

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

Judgment Reserved on: July 25, 2017

% *Judgment Delivered on: August 01, 2017*

+ **CRL.A. No.702/2017**

MOHD GULZAR

..... Appellant

Through: Mr.Bipin Kumar Jha, Advocate

versus

STATE (GOVT OF NCT) OF DELHI

..... Respondent

Through: Ms.Kusum Dhalla, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT

1. The instant appeal has been preferred by the appellant Gulzar impugning the judgment dated 16th May, 2017 whereby he alongwith co-convicts namely Amzad and Salman has been convicted for committing the offence punishable under Section 394/34 IPC and 411 IPC. Appellant Gulzar has also been convicted for committing the offence punishable under Section 397 IPC. Vide impugned order on sentence dated 31st May, 2017, the appellant and co-convicts were sentenced as under:

Appellant Gulzar

- | | | | |
|------|----------------|---|--|
| (i) | U/S 394/34 IPC | : | to undergo RI for four years and six months and to pay a fine of ₹5000/- and in default of payment of fine to undergo SI for six months. |
| (ii) | U/S 411 IPC | : | to undergo RI for three years |

and to pay a fine of ₹5000/- and in default of payment of fine to undergo SI for three months.

- (iii) U/s 397 IPC : to undergo RI for seven years and to pay a fine of ₹5000/- and in default of payment of fine to undergo SI for six months.

Co-convicts Amzad and Salman

- (i) U/S 394/34 IPC : to undergo RI for four years and six months and to pay a fine of ₹5000/- each and in default of payment of fine to undergo SI for six months.
- (ii) U/S 411 IPC : to undergo RI for three years and to pay a fine of ₹5000/- each and in default of payment of fine to undergo SI for three months.

All the sentences were ordered to run concurrently with benefit of Section 428 Cr.P.C.

2. Learned counsel for the appellant, on instructions, submits that the appellant is challenging his conviction only under Section 397 IPC and the sentence awarded thereunder.

3. Learned counsel for the appellant has submitted that for convicting a person under Section 397 IPC, the prosecution was required to prove that at the time of committing robbery or dacoity, the offender used any deadly weapon or caused grievous hurt or attempted to cause any grievous hurt to any person. Learned counsel

for the appellant has drawn the attention of this Court to the MLC of the complainant as per which he suffered simple injury. It has been contended that no knife was recovered in this case. Even neither on the MLC nor in the complaint, it has been mentioned by the complainant that at the time of commission of robbery, he was assaulted by the appellant Gulzar with a knife. It has been contended that since the ingredients required to base conviction for the offence punishable under Section 397 IPC are missing in this case and no grievous injury has been caused to the complainant and no deadly weapon like knife has been recovered, the conviction of the appellant Gulzar for committing the offence under Section 397 IPC may be set aside.

4. Learned counsel for the appellant Gulzar submits that the appellant has been held guilty under Section 397 IPC and sentenced to undergo rigorous imprisonment for seven years despite the fact that the nature of injury is simple which was not caused by the appellant.

5. LCR has been perused. Perusal of the FIR No.8/2013 under Section 392/391/34 IPC (Ex.PW-2/A) recorded on the statement of the complainant Vijaypal (PW-2) shows that in his complaint to the police he stated that he is an auto driver by profession. On 4th January, 2013 at about 9:00 PM he was waiting at Majnu Ka Tilla for passengers when three persons approached him for hiring the auto for going to Sarai Kale Khan. He agreed and all the three persons sat on the passenger seat. When the auto reached near Rajghat Power House, one of them asked him to stop the auto. When he stopped the auto, one person got down to pass urine and returned within a minute. The

moment he (PW-2) started the auto, two passengers sitting on the rear seat pulled him on the back seat by putting a noose of sheet around his neck and the third person who had returned after passing urine, started driving the auto. One of the two persons sitting on the rear seat tried to stab him on his abdomen with a knife but he tried to hold the knife with his hand and he suffered injury on his right hand in the process. He was also given beating and his black leather jacket, raxin purse containing ₹1,500, some visiting cards as well as mobile phone Nokia 1650 were also taken. He was made to get down at Pushta Road near Geeta Colony flyover and they escaped in his TSR.

6. When the complainant appeared as PW-2, in his examination-in-chief he stated as under:

“Accused Gulzar is the person who had stopped my said TSR and the assailant who had gone ahead on the pretext of passing urine came back and sat in my TSR as soon as I started the same. Accused Amzad is the same person who along with accused Salman had put noose (funda) with the help of chaddhar around my neck and had pulled me back and then accused Gulzar started driving my said TSR and when I tried to save myself, accused Gulzar came at the back seat and accused Amzad started driving the said TSR.

Accused Gulzar had also stabbed me. Accused Salman had brought my Nokia mobile, purse and documents and all the three accused had given beating to me.”

7. His cross-examination by learned counsel for the accused Gulzar reads as under:

XXX by Shri Jag Mohan Singh, Ld counsel for accused Gulzar

I had been plying TSR for the last about 15 years in Delhi. I have idea of most of the routes of area in Delhi.

I had visited PS in connection with the present case 3-4 times. It is wrong to suggest that I was shown accused persons by the police before participating in judicial TIP proceedings.

Accused who had gone out on the pretext of passing urine had come and sat in my TSR after I was pulled back by putting noose with the help of chaddar by other accused persons. I cannot tell colour of the said chaddar.

Lastly, I was pushed out from the said TSR before accused persons fled away with robbed case property.

Accused Gulzar was driving the TSR.

Que.: I suggest you that accused Gulzar was driving the TSR when you were thrown out. What have you to say?

Ans.: It is correct.

It is wrong to suggest that I was shown the photographs of accused while going to Tihar jail for TIP proceedings of accused persons.

SHO and other police officials had come in the hospital at about 10/10.30 p.m. I do not recollect the name of the SHO. I remained in the hospital for about 30 minutes. SHO brought me to PS from the hospital. It is correct that my statement was recorded after making inquiries from me when I was brought by the SHO.

At that time, I had signed only one paper. Perhaps I had not signed the site plan. Public persons were not

present at the spot when I accompanied the police to the place of occurrence for its pointing out.

When I was pushed down by the accused persons from the said TSR, I walked upto 100 meters and on the way two passerby had met me to whom I requested to make phone call to the police but they declined. It is wrong to suggest that nothing such had happened with me or that I had identified Gulzar in the Court at the instance of the police. It is also wrong to suggest that I was shown accused Gulzar and his photographs in the PS itself by the police or that I am deposing falsely.”

8. In the complaint Ex.PW-2/A which was recorded immediately after the occurrence, version of the complainant was that he was tried to be attacked with a knife by one of the two persons sitting on the rear seat and not by the person who was driving the auto. When the auto driver i.e. the complainant was dragged on the rear seat by putting a noose of sheet around his neck, appellant Gulzar was driving the TSR. In that case, had he been attacked with a knife by Gulzar, in the complaint he would have mentioned that the person on the driving seat used the knife. But as per Ex.PW-2/A this role is attributed to one of the two persons sitting on the rear seat.

9. Section 397 IPC is intended to cover a person who displays a deadly weapon or makes use of any deadly weapon while committing robbery or dacoity. Section 34 IPC has no application in construction of Section 397 IPC. Thus, the liability to enhance the punishment of minimum seven years under Section 397 IPC is limited to the offender who actually uses the deadly weapon or causes grievous hurt and not all the persons associated with such offender in the commission of the offence.

10. In the instant case, the testimony of PW-2 Vijay Pal that the appellant Gulzar subsequently came to the rear seat and Amjad started driving the auto is an improvement on the basis of which Gulzar could not have been convicted under Section 397 IPC especially in view of his deposition during his cross examination that appellant Gulzar was driving the auto after the complainant was dragged on the passenger seat.

11. In view of the above discussion, the conviction of the appellant for committing the offence punishable under Section 397 IPC cannot be sustained. Hence, the conviction as well as the sentence awarded to the appellant for the committing offence punishable under Section 397 IPC is set aside.

12. Vide impugned judgment, the appellant has also been convicted and sentenced to undergo RI for four years and six months with fine of ₹5,000/- and in default of payment of fine, to undergo SI for six months for the offence punishable under Sections 394/34 IPC and further to undergo RI for three years and fine of ₹5,000/- and in default of payment of fine to undergo SI for three months for offence punishable under Section 411 IPC.

13. Since vide impugned order on sentence, the fine imposed for the offences punishable under Sections 394/34 and 411 IPC is ₹5000/- each and there is discrepancy in the period of sentence to be undergone in default of payment of fine i.e. to undergo SI for six months in default of payment of fine for the offence punishable under Section 394/34 IPC and to undergo SI for three months in default of payment of fine for the offence punishable under Section 411 IPC,

while maintaining the conviction as well the substantive sentence and fine imposed on the appellant for the offence punishable under Sections 394/34 and 411 IPC, the period of sentence to be undergone by the appellant in default of payment of ₹5000/- for the offence punishable under Section 394/34 IPC is reduced to three months.

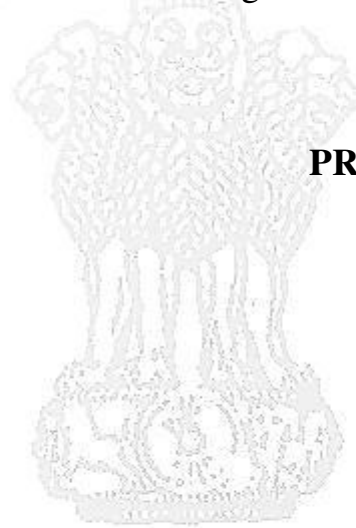
14. The appeal is allowed in the above terms.

15. Copy of this order be sent to the learned Trial Court as well as to concerned Jail Superintendent for information.

16. As prayed, copy of the order be given *dasti* to learned counsel for the appellant.

**PRATIBHA RANI
(JUDGE)**

AUGUST 01, 2017
'st'



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