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

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Date of Decision: December 01, 2017

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CRL.A. 333/2011

DIG BAHADUR @ RAHUL @ VINOD Appellant

Through: Ms.Saahila Lamba, Advocate
(DHCLSC)

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 has preferred this appeal assailing the judgment dated 8th February, 2011 and order on sentence dated 14th February, 2011 passed in Session Case No.44/2008 (in FIR No.822/2007 under Sections 342/381/397/395/412/34 IPC, PS Prashant Vihar) whereby he has been convicted for committing the offence punishable under Section 392 read with Section 397 IPC and sentenced to undergo RI for seven years with fine of ₹5,000/- and in default of payment of fine to undergo SI for five months.

2. Ms.Saahila Lamba, learned counsel for the appellant has submitted that this appeal is being pressed to the extent of challenging his conviction under Section 397 IPC as the ingredients of Section

397 IPC are not satisfied. Learned counsel for the appellant submits that as neither the knife, allegedly used at the time of commission of robbery, has been recovered nor the description of the knife has been given by PW-2 Smt.Kavita – the complainant, to prove that the appellant had used deadly weapon at the time of commission of robbery, the conviction of the appellant under Section 397 IPC is not justified. The defence counsel has relied upon decision of this Court in Gulab @ Bablu vs. The State (N.C.T. of Delhi) in CrI.A.515/2010 wherein it was held as under:

“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 ICP and Trial Court has erred on this point.”

3. Mr.Kewal Singh Ahuja, learned APP for the State has submitted that to convict a person for the offence punishable under Section 397 IPC, the requirement is about the use of deadly weapon in commission of robbery/dacoity. Hence merely because the knife has not been recovered, it cannot be made a ground to acquit the appellant for the

offence punishable under Section 397 IPC. It has been further submitted that since the knife has been used at the time of commission of robbery and the complainant has nowhere stated that it was a vegetable cutting knife, and the purpose of the appellant was to create a fear in the mind of PW-2 Smt.Kavita – the complainant and it amounts to use of deadly weapon while committing the robbery. Thus the appellant has been rightly convicted for committing the offence punishable under Section 392 IPC read with Section 397 IPC.

4. I have considered the rival contentions and carefully gone through the record.

5. The appellant Dig Bahadur @ Rahul, who was associate of the two Nepali servants namely Kancha and Inder Bahadur employed at the house of the complainant, has been duly identified by PW-2 Smt. Kavita stating that the appellant had visited her house earlier also to meet Kancha and Inder Bahadur. Thus, the identity of the appellant is not in dispute.

6. The identity of the appellant has not been disputed. His identity is duly established as the participant in the commission of robbery along with the two servants namely Kancha and Inder Bahadur, employed by PW-2 Smt.Kavita (the complainant) as servants, a few months prior to this incident. The sole question that needs to be examined is whether the conviction of the appellant under Section 397 IPC is justified.

7. In respect of the incident dated 14th November, 2017 at the house of PW-2 Smt.Kavita, criminal law was set into motion when information was received at PS Prashant Vihar, vide DD No.21A

Ex.PW5/A. The information given to the PCR was:

‘C-2/16 Prashant Vihar Naukar aurat ko bandhak banakar lootkar chale gaye hain’.

8. The DD was assigned to SI Ramphal who reached the spot and recorded the statement Ex.PW2/A of complainant Smt.Kavita. The statement Ex.PW2/A made by PW-2 Smt.Kavita – the complainant is to the effect that she is a housewife. On 14th November, 2007 she was alone at her house and two Nepali servants employed by them three months and five months prior to this incident, whose police verification was not got done, were also present at the house. On that day at about 10.50 am one of associate of her two servants came to her house. All three of them dragged her from the kitchen and confined her in the bathroom. Thereafter, they took away the cash of ₹10 lakh, jewellery containing one gold chain weighing 3 tolas and four gold bangles weighing four tolas from the Almirah. After they left, she forced open the door of the bathroom and informed her family members who in turn informed the PCR. On the basis of above statement case FIR No.822/2007 under Sections 342/381/397/395/412/34 IPC was registered at PS Prashant Vihar.

9. Since the appellant is challenging his conviction only to the extent of his conviction under Section 397 IPC, it has to be considered by this Court whether on the basis of the statement made by PW-2 Smt.Kavita, the ingredients of Section 397 IPC have been proved by the prosecution so as to maintain his conviction for the aforesaid offence.

10. In the decision reported as Dilawar Sinvh vs. State of Delhi

(2007) 12 SCC 641, the ingredients of Section 397 IPC and the meaning of the word “offender” for the purpose of Section 397 IPC have been discussed by the Hon’ble Supreme Court as under:

“22. The essential ingredients of Section 397 IPC are as follows:

1. Accused committed robbery.

2. While committing robbery or dacoity (i) accused used deadly weapon (ii) to cause grievous hurt to any person (iii) attempted to cause death or grievous hurt to any person.

3. "Offender" refers to only culprit who actually used deadly weapon. When only one has used the deadly weapon, others cannot be awarded the minimum punishment. It only envisages the individual liability and not any constructive liability. Section 397 IPC is attracted only against the particular accused who uses the deadly weapon or does any of the acts mentioned in the provision. But other accused are not vicariously liable under that Section for acts of co-accused.

23. As noted by this Court in Phool Kumar v. Delhi Administration MANU/SC/0210/1975 : [1975]3SCR917, the term "offender" under Section 397 IPC is confined to the offender who uses any deadly weapon. Use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397 IPC for the imposition of minimum punishment on another offender who had not used any deadly weapon. There is distinction between 'uses' as used in Sections 397 IPC and 398 IPC. Section 397 IPC connotes something more than merely being armed with deadly weapon.

24. In the instant case admittedly no injury has been inflicted. The use of weapon by offender for creating terror in mind of victim is sufficient. It need not be

further shown to have been actually used for cutting, stabbing or shooting, as the case may be. (See: Ashfaq v. State (Govt. of NCT of Delhi) MANU/SC/1042/2003 : 2004CriLJ936).

25. Therefore, the offence under Section 397 IPC has clearly not been established. In addition, the ingredients necessary for offence punishable under Sections 392 and 452 have not been established in view of the highly inconsistent version of the complainant PW 1.”

11. In the decision reported as Mohan Singh vs. State 1987(13) DRJ 176, it was held as under:

(12) On the second aspect even though there is some evidence to suggest that at the time of the committing of dacoity one of the offenders caused injury by knife on the left hand of Sham Lata Goel but unfortunately the said knife has not been recovered. In order to bring home a charge under Section 397 the prosecution is duty bound to produce convincing evidence that the knife used by the accused in this case was a deadly weapon, it is no doubt true that knives are weapons available in various sizes and may just cause little hurt or may be a deadliest. There are deadly weapons parse as much as would ordinarily result in death by their use. M.L. Jain, J. in the case reopen as Balak Ram v. State MANU/DE/0387/1983 : 1983 Dlt 142 on this aspect observed that what would make a 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 and prosecution should prove that the knife used by the accused was a deadly weapon. Applying the said principle on the facts .of the present case I find that there is not an iota of evidence on record to suggest that the knife used by the accused way a deadly weapon. Even Sham Lata Goel has not given its description. We are probably in the dark to conclude if the knife was a but tender knife, a kitchen knife or a pen knife or the knife

used could possible cause the death of the victim, in the absence of such an evidence and particularly the non-recovery of the weapon will certainly bring the case of the accused out of the ambit of Section 397 Indian Penal Code. The accused could, under the circumstances, be convicted under Section 392 Indian Penal Code.

12. Reverting to the facts of the present case, PW-2 Smt.Kavita had not suffered even a scratch on her person. Even while reporting the matter to the police soon after the occurrence (rukka has been sent at 12.50 pm), she did not state about any of the robber being armed or any weapon being used by any of the person while dragging her from kitchen to bathroom and bolting her there. Rather, as per the complaint Ex.PW2/A, the cash and the jewellery has been taken after she was bolted inside the bathroom. Thus, there is no evidence of use of any deadly weapon while committing the robbery.

13. Since neither any knife was possessed, used or recovered nor any injury was suffered by the complainant PW-2 Smt. Kavita at the time of commission of robbery, the appellant could not have been convicted under Section 397 IPC.

14. Taking into consideration the entire facts and evidence of PW-2 Smt. Kavita – the complainant, the conviction of the appellant under Section 397 IPC cannot be sustained. The appellant is acquitted of the charge under Section 397 IPC.

15. The conviction of the appellant for committing the offence punishable under Section 392 IPC is maintained.

16. Vide order dated 17th August, 2011, the substantive sentence of the appellant was suspended till the disposal of the appeal.

17. The nominal roll of the appellant available on record is dated 10th August, 2011 as per which he has remained in custody in this case for three years, seven months and twenty days and also earned the remission of 25 days.

18. Since conviction of the appellant for committing the offence punishable under Section 397 IPC has been set aside, the sentence of the appellant for committing the offence punishable under Section 392 IPC is reduced to the period already undergone by him in this case.

19. The appeal is partly allowed and impugned order on sentence is modified to the above extent.

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

21. Copy of this order be sent to the concerned Jail Superintendent for information.

22. Copy of order be also given *dasti* to the counsel for appellant.

PRATIBHA RANI
(JUDGE)

DECEMBER 01, 2017
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