

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

Date of decision: June 05, 2017

+ **CRL.A. 409/2015**

DHARMENDER

..... Appellant

Through: Mr. Amar Nath, Amicus Curiae
with Mr. Love Deep Gaur,
Advocate and Mr. Animesh
Madhukar, DHCLSC Panel
Lawyer with Mr. Anshu Bhanot,
Advocate

Versus

STATE (GOVT OF NCT OF DELHI)

..... Respondent

Through: Ms. Meenakshi Chauhan, Addl.
Public Prosecutor for State with SI
Shri Gopal, Police Station Shakar
Pur

+ **CRL.A. 480/2015**

AJAY

..... Appellant

Through: Mr. Amar Nath, Amicus Curiae
with Mr. Vikas Padora, DHCLSC
Panel Advocate

Versus

STATE

..... Respondent

Through: Ms. Meenakshi Chauhan, Addl.
Public Prosecutor for State with SI
Shri Gopal, police station Shakar
Pur

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT

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1. Impugned judgment of 1st December, 2014 holds appellants *Dharmender* and *Ajay* guilty of offence under Sections 392/34 of IPC r/w Section 397 IPC and they have been also held guilty for the offence under Section 411 IPC. In addition, appellant – *Dharmender* stands convicted for offence under Section 25 of *The Arms Act*. Vide impugned order of 5th December, 2014, both these appellants have been sentenced to rigorous imprisonment for seven years with fine of ₹10,000/- each for the offence under Sections 392/34 IPC r/w Section 397 IPC with default clause. Both the appellants are also sentenced to rigorous imprisonment for two years with fine of ₹5,000/- each for the offence under Section 411 IPC with default clause. Appellant- *Dharmender* has been also sentenced to rigorous imprisonment for three years with fine of ₹5,000/- with default clause for the offence under Section 25 of *The Arms Act*.
2. Counsel for appellant- *Ajay* submits that in pursuance to bailable warrants issued vide last order, appellant- *Ajay* is present in the Court. Appellant- *Dharmender* is in custody.
3. Since both these appeals arise out of common impugned judgment,

therefore, with the consent of counsel for the parties, they have been heard together and are being decided by this common judgment.

4. The facts as noticed in the impugned judgment are that on the statement of complainant- *Satish Sharma*, FIR of this case was registered and the version put forth by him is as under:-

“That on 01.03.2012 he was returning to his house alongwith his wife in his Swift Dzire Car from Gurgaon and that at about 11.20 p.m. he stopped his car at Vikas Marg, about 100 meters from Geeta Colony cut to urinate. Two boys aged about 23-24 years came out of Yamuna Khadar jhuggies, one of them put pistol type weapon at him and asked him to bring out whatever he had and forcibly snatched his mobile phone make Nokia bearing Sim No. 9810068785, a gold ring, a gold kara and ₹35,000/- while the second boy robbed gold mangalsutra, two gold bangles, two gold karas, three gold rings, a gold chain from his wife after showing knife to her. Thereafter both the boys ran away towards Yamuna Khadar jhuggies. On his statement FIR was registered under Section 392/34 IPC. On 18.03.12 accused Dharmender & Ajay were arrested.”

5. While relying upon the evidence of complainant- *Satish Sharma* (PW-4) and testimony of his wife *Smt. Alka Sharma* (PW-3) and evidence of Investigating Officer (PW-9) and other police witnesses, appellants have been convicted and sentenced by the trial court as has been noted

hereinabove. Pertinently, the stand of both the appellants before the trial court was of denial and they had not led any evidence in defence.

6. The challenge to the impugned conviction and sentence awarded to appellants by learned counsel for appellants is on the ground that the recovered weapons of offence were not shown to the witnesses and so, the recovery of weapons of offence does not stand proved and thus, conviction of appellants for the offence under Section 397 IPC deserves to be set aside. To submit so, reliance is placed upon decisions of Coordinate Bench of this Court in *Balak Ram Vs. State* 24 (1983) DLT 142 and *Sunil Vs. State (Govt. of NCT)* 2010 (1) JCC 388. In addition, it is submitted by learned counsel for appellant- *Dharmender* that there is discrepancy regarding recovery of weapon of offence. It is pointed out that as per evidence of complainant and his wife, accused *Dharmender* was armed with a knife but as per evidence of Investigating Officer (PW-9), recorded on 21st September, 2013, one country made pistol was recovered from appellant-accused *Dharmender*. It is also pointed out by learned counsel for appellant- *Dharmender* that Investigating Officer in his evidence recorded on 19th November, 2013 had deposed that a knife was recovered from the right side pocket of this appellant-accused. It is submitted that recovery of weapon of offence from appellant-accused *Dharmender* is suspected and so, benefit of doubt ought to be given to this appellant. Lastly, it is submitted on behalf of appellants that the alleged recovery was not in pursuance to the disclosure statement made by appellants but was in response to their casual search. So, acquittal of appellants is sought in these appeals.

7. On the contrary, learned Additional Public Prosecutor for respondent-State supports the impugned judgment and order on sentence and submits that there is no illegality in it. She relies upon a judgment of this Court in *Sheetal Vs. State (NCT of Delhi)* (2014) 215 DLT 60 to submit that once it is shown that weapon was used in the commission of offence to frighten the witnesses to facilitate the offence of robbery/dacoity, appellants' conviction under Section 397 of IPC is well deserved and need not be interfered with, even if weapon of offence is not there. It is pointed out by learned Additional Public Prosecutor for respondent-State that in the instant case, weapon of offence i.e. *pistol and knife* have been recovered and from the sketch of knife, it is evident that it is a deadly weapon. Thus, dismissal of these two appeals is sought by learned Additional Public Prosecutor for respondent-State.

8. Upon hearing and on perusal of impugned judgment and order on sentence, evidence on record and decisions cited, I find that complainant (PW-4) and his wife (PW-3) are forthright in their deposition regarding the manner in which both the appellants have used the weapon of offence i.e. *pistol and a knife*, having blade of length of more than 12 cm and width of 4 cm and so, it cannot be said that the country made *pistol or the knife* is not a deadly weapon. Merely because the weapon of offence i.e. *the pistol and knife* in question have not been identified by the complainant and his wife, it would not justify their acquittal for the offence under Section 397 IPC because it is evident from the evidence of complainant and his wife that without use of *pistol and knife* in question, offence of robbery could not have been committed by appellants.

9. After going through the decisions cited, I find that a pedantic view, as has been taken in *Balak Ram (supra)* and *Sunil (supra)*, is not required to be adopted in view the ground realities and the fact situation of the instant case. A pragmatic view has been taken by this Court in a later decision in *Sheetal (supra)* regarding the weapon of offence being not identified by the witnesses during the course of evidence, is not fatal for conviction under Section 397 of IPC. Taking into consideration the ground realities, this Court is of the considered opinion that even if the weapon of offence is not recovered, still the conviction of accused for the offence under Section 397 IPC cannot be set aside if the version of complainant regarding the use of weapon is convincing and reliable. In the instant case while relying upon the ratio of decision of this Court in *Sheetal (supra)* and in view of evidence on record, I find no hesitation to conclude that the version of complainant and his wife clearly proves that both the appellants had used the deadly weapons in commission of offence and so, their conviction under Section 397 IPC cannot be faulted with, merely because the recovered weapons i.e. *the knife and pistol* are not identified by the witnesses.

10. As regards the discrepancy in evidence regarding the recovery of weapon in question is concerned, I find that due to the time gap in recording of evidence of witnesses, discrepancy regarding recovery of which weapon is from which accused, is likely to arise and thus, the so called discrepancy in the evidence of Investigating Officer (PW-9) and another police official (PW-10) is not material and is not sufficient to cause any dent in the prosecution case. Pertinently, recovered knife and

pistol have been identified by the Investigating Officer in his evidence as the ones which were recovered from appellants/ accused herein. Nothing substantial turns on the fact as to whether recovery of weapon of offence from appellant/accused was on a casual search or was in pursuance to their disclosure statement as the factum of recovery of weapon of offence from both the appellants/ accused remains unassailable.

11. In view of afore-going narration, the above captioned two appeals are dismissed, as I find no substance in them. Thus, the conviction of appellants and sentence awarded to them is maintained. Appellant/accused-Ajay is present in the Court. His bail bond(s) are forfeited and he directed to be taken into custody to serve out the remainder of sentence awarded to him. Appellant-accused *Dharmender* is already in custody and he shall serve the remainder of sentence as awarded to him by the trial court.

12. With aforesaid directions, these appeals are disposed of.

13. A copy of this order be sent to the concerned Jail Superintendent for compliance.

14. A copy of this order be given *dasti* under the signatures of Court Master to respondent-State.

(SUNIL GAUR)
JUDGE

June 05, 2017

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