

\$~2

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

+ CRL.A. 522/2004

SONU

..... Appellant

Through: Ms. Malika Parmar, Adv. (DHCLSC)

versus

THE STATE (GOVT. OF NCT) DELHI

..... Respondent

Through: Ms. Kusum Dhalla, APP for State
with SI Vijay Kaushik, PS Kalkaji.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

ORDER

07.06.2018

%

The nominal roll has been received from the Superintendent Jail, Central Jail No.2, Tihar, New Delhi indicating that the appellant qua the FIR No.03/2001, PS Kalkaji had **completed his sentence on 31.10.2006** with that the sentence in the instant case in relation to the FIR No.03/2001, PS Kalkaji qua conviction of the appellant for the offences punishable under Sections 392 r/w 397 and 452 Indian Penal Code, 1860 vide the impugned judgment dated 26.02.2003 being to the extent of Rigorous Imprisonment for a period of seven years and a fine of Rs.1,000/- and in default of the said fine, to Simple Imprisonment for a period of 15 days qua the offences punishable under Sections 392/397 Indian Penal Code, 1860 and for a further period of one year of Rigorous Imprisonment and a fine of Rs.1,000/- and in default of payment of the said fine, to undergo Simple Imprisonment of 15 days qua the offence punishable under Section 452 Indian Penal Code, 1860 with all the sentences having directed to run

concurrently with the benefit of the period of detention already undergone having been directed to be set off against the sentence awarded also, vide the impugned order on sentence dated 26.02.2003. **The nominal roll indicates that the total fine imposed of Rs.2,000/- has already been paid by the appellant.** The nominal roll dated 07.06.2018 however indicates that the appellant had been released from jail on 23.12.2006 as he was serving a remaining sentence in FIR No.621/1999, PS Kalkaji.

Submissions have also been made on behalf of the State that the appellant has since expired in Calcutta but the death certificate is not available. However, as the demise of the appellant was after the completion of the incarceration of the period of sentence imposed vide the order on sentence dated 26.02.2003 qua conviction in FIR No.03/2001, PS Kalkaji the same would not matter qua the aspect of his conviction and the appeal cannot abate and is thus being considered.

On behalf of the appellant the learned counsel for the appellant has submitted that the testimonies of the prosecution witnesses examined are inconsistent with each other in relation to material particulars. It has also been submitted on behalf of the appellant that the conviction of the appellant under Section 397 Indian Penal Code, 1860 is not borne out from the records at all inasmuch as there was no use of any deadly weapon by the appellant. Reliance is placed on behalf of the appellant on the sketch of the knife placed on the trial Court record which has been received to submit that the knife has a blade with a length of 12.5 cms only and that there are discrepancies in the description of the knife as put forth through the testimony of PW-1 Shri Tula Ram, s/o Shri Jyoti Pershad, the complainant in contrast with the testimony of PW-4, Constable Mahavir Singh, one of the

recovery witnesses for where as it has been testified by PW-1 Shri Tula Ram in his cross examination that the handle of the knife was of a glass and that the handle of the knife was of a white like colour, the witness PW-4 who in his cross examination has testified to the effect that the handle of the knife was of plastic and that **‘as far as he could remember the colour of the handle of the knife was black’**.

Reliance is also placed on behalf of the appellant on the verdict of this Court in ***Dig Bahadur @ Rahul @ Vinod Vs. State*** in Crl. A.333/2011 with placing reliance on observations therein in ***Mohan Singh Vs. State*** 1987 (13) DRJ 176 in which also there is a reference made to ***Balak Ram Vs. State*** 1983 DLT 142 to contend that all knives cannot fall within the ambit of a ‘deadly weapon’ to bring the culpability of the appellant within the ambit of Section 397 Indian Penal Code, 1860 and that there is not a shred of evidence as alleged in the instant case to indicate that the weapon of the offence allegedly utilized by the appellant was a deadly weapon and it has been submitted on behalf of the appellant that the sketch of the knife, placed on record as Ex.PW1/4 nowhere brings forth that it can in any manner be found to be a knife of a kind that can cause the death of any victim, qua the said submission that has been made on behalf of the appellant placing reliance on the verdict of this Court in ***Dig Bahadur @ Rahul @ Vinod Vs. State (supra)*** with reference therein to the verdict in ***Mohan Singh Vs. State (supra)*** and to ***Balak Ram Vs. State (supra)***, it has been rightly contended on behalf of the State that the observations in the said verdicts would necessarily have to relate to the non-production of the knife in ***Mohan Singh Vs. State (supra)*** inasmuch as in the said case, the injured had not been able to give the description and the Court had observed to the effect

that it was in the dark to conclude if the knife was a tender knife, a kitchen knife or a pen knife or the knife used could possibly cause the death of the victim and in the absence of such an evidence and the non-recovery of the weapon would certainly bring the case of the accused out of the ambit of Section 397 Indian Penal Code, 1860 and thus the accused could not have been convicted thereunder and could be convicted only under Section 392 Indian Penal Code, 1860.

On behalf of the State the learned APP for State further placed reliance on the sketch of the knife itself Ex. PW1/4 to contend that the shape of the blade of the knife if of 12.5 cm in length and that a groove in between at some distance from the tip of the knife, is itself an indicator to the effect that the knife recovered was not a kitchen knife and would fall within the ambit of a '**deadly weapon**'.

A further submission has been made on behalf of the appellant that the falsity of the prosecution version is also brought forth through the factum that as per the averments made in the FIR, the complainant has alleged that at the time of commission of the alleged robbery on 31.12.2000 at about 11:30 pm, the appellant had taken out the purse belonging to the complainant containing Rs.1,500/- and some papers, whereas the alleged recovery in the instant case as also indicated through the statement under Section 313 Cr.PC, 1973 of the appellant recorded indicated that what was recovered was allegedly a purse containing Rs.400/- i.e. four currency notes of Rs.100/- each from the jhuggi of the appellant and it has been submitted on behalf of the appellant that whereas the incident is of 31.12.2000, the recovery having been effected from the next day on 01.01.2001 soon after the alleged occurrence makes it apparent that the allegations levelled against

the appellant are wholly false and have not been conclusively established.

A further submission was raised on behalf of the appellant that the MHC(M) in the instant case had not been examined, and that the identity of the articles allegedly recovered from the jhuggi of the appellant had not been established beyond a reasonable doubt. It has further been submitted on behalf of the appellant that the testimony of the complainant itself is not consistent in relation to the prosecution version to the effect that recovery of the purse containing Rs.400/- and the knife were effected from the jhuggi of the appellant in the presence of PW-1 Tula Ram inasmuch as he has categorically stated that the said recovery was not effected in his presence from the jhuggi of the appellant.

On behalf of the State the said submissions too have been vehemently refuted by the learned APP for the State submitting to the effect that the testimonies of the prosecution witness Tula Ram, the complainant examined as PW-1, Ramesh, the brother of the complainant examined as PW-2 and the testimony of PW-4 Constable Mahavir Singh, one of the recovery witnesses and the testimony of PW-5 SI Akhilesh Yadav, the Investigating Officer are all consistent and categorical in relation to the recovery of the purse belonging to the complainant containing Rs.400/- at the time of the recovery i.e. Ex.P1 and the knife Ex.P2 from inside the jhuggi of the appellant on the date 01.01.2001 when he, the appellant was arrested. Though the arrest memo is not placed on the record as submitted on behalf of the appellant to contend that the allegations levelled against the appellant were false, on behalf of the State has been produced the original Case Diary of the case which bears within it the arrest memo dated 01.01.2001 of which the judicial notice is taken which indicates that the time of the arrest of the appellant

was 2:30 pm and he was arrested from the jhuggi at Nehru Camp with the address of the appellant being A-343, Nehru Camp, Govind Puri, New Delhi. The said original arrest memo is directed to be placed on record by the State.

Taking into account the factum that the date of the incident is 31.12.2000 at about 11/11:30 pm with the recovery having been effected from the jhuggi of the appellant on the date 01.01.2001 at 2:30 pm, taking into account the consistency of the testimonies of PW-1 Shri Tula Ram, the complainant, which is consistent with the averments made in the FIR that the accused had removed his purse from his pocket containing Rs.1,500/- and some papers, merely because at the time of the recovery what was recovered from the jhuggi of the appellant was the purse containing Rs.400/- which purse has been identified by the complainant as belonging to him and has also been identified by his brother Ramesh as belonging to his brother Tula Ram, it cannot be contended on behalf of the appellant that the version put forth by the prosecution in relation to recovery of the purse with its contents from the jhuggi of the appellant along with the knife utilized at the time of alleged commission of offence of robbery have not been established. The submission made on behalf of the State thus that the incident having taken place at about 11/11:30 pm at the night of 31.12.2000 with the recovery having been effected on 01.01.2001 at about 2:30 pm, the next day and thus the same may have resulted into the utilization of the said money, appears plausible.

As regards the contention that has been raised on behalf of the appellant in relation to the aspect that the knife Ex.P2 was allegedly utilized at the time of the commission of the offence was not established in view of

the testimonies of PW-1 Shri Tula Ram, the complainant, PW-4, Constable Mahavir Singh, one of the recovery witnesses, it is essential to observe that PW-1 Shri Tula Ram, the complainant in his cross examination has categorically stated that **‘the handle of the knife was of a glass and the handle of the knife was of a white like colour’**. The seizure memo placed on record Ex.PW1/5 indicates the recovery of the knife from the jhuggi of the appellant on 01.01.2001 and indicates to the effect that **“Daste par plastic chadi hai” (there was plastic on the handle of the knife)** which is in corroboration to the statement made by PW-1 that the handle of the knife was of glass and that handle of the knife was of white like colour corroborating its looks to be like that of plastic/glass. The statement of PW-4 is also categorical in relation to the aspect that the handle of the knife was of plastic. It is essential to observe that he stated that **‘as far as he could remember the colour of the handle of the knife was black’**. The incident is of the night of 31.12.2000 with the recovery having been effected on 01.01.2001 and the testimony of the PW-4, a police official witness is indicated to have been recorded on 22.01.2003, after a lapse of substantial period of time in relation to a witness who would apparently have been participating in recoveries of such crimes and thus in the circumstances of the case, the minor discrepancy in the colour of the handle of the knife as put forth through the testimonies of PW-4 does not suffice to dislodge the prosecution version inasmuch as all that he states is “as far as I remember the color of the handle of the knife was black”.

The prosecution witness PW-1 Shri Tula Ram, the complainant is categorical in support of averments made in the FIR in relation to the material particulars qua the incident inasmuch as he testifies to the accused

i.e. the appellant herein having entered his jhuggi with a knife on the night of 31.12.2000 at about 11 pm when the appellant was present at his jhuggi at C-72, Navjiwan Camp along with his brother Ramesh and states that the appellant put the knife on his chest which is consistent with the averments made in Ex.PW1/1, the statement made in the FIR that the knife was put on the chest of the complainant by the appellant and all other contents of the FIR are also corroborated by the testimony of the complainant Tula Ram who testified to the effect that the appellant stated whilst putting the knife on the chest of the complainant that he had spent eight months in jail and if he/the complainant raised an alarm he would cause so many holes that his body would not be identified and the appellant had removed the purse of the complainant containing Rs.1,500/- and some papers from his pocket and also told the complainant that if he reported the matter to the police, he would not remain alive. *Inter alia* Tula Ram PW-1 has identified the knife and has also identified the purse belonging to him with its contents and though his cross examination undoubtedly he has denied the production by the appellant of the knife and the purse with its contents from his jhuggi, he has categorically however testified to the effect that recovery was effected from the appellant by the production of the appellant of the knife and the purse with its contents.

The statement of PW-2 Ramesh, brother of the complainant also corroborates the averments made in the FIR and he has too identified the purse belonging to his brother as Ex.P1 with its contents as that removed from the pocket of his brother by the appellant and has also identified Ex.P2, the knife which was shown by the appellant to his brother. This witness on being cross examined categorically denied the suggestion that the accused

had not entered his jhuggi and had not shown the knife and had not removed the purse from the pocket of his brother and denies the suggestion that he had deposed falsely as he was the brother of the complainant.

The testimonies of PW-4, Constable Mahavir Singh, one of the recovery witnesses and PW-5 SI Akhilesh Yadav, the Investigating Officer also corroborates the prosecution version in toto in relation to the complaint made by the complainant, the apprehension of the appellant on the next day on 01.01.2001 from his jhuggi and also the recovery of Ex.P1, the purse belonging to the complainant with a sum of Rs.400/- and the knife Ex.P2 utilized at the time of commission of the alleged robbery. It has also been submitted by the IO that the number of jhuggi is A-343, Nehru Camp, Govind Puri and that the appellant was the owner of the same. He however stated that he was unable to verify at that time whether the appellant had spent a period of eight months in jail as alleged in the complaint. As the testimonies of PW-1 Shri Tula Ram, the complainant are consistent in relation to the incident and the manner in which the incident was committed, the non-verification by the IO of the period of time allegedly spent by the appellant in jail after which he had come out and committed the offence in the instant case, does not in any manner assist the appellant. Rather the nominal roll which has been received from the Superintendent of Prison, Central Gate No.2, Tihar, New Delhi today, also shows that the appellant had been in custody in FIR No.621/1999, PS Kalkaji and also was in fact serving the remaining sentence in the said case at the time when he had completed the sentence in the present case in relation to FIR No.03/2001, PS Kalkaji on 31.10.2006.

The available record thus establishes conclusively the allegations

levelled against the appellant of the commission of offences of house trespass after preparation for causing hurt punishable under Section 452 Indian Penal Code, 1860, and also of the commission of the offence punishable under Section 392 Indian Penal Code, 1860 inasmuch as at the time of the commission of the theft of the purse, the appellant had apparently attempted to cause restraint and fear of instant death to Tula Ram which makes the said theft of the purse of PW-1 with its contents to fall within the ambit of ‘**robbery**’ as defined in terms of Section 390 Indian Penal Code, 1860 punishable in terms of Section 392 Indian Penal Code, 1860.

As regard the submissions made on behalf of the appellant that the offence committed by the appellant does not fall within the ambit of Section 397 Indian Penal Code, 1860, as already observed elsewhere hereinabove the shape/structure of the knife Ex.P2 as described in Ex.PW1/4, sketch of the knife indicates that it had a blade of length of 12.5 cm and had a sharp edged tip with also a groove at some distance beneath the tip and was apparently not a kitchen knife. As observed hereinabove, the reliance placed on behalf of the appellant on the verdict of this Court in ***Dig Bahadur @ Rahul @ Vinod Vs. State*** (supra) with reference therein to the verdict in ***Mohan Singh Vs. State*** (supra) and to ***Balak Ram Vs. State*** (supra) is misplaced in view of the factum that in the said case, ***Mohan Singh Vs. State*** (supra), the weapon of the offence the stated knife had not been recovered and it had thus been as observed therein that the Court was in the dark to conclude if the knife was a tender knife, a kitchen knife or a pen knife or whether the knife used could possibly cause the death of the victim, whereas in the instant case, the knife Ex.P2 has been produced and the

sketch of the knife Ex.PW1/4 is on the record. The verdict of the Hon'ble Supreme Court in *Arun Raj Vs. Union of India* dated 13.05.2010 in CrI. A. 1123/2008 categorically lays down to the effect in para 11 thereof in which case the appellant had used 'a kitchen knife' that a knife with sharp edges is a dangerous weapon and it is very obvious that the appellant was aware that the use of such a weapon can cause death or serious bodily injury that is likely to cause death. The impugned judgment in the instant case makes a reference to the verdict in *Phool Kumar Vs. Delhi Administration* AIR 1975 SC 905 where it has been held that to bring the case within the purview of Section 397 Indian Penal Code, 1860, the brandishing of the knife or causing of grievous hurt is not necessary and that where the robbery is committed with the deadly weapon which is within the vision of the victim and capable of creating terror in his mind, the offender must be deemed to have used a deadly weapon. It is also rightly observed vide para-15 of the impugned judgment dated 26.02.2003 in the instant case that the knife is a deadly weapon as observed in *Phool Kumar Vs. Delhi Administration* (supra) and as also laid down in *Salim Vs. State* 1987 (3) Crimes 794 relied upon in the impugned judgment that it would not be appropriate to categorize a knife or to fix its size for it to be a deadly weapon and that it would not be a correct statement to state that a knife to be a deadly weapon, should be of a particular size. The verdict of the High Court of Bombay in *State of Maharashtra Vs. Vinayak* 1997 Cr.L.J. 3988 is also to the effect that the knife is a deadly weapon within the ambit of expression 'deadly weapon' used in Section 397 Indian Penal Code, 1860. Taking the same into account and also Ex.P2, the knife through its depiction in Ex.PW1/4, the sketch of the knife, it is established that the knife utilized in the instant case

was a deadly knife which makes it fall within the culpable ambit of Section 397 Indian Penal Code, 1860.

As regards the contention that has been raised on behalf of the appellant to the effect that the MHC (M) in the instant case was not produced by the State during trial and that the identity and custody of the knife was not established, it is essential to observe that the witness PW-4 Constable Mahavir Singh, one of the recovery witnesses and the IO of the case IS Akhilesh Yadav have both testified to the effect that after the seizure of Ex.P2, knife from the jhuggi of the appellant, the sketch of the knife Ex.PW1/4 had been prepared and that the purse and the knife were kept in a packet which was sealed with a seal of AS and after this, the seal was given to Tula Ram and the knife and the purse were seized vide a memo Ex.PW1/5. During the examination in chief of PW-1 Tula Ram, a parcel sealed with a seal of AS was opened and its contents were taken out i.e. Ex.P1 the purse, which was removed by the accused from the pocket of Tula Ram as testified by him and Ex.P2 the knife, which the accused i.e. the convict/appellant herein was carrying with him as identified by Tula Ram and which the appellant herein had put on the chest of the complainant Tula Ram to put him under fear of death to commit the robbery. In view thereof, the identity of the knife and the purse in question Ex.P2 and Ex.P1 respectively with its contents has been established.

In the circumstances of the case, there is thus no infirmity in the impugned judgment dated 26.02.2003 in relation to FIR No.03/2001, PS Kalkaji qua conviction of the appellant under Sections 392 r/w 397 and 452 Indian Penal Code, 1860, which is thus upheld. As observed hereinabove, the appellant has already undergone the entire sentence imposed vide the

order on sentence dated 26.02.2003.

The Crl. Appeal 522/2014 is thus dismissed.

ANU MALHOTRA, J

JUNE 07, 2018

vm