

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

Date of Decision: June 16, 2017

+ **CRL.A. 14/2016**

AJAY @ MUNNA

..... Appellant

Through: Mr. Amar Nath, Amicus Curiae
with Mr. Sitab Ali Chaudhary,
Delhi High Court Legal Services
Committee's Panel Advocate

versus

STATE

.....Respondent

Through: Mr. Mukesh Kumar, Additional
Public Prosecutor with SI Nanag
Ram

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT
(ORAL)

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The challenge in this appeal is to impugned judgment of 30th September, 2015 vide which appellant has been convicted for the offence under Section 392 of IPC read with Section 397 of IPC and to order of 20th November, 2015 vide which appellant has been sentenced to rigorous imprisonment for seven years with fine of ₹5,000/- and in default of payment of fine, trial court has directed that appellant shall undergo simple imprisonment for 15 days for the aforesaid offences. The facts emerging from impugned judgment are as under: -

“The prosecution case is that ASI Ramvir lodged DD no.5 with PS-Dwarka South, to the effect that at Power House, Red Light, the auto driver informed that someone tried to snatch his mobile phone and on his identification, the culprit was apprehended and the mobile phone and knife was recovered from his possession. The said DD was marked to HC Rajesh, who alongwith Ct. Satish Kumar reached the spot where complainant was present who informed that one boy at the point of knife had snatched his mobile phone and was apprehended by him with the help of other auto drivers and that PCR officials had taken that boy to the police post. Thereafter, the complainant was taken to the police station by HC Rajesh Kumar and his statement was recorded to the effect that on that day i.e. 10.02.2014 at about 6.30am , he was present alongwith his auto bearing registration no. DL-1RL-9358, opposite Power House, Sector 2, Dwarka, New Delhi, one boy came to him and asked for his mobile phone to make a call. When complainant told him that there was no balance in his phone, the boy pulled him outside from the auto and took him near the tree behind the auto and then took out a long knife from his waist and threatened to kill him. He snatched his mobile phone bearing no. 9718899021. Complainant raised alarm. The other auto drivers of nearby reached the

spot and apprehended the boy namely Ajay @ Munna. He was handed over alongwith knife and mobile phone to the officials of PCR who passed through that place. On the basis of the aforesaid statement of Rahul, case FIR no. 65/14 was registered under Section 394/411 IPC with PS Dwarka South.”

Apart from evidence of complainant (PW-1) and public witness (PW-5), there is other evidence on record on which trial court has relied upon to convict appellant-accused while discarding his version of false implication.

Learned counsel for appellant submits that in pursuance to issuance of production warrants, appellant was produced in custody before the Court and he had interacted with appellant.

At the outset, learned counsel for appellant submits that public witness (PW-5) is not an eye-witness and neither from his evidence nor from the evidence of complainant (PW-1), ingredients of Section 397 of IPC are attracted as it is not in complainant's evidence that the 'knife' was shown to complainant prior to robbing him of his mobile phone. To submit so, attention of this Court is drawn to deposition of complainant (PW-1) and that of public witness (PW-5). It is pointed out by appellant's counsel that in the cross-examination, complainant (PW-1) has admitted that the public witness had not witnessed the incident in question and so, it is submitted that the evidence of said public witness (PW-5) is of hearsay.

Learned counsel for appellant submits that at best the offence committed by appellant comes within the ambit of Section 392 of IPC only, which does not carry any minimum sentence and that as per the Nominal Roll of appellant, he has already undergone sentence of 3 years and 9 months and that he is not involved in any other case. Lastly, it is submitted that appellant is a poor labourer, who was aged 22 years at the time of this incident and so, sentence awarded to appellant deserves to be reduced to the period already undergone by him.

Learned Additional Public Prosecutor supports impugned judgment and submits that appellant, who was arrested at the spot, had used the recovered '*knife*' and so, the sentence awarded to appellant is just and proper.

Upon hearing and on perusal of impugned judgment, order on sentence, appellant's Nominal Roll and the evidence on record, I find that the pre-requisite to attract Section 397 of IPC is that a weapon has to be used to facilitate the commission of offence of robbery or dacoity. It is amply clear from the evidence of complainant (*PW-1*) and that of public witness (*PW-5*) that appellant had not shown the '*knife*' to complainant prior to robbing him of his mobile phone. Strangely, after appellant had robbed complainant of his mobile phone, he had shown '*knife*' to complainant. It has come in the evidence of complainant that such a course was adopted by appellant to facilitate his escape from the spot and this endeavour proved unsuccessful as appellant was apprehended at the spot. There is no doubt that the offence of robbery has been committed by appellant and so, his conviction for the offence under Section 392 of IPC

is well deserved. However, the evidence on record does not reveal that appellant had shown or used the '*knife*' before robbing complainant and so, provision of Section 397 of IPC is not attracted to the instant case. Quite evidently, in the evidence of public witness or complainant's evidence, it has not come that appellant had shown the '*knife*' prior to robbing complainant of his mobile phone. So, trial court has erred in convicting appellant with the aid of Section 397 of IPC.

Resultantly, appellant's conviction under Section 397 of IPC is set aside. As per Nominal Roll of appellant, he has undergone sentence of 3 years and 9 months. Since offence under Section 392 of IPC does not carry any minimum sentence, therefore, in the facts and circumstances of this case, appellant is sentenced to rigorous imprisonment for 3 years and 6 months for the offence under Section 392 of IPC and remaining period of 3 months already undergone by appellant shall be the sentence in default of payment of fine.

With aforesaid modification, this appeal is disposed of. Appellant is in custody. He be released forthwith, if he has already undergone the modified sentence and is not wanted in any other case. The concerned Jail Superintendent be apprised of this judgment forthwith to ensure its compliance and to intimate appellant about the fate of this appeal.

(SUNIL GAUR)
JUDGE

JUNE 16, 2017

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