

\$~R-24

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

+ **CRL.A. 684/2005**

MUMTAZ

..... Appellant

Through: Appellant in person with Mr.
Saurabh Kansal, Advocate.

versus

STATE

..... Respondent

Through: Ms. Aasha Tiwari, APP for
State with SI Manoj Kumar, PS
Jahangirpuri.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

ORDER (ORAL)

%

13.06.2018

ANU MALHOTRA, J.

1. The matter had vide proceedings dated 12.06.2018 been re-notified for today in view of the CRL.A.646/2005 qua the co-convict Titu @ Irfan being listed for today. Vide a separate judgment of even date, CRL.A.646/2005 in relation to the co-convict Titu @ Irfan produced in judicial custody has been dismissed.

2. Arguments have been addressed on behalf of the appellant by the learned counsel for the appellant and on behalf of the State by the learned APP for the State.

3. The appellant in response to a specific Court query submits that he does not seek to contest the appeal on merits any more having undergone the impugned sentence awarded on 30.10.2004 in the instant case whereby he having been convicted vide the impugned

judgment dated 25.10.2004 qua the commission of the offences punishable under Section 392/34 of the Indian Penal Code, 1860 and Section 397 of the Indian Penal Code, 1860 and Section 27 of the Arms Act, 1959, was sentenced to undergo Rigorous Imprisonment for a period of 5 years, to pay a fine of Rs.1,000/- and in default of the payment of the fine to further undergo Rigorous Imprisonment for a period of 6 months qua the offence punishable under Section 392/34 of the Indian Penal Code, 1860 and was ordered to undergo Rigorous Imprisonment for a period of 7 years, to pay a fine of Rs.1,000/- and in default of the payment of the fine to further undergo Rigorous Imprisonment for a period of 6 months qua the offence punishable under Section 397 of the Indian Penal Code, 1860 and was further ordered to undergo Rigorous Imprisonment for a period of one year, to pay a fine of Rs.500/- and in default of the payment of the fine to further undergo Rigorous Imprisonment for a period of three months qua the offence punishable under Section 27 of the Arms Act, 1959 with all the sentences having been directed to run concurrently with the benefit of provision of Section 428 of the Cr.P.C., 1973.

4. Learned counsel for the appellant however submits that though the conviction of the appellant qua the offences punishable under Section 392/34 of the Indian Penal Code, 1860 and Section 27 of the Arms Act, 1959 are not contested on merits, it has been submitted that the ingredients of the alleged commission of the offence punishable under Section 397 of the Indian Penal Code, 1860 had not been brought forth even remotely. Reliance has been thus placed on behalf of the appellant on the very charge framed against the appellant on

26.08.2003 in relation to the allegations against him that on 23.04.2003 at about 10.30 PM at house no. B-138-139 Jahangirpuri, the appellant, Mumtaz in furtherance of his common intention with Anal and Alisher had committed a robbery of Rs.70,000/-, some jewellery of gold and silver, one wrist watch and a mobile phone belonging to Virender Kumar and had also in furtherance of common intention of all these persons whilst the appellant was armed with a knife, a deadly weapon committed a robbery and thus committed an offence punishable under Section 397/34 of the Indian Penal Code, 1860 and a separate charge was also framed against the appellant to the effect that he having used a knife in the commission of the offence of robbery had committed an offence punishable under Section 27 of the Arms Act, 1959. Vide the charge framed on 17.11.2003 against the other co-accused in the instant case Ravibul, Ali Sher and Titu @ Irfan (in relation to whom CRL.A.646/2005 has been dismissed vide a separate order of even date), there are allegations specifically to the effect that on the said date, the persons named Ravibul, Titu @ Irfan, Shekh Salim had in furtherance of their common intention whilst committing robbery when Mumtaz, i.e., the appellant herein as armed with a deadly weapon had committed an offence punishable under Section 397/34 of the Indian Penal Code, 1860 and it has thus been submitted on behalf of the appellant that the testimonies of the prosecution witnesses examined do not support the prosecution version in material particulars in relation to the alleged deadly weapon utilized at the time of the commission of the robbery.

5. Reliance has thus been placed on behalf of the appellant on the testimony of PW-2 Babloo who identified four boys Titu @ Irfan, Mumtaz, i.e., the appellant herein, Anal and Kalu as being the persons who were standing outside the house of his brother Virender Kumar on 23.04.2003 at about 11.00 PM and stated that they had some goods in their hands and they had run away from there submitting to the effect that the testimony of PW-2 Babloo does not bring forth the possession of any deadly weapon in the hands of the appellant even at the stage when Babloo saw him running away. Reliance is also placed on behalf of the appellant on the statement of PW-3 Meer Mohd. Sirazul Islam, the plumber who was doing the plumbing work at the house of Virender Kumar on 23.04.2003 who stated to the effect that four persons entered into the house of Virender Kumar, the complainant and at that time they attacked at Virender Kumar and they were armed with knives and revolvers and that two of them had revolvers and two had knives in their hands and they extended threats to Virender Kumar and forcibly snatched the key of the almirah and looted all the ornaments of gold and silver and cash from the said almirah belonging to Virender Kumar and that one of the boys pointed a knife on his neck and that person was named Anal who was also identified by PW-3. This witness also testified in his testimony that he could identify the other three boys if they were shown to him and stated that after the incident, he came to know that the names of those three boys were Kalu, Titu and Mumtaz being the present appellant herein and he identified the said persons and further stated that these persons also extended threats to Virender Kumar that if he

reported the matter to the police, his dead body would be found in the way. PW-3 further reiterated that Anal and Sheikh Saleem had a knife and that Mumtaz, i.e., the appellant herein and Titu @ Irfan co-convict in CRL.A.646/2005 which appeal has been dismissed vide the separate order of even date had Kattas in their hands and had immediately run away from the spot. It was thus submitted on behalf of the appellant that the testimony of PW-3 Mumtaz also does not substantiate the charge of allegations levelled against the appellant qua the possession of a deadly weapon, a knife at the time of alleged commission of the offence of robbery. It has also been submitted on behalf of the appellant that the cross-examination in the instant case conducted of this witness also does not anywhere challenge the statement of Meer Mohd. Sirazul Islam in relation to the discrepancy qua the weapon of the offence.

6. Reliance was also placed on behalf of the appellant on the statement of the complainant Virender Kumar who testified to the effect that on 23.04.2004 at about 10.30 PM when he was getting the house repaired at that time the plumber was working on a tap inside his house and four boys armed with knives, pistol and katta entered into his house and suddenly surrounded him and they started beating him and threatened him to hand over the key of the almirah or else they would kill him and uttered that they had just been released from the jail and after killing him they would again go to jail and snatched the key of the almirah from him and had opened the almirah with the key, looted a sum of Rs.70,000/- which was kept by him in the said almirah for giving to a trader and also looted some gold and silver

ornaments of his wife and children and looted his wrist watch of the make Titan of golden colour with a white tag and also his mobile phone and after looting him they left extending threats to him and he became very perplexed as they threatened him and told him that if he informed the police, they would kill him and his family members and ran away from there and thereafter he along with the plumber were bolted inside the room by them and after hearing their voice, the police had come. It was stated by this witness in his examination in chief that he could identify those four persons who entered into his house and he further stated that the accused Anal was present and correctly identified him amongst the co-accused persons and stated that he had a knife in his hand at that time. He also stated that the accused Mumtaz, i.e., the appellant herein was identified by him correctly but stated that he does not recollect what arm was with him in his hand at that time. He further stated that he does not recall what arm was with the accused Kalu @ Salim. He further identified Titu @ Irfan present in the Court as being one of the persons present as the accused and stated that he had a country made pistol in his hands and stated that all these four persons who entered on that day in his house had threatened him and looted him of his cash and jewellery, watch and his mobile phone. It is thus been submitted on behalf of the appellant that the charge of allegations framed against the appellant in relation to the user of a deadly weapon in the form of a knife was framed on 26.08.2003 for the offence punishable under Section 397/34 of the Indian Penal Code, 1860 was not brought forth through the testimonies of these three material witnesses.

7. On behalf of the State, the learned APP has vehemently opposed the said prayer and has placed reliance on the testimony of PW-7 Constable Ramesh Kumar and submitted to the effect that this witness has categorically testified to the effect that on 29.05.2003, the accused Mumtaz, i.e., the appellant herein was arrested from his Jhuggi no. 71, CR Park, Jahangirpuri vide an arrest memo Ex.PW7/E on which Constable Ramesh Kumar had signed and that a personal search of the other accused-appellant herein was conducted vide memo Ex.PW7/F and his disclosure statement was recorded vide memo Ex. PW7/G and that the accused Mumtaz, appellant herein had got recovered a buttondar knife from the right side of the room of the jhuggi which was taken into possession vide a memo Ex.PW7/H by SI Sandeep Gupta who prepared the sketch thereof as Ex.PW7/J and that the accused Mumtaz, i.e., appellant herein also got recovered a purse containing cash Rs.10,000/- and a watch of the make of Titan which was taken into possession vide Ex. PW7/K. It was also submitted on behalf of the State that the testimony of PW-12 SI Sandeep Gupta also corroborates the testimony of the Investigating Officer also in consonance with the testimony of PW-7 Constable Ramesh Kumar in relation to the recovery of the knife on 29.05.2003 at the behest of the appellant pursuant to the disclosure statement of the appellant Mumtaz Ex. PW7/G and also to the recovery of Rs.10,000/- in cash and one Titan Watch taken into possession vide Ex.PW7/K that the said knife recovered in relation to which a sketch to the effect Ex.PW7/J was prepared indicated that it had a blade with a length of 11cms, with a width of 2.5 cms and was a buttondar knife and had been utilized in

contravention of any license issued in terms of the Arms Act, 1959 and had been utilized at the time of commission of the offence of robbery on 23.04.2003 and that thus the ingredients of Section 397 of the Indian Penal Code, 1860 were wholly brought forth in view of the testimony of PW-4 Virender Kumar which brought forth that he was wholly terrorized at the time of the commission of the offence by the appellant with the co-accused persons and reliance in relation to this submission was placed on behalf of the State on the verdict of the Hon'ble Supreme Court in **"Ashfaq Vs. State Govt. of NCT of Delhi"** AIR 2004 Supreme Court 1253 to contend that what is essential to satisfy the word 'uses' for the purpose of Section 397 of the Indian Penal Code, 1860 is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of the victim and not that they should be further shown to have been actually used for cutting or shooting as the case may be and it was thus submitted on behalf of the State that the testimonies of PW-2, PW-3 & PW-4 bring forth the creation of terror by a user of a weapon by the appellant which was deadly enough to cause death, was created in the mind of the victim Virender Kumar and also the plumber PW-3 is sufficient to bring forth the charge of allegations and to uphold the conviction of the appellant qua the commission of the offence punishable under Section 397 of the Indian Penal Code, 1860. Reliance is also on behalf of the State on the observations in Paragraph 24 of the verdict of the Hon'ble Supreme Court in **"Dilawar Singh Vs. State of Delhi"** AIR 2007 Supreme Court 3234

wherein it has been observed to the effect “In the instant case admittedly no injury has been inflicted. The use of weapon by offender for creating of terror in the mind of the victim is sufficient and it need not be further shown to have been actually used for cutting, stabbing or shooting as the case may be, which is in reiteration of the observations in the case “**Ashfaq Vs. State Govt. of NCT of Delhi**” AIR 2004 Supreme Court 1253.

8. On a consideration of the rival submissions that have been put forth on behalf of the appellant and on behalf of the State, it is essential to observe that the observations in the Para 22 of the verdict of the Hon’ble Supreme Court in “**Dilawar Singh Vs. State of Delhi**” AIR 2007 Supreme Court 3234 are to the effect:-

“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.”

and relate back to the observations of the Hon'ble Supreme Court in **“Phool Kumar Vs. Delhi Administration” AIR 1975 Supreme Court 905** which lays down specifically to the effect that the term offender under Section 397 of the Indian Penal Code, 1860 is confined to the offender who uses any deadly weapon and use of a deadly weapon by one offender at the time of committing robbery cannot attract Section 397 of the Indian Penal Code, 1860 for imposition of the minimum punishment for another offender who had not used any deadly weapon and that there is a distinction between ‘uses’ as used under Section 397 & 398 of the Indian Penal Code, 1860 and that Section 397 of the Indian Penal Code, 1860 connotes something more than being armed with a deadly weapon.

9. It is essential to observe also to the effect that as observed in **“Dilawar Singh Vs. State of Delhi” AIR 2007 Supreme Court 3234** the word offender envisages individual liability and not any constructive liability.

10. In the instant case though, undoubtedly there has been a recovery of a knife on the date 29.05.2003 at the behest and pursuant to the disclosure statement of the accused-appellant, Mumtaz, the disclosure statement made by the appellant made to the police personnel confined to the extent of the recovery of the knife that has been so effected, i.e., Ex. PW7/J, the date of the commission of the offence in the instant case being 23.04.2003. None of the testimonies of PW-2, PW-3 and PW-4 specifically attribute the possession of the knife as recovered and as depicted through Ex.PW7/J from the appellant on the date 23.04.2003. In the circumstances though

undoubtedly, the appellant had created a terror in the mind of Virender Kumar and the plumber, PW-3 Meer Mohd. Sirazul Islam at the time of the commission of the offence, the said terror created by him along with the co-accused persons is sufficient and culpable enough to bring him within the ambit of culpability under Section 390 of the Indian Penal Code, 1860 where theft is 'robbery' if in order to commit the theft or attempting to carry away the property obtained by the theft, the offender for that act voluntarily caused or attempts to cause to any person death or hurt or wrongful restraint or instant hurt or instant wrongful restraint and the said offence of robbery is punishable in terms of Section 392 of the Indian Penal Code, 1860.

11. The learned APP for the State has submitted that Section 390 of the Indian Penal Code, 1860 does not mandate the requirement of a weapon of an offence which is necessary for the culpability to be attributed in terms of Section 397 of the Indian Penal Code, 1860. Undoubtedly, the said contention is correct inasmuch as the creation of a fear of wrongful restraint or death or instant hurt can be created without the user of any weapon whether it is deadly or not. However, the same does not suffice to bring the present appellant within the ambit of culpability under Section 397 of the Indian Penal Code, 1860 by recovery of the buttandar knife on 29.05.2003 in the instant case in relation to the offence committed on 23.04.2003.

12. In the circumstances the conviction of the appellant is upheld qua the commission of the offences punishable under Section 392/34 of the Indian Penal Code, 1860 and also qua the offences punishable under Section 27 of the Arms Act, 1959 but the conviction of the

appellant qua the offence punishable under Section 397 of the Indian Penal Code, 1860 is set aside. The appellant having already undergone the impugned sentence, the impugned judgment and sentence are modified to the extent as directed hereinabove.

13. The appeal is disposed of accordingly.

14. Copy of this judgment be sent to the Superintendent Jail, Delhi.

ANU MALHOTRA, J

JUNE 13, 2018/NC

