at knife point. He has been sentenced to undergo RI for 7 years and to pay a fine of ₹500 in default to undergo RI for six months.

2. This appeal has been preferred by him challenging his conviction and the sentence awarded to him for committing the offence punishable under Section 397 IPC.

3. In brief the prosecution case as narrated in the complaint Ex.PW-3/A is that on 4th July, 2000 the complainant Sh. Shyam Sunder Gupta (PW-3) along with his friend Martin (PW-4) was travelling in bus route no.729. He was carrying ₹8,000/- in his pocket.

When the bus reached Gol Dak Khana and took turn towards Pt.Pant Marg, he was surrounded by four persons. Suspecting them to be pick-pocket his friend Martin asked him to come in the rear portion. When the bus reached at the Bus Stop, Pandit Pant Marg, they decided to travel by another bus and got down. All those four boys also got down and one of them took out a long knife and while showing the knife, asked them to hand over whatever they had and took out the money from the pocket of complainant and started running towards Talkatora road. The complainant along with his friend Martin chased them and also raised alarm. While three persons managed to escape, the appellant, who was carrying a knife in his hand, was caught by them with the help of one person. The appellant informed that his associates have run away with the money. The PCR van took all of them to the police station where the offender Shyam Sunder along with knife was handed over to SI Sanjeev Kumar Verma PS Parliament Street.

4. On the basis of the above complaint Ex.PW-3/A, FIR No.192/2000 under Section 392/34 IPC and Under Section 27/54/59 Arms Act (Ex.PW1/C) was registered at PS Parliament Street. After completion of the investigation, the appellant was sent to face trial for the offences complained of.

5. The appellant Shaym Sunder was charged for committing the offence punishable under Section 397 IPC to which he pleaded not guilty and claimed trial.

6. The prosecution has examined five witnesses in all to bring home the guilt of the appellant. In his statement recorded under

Section 313 Cr.P.C., the appellant denied his involvement in the said occurrence and claimed himself to be innocent. The appellant has examined two witness i.e. Sh.Jagbir Singh, Record Clerk, RML Hospital as DW-1 and his wife Smt.Bhago as DW-2. Thereafter Ct.Raj Kumar has also been examined as CW-1 on 3rd November, 2001.

7. After trial, the learned ASJ held the appellant guilty for the offence punishable under Section 397 IPC for the following reasons:-

(i) The complainant and his friend Martin (PW-4) are not residents of Delhi. The statement of the complainant that he was robbed at knife point has remained unchallenged.

(ii) The complainant version that accused has fallen down while running away from the spot stands corroborated from the version of constable Raj Kumar.

(iii) Non-recovery of looted cash has no effect on the prosecution case and recovery is not a condition precedent for conviction for the offence of robbery.

8. The appellant has not been separately charged for the offence punishable under Section 27/54/59 IPC nor he has been convicted for the said offence.

9. Mr. Awnesh Madhukar, who was appointed as amicus curiae for the appellant, has submitted on instructions that it is a case where no recovery has been effected from the appellant. There are material contradictions in the statement of the material prosecution witnesses i.e. PW-3, Shyam Sunder Gupta and PW-4, Martin as to how the occurrence has taken place and in what manner the appellant has been

apprehended. It has been submitted that Raj Kapur - one of the associate of the appellant to whom the money was allegedly given, though traceable but was not even arrested to effect the recovery. So far as the appellant is concerned, only knife is claimed to be recovered from him. It has been contended that knife was planted just to make the offence more serious. It is improbable that while committing the robbery with a long knife in hand, the complainant or his friend or the other person who remained unnamed, but with whose assistance the appellant was stated to have been apprehended, would not suffer even a scratch/injury on their person and the appellant would not use the knife to free himself from the clutches of the complainant or his friend.

10. Learned APP for the State has submitted that in this case, the two public witnesses i.e. PW-3 Sh.Shyam Sunder and PW-4 Sh.Martin had no enmity with the appellant and they had absolutely no reason to make a false complaint against the appellant. It is further submitted that the impugned order needs no interference which has been based believing the testimony of the public witnesses.

11. Perusal of the LCR shows that the DD entry No.14A Ex.PW-1/A dated 4th July, 2000 was recorded pursuant to the telephonic information received at about 12.38 p.m. from D-50, NDCR that Constable Rakesh had informed about one pick-pocket being caught at Talkatora Road, Pt. Pant Marg. The DD entry was marked to SI Sanjeev Kumar and sent to him through Constable Shyam Neelvaran for necessary action. The informant Constable Rakesh Kumar has not been cited as a witness. The person who assisted the complainant and

his friend in apprehending the appellant has remained unnamed. It is neither stated by the complainant Shyam Sunder Gupta (PW-3) nor by his friend Martin (PW-4) as to who had disarmed the appellant and produced the knife before the PCR/Local police.

12. As per the complaint Ex.PW-2/A the occurrence has taken place at Pt.Pant Marg bus stop and after chasing for some distance the appellant has been apprehended. Neither the bus stand nor the place of apprehension of the appellant is shown in the site plan Ex.PW5/A. The distance covered to chase the person who had committed robbery was not reflected in the site plan. Even if this is ignored, the arrest memo Ex.PW-5/B shows that there is over-writing on the time of arrest as 1.45 a.m. has been changed to 2.45 p.m. without even putting initial on the correction. The personal search memo Ex.PW-1/D shows that nothing was recovered during his personal search. As per prosecution the appellant was travelling in the bus and at least the bus ticket or to buy ticket, some money would have been kept by him. But, *Jama Talashi* has been shown as 'Nil'.

13. The appellant, who has been produced from the judicial custody, submits that he has spent more than four years in custody in this case. He further submits that at the most the prosecution case can be that he was a pick-pocket and for that he could have been convicted under Section 379 IPC and if as per the prosecution case if some criminal force has been used it could not have been under Section 397 IPC but he has been convicted under Section 397 IPC on the basis of statement that a knife has been used for commission of the crime. The appellant has submitted that no one has suffered even a scratch in this

case rather he suffered multiple injuries as recorded in his MLC Ex.DW1/A. Since Neither any knife has been recovered from him nor any injury was suffered by anyone, the appellant could not have been convicted under Section 397 IPC on the basis of statement of PW-3 Sh. Shyam Sunder Gupta - the complainant and his friend PW-4 Sh.Martin or CW-1 Ct.Raj Kumar.

14. The statement of the complainant and his friend Martin is to the effect that on suspecting that four persons present in the bus were pick-pocket they got down from the bus may be creditworthy. However, the entire prosecution story thereafter is full of material contradictions on all material points. There are many flaws in the prosecution story so far as use and recovery of knife is concerned. The endorsement Ex.PW5/C made on the rukka Ex.PW-3/A needs to be referred for this purpose. As per the endorsement Ex.PW-5/C SI Sanjeev Kumar Verma on receiving DD No.14/A regarding apprehension of a pick pocket at Pt.Pant Marg proceeded to that place along with Constable Shyam Neelvaran. On the way he met Constable Ram Singh No.1334/PCR (PW-2) who informed that complainant and accused were being taken to the police station. Then along with PCR Van also he reached the police station where the complainant made his statement Ex.PW-3/A and produced the knife, sketch of which was prepared on a paper. Complainant Shyam Sunder Gupta, PW-3 during his examination-in-chief did not state that when they (PW-3 & PW-4) were chasing the appellant, CW-1 Ct.Raj Kumar apprehended the appellant. In his examination-in-chief his version is that the knife was with the accused when he was brought to the police station from the

spot. It is highly improbable that a robber with a knife in his hand would be allowed to carry the knife in his hand till he was taken by the PCR Van to the police station.

15. It is necessary to mention here that in the complaint Ex.PW-3/A there is no mention of any injury being suffered by the accused Shyam Sunder either at the hands of complainant PW-3 Sh.Shyam Sunder Gupta and his friend PW-4 Sh.Martin or by any public person.

16. PW-3 Sh.Shyam Sunder Gupta - the complainant did not state that public persons gathered at the spot and gave beatings to the accused. Constable Raj Kumar (CW1), who as per prosecution case apprehended the accused when he was being chased by PW-3 Sh.Shyam Sunder Gupta & PW-4 Martin.

17. CW-1 Ct.Raj Kumar when examined as CW-1 stated that he was on duty at Rastrapati Bhavan on 4th July, 2000 and on that day when he was going towards Gol Dak Khana, he saw the accused running with a knife in his hand and was being chased by the two persons. In order to frighten the accused he picked up a stone and made gesture to throw it towards him due to which the accused fell on the road. CW-1 Constable Raj Kumar apprehended the accused and in the meantime the two other persons (PW-3 & PW-4) who were chasing him also reached there. They informed that he had robbed them. One traffic constable informed the PCR. In cross-examination CW-1 Constable Raj Kumar has stated that he had also accompanied the complainant and his friend in the PCR vehicle and remained in the police station for about 20-25 minutes. Thus, as per the statement of CW-1 no injury was received by the accused due to any beating given

by PW-3, PW-4 or by any public person. The version of PW-3 before the Court was not that any injury was received by the accused at the hands of public person. PW-4, Martin who accompanied the complainant has another explanation for the injuries suffered by the accused. As per him the accused suffered injury while he was trying to board the bus which was successfully boarded by his three associates. As per PW-4, Martin the person who caught the accused, alighted from the same bus which is contrary to the statement of CW-1 in this regard.

18. SI Sanjeev Kumar, PW-5 the investigating officer during his cross-examination stated that the accused was not having any visible injury and that he was sent for medical examination about 3.00-4.00 p.m. He admitted that due to serious medical condition of the appellant, the Court declined to grant police custody of the accused. SI Sanjeev Kumar has admitted that Raj Kapur was disclosed to be the person who had taken the money and despite the fact that Raj Kapur was very much traceable as he was residing along with his family members, he (Investigating Officer) preferred not to arrest Raj Kapur and seek recovery from him.

19. DW-1, Jagbir Singh, record clerk of RML Hospital produced the copy of the MLC of the accused exhibited as DW-1/A. As per the MLC the accused had suffered the following injuries:-

- (i) Bruises over right eyelid (upper)
- (ii) Swelling over right side of nose
- (iii) Bruises over back (interscapular region)
- (iv) Bruises over left thigh

(v) Swelling over right scrotum

20. For the reasons best known to the investigating officer he preferred not to even place on record the MLC of the accused. The nature of the injuries suffered by the accused could not have been due to the beatings given by the public. At the cost of the repetition it can be mentioned that neither the PW-3 and PW-4 nor CW-1 Constable Raj Kumar stated about beatings being given to the accused by the public persons. Even PW-2 Constable Ram Singh did not state that when PCR van reached the spot, he saw public persons giving beating to the accused. The accused who was armed with a long knife in his hand would not have allowed the public beat him without putting any resistance.

21. The appellant has neither been charged nor convicted for committing the offence punishable under Section 27/54/59 IPC.

22. Taking into consideration the entire facts and circumstances of the case, the conviction of the appellant under Section 397 IPC cannot be sustained.

23. Although no recovery has been effected from the appellant and Raj Kapur to whom the money was allegedly handed over who has neither been arrested nor prosecuted though he was very much available as admitted by PW-5 SI Sanjiv Kumar – the investigating officer, the appellant is convicted for committing the offence punishable under Section 392 IPC as to that extent, he is not disputing his role.

24. Accordingly, the appeal is partly allowed. The appellant is convicted under Section 392 IPC and sentenced to undergo RI for

four years. The sentence of fine of ₹500/- imposed by the learned Trial Court is maintained but the period to be undergone in default is reduced to SI for three days.

25. The wife of the appellant is present today in the Court and submits that fine if not already deposited, she will deposit the same before the Jail Superintendent, today itself.

26. As per the nominal roll as on 14th September, 2017 he has remained in judicial custody in this case for 3 years, 11 months and 6 days of sentence and earned remission of 1 year, 2 months and 18 days. The unexpired period of sentence is 1 year 10 days and 6 months. Since the appellant has already undergone the sentence awarded to him the appellant shall be released from the jail forthwith, if not wanted in any other case.

27. TCR be sent back alongwith copy of this order.

28. Copy of this order be sent to the concerned Jail Superintendent for information and compliance.

29. Copy of order be also given *dasti* to the counsel for petitioner under the signature of the Court Master/Private Secretary.

PRATIBHA RANI
(JUDGE)

SEPTEMBER 15, 2017
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