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

+ CRL.A. 712/2018

JITENDER

..... Appellant

Through Mr.Vineet Malhotra, Adv.

Versus

STATE

..... Respondent

Through Ms.Aashaa Tiwari, APP.

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

ORDER

% **10.07.2018**

Crl. M.A. no.12262/2018 (exemption)

Allowed, subject to all just exceptions. Application is disposed of.

Crl. M.A. no. 12261/2018 (delay)

40 days delay in filing the appeal is condoned. Application is disposed of.

Crl.A.712/2018

Aggrieved by the judgment dated 19th January, 2018 and order on sentence dated 02nd February, 2018 of the trial Court, appellant has preferred this appeal. Appellant has been convicted under Sections 392/397 IPC and 25/27 of the Arms Act. He has been sentenced to undergo rigorous

imprisonment for three years with fine of ₹3,000/- and in default of payment of fine to undergo rigorous imprisonment for two months under Section 392 IPC; rigorous imprisonment for seven years with fine of ₹5,000/- and in default of payment of fine to undergo rigorous imprisonment for three months under Section 397 IPC and rigorous imprisonment for three years with fine of ₹2,000/- and in default of payment of fine to undergo rigorous imprisonment for two months under Sections 25/27 of the Arms Act. All the sentences have been directed to run concurrently. Benefit of Section 428 Cr.P.C. has also been given to appellant.

As per the prosecution, complainant PW5 Rajesh Saket was returning home from his office on 16.01.2017 and when he reached near police booth situated near City Park Hotel, Pitam Pura, Delhi at about 08:30 p.m., the appellant waylaid him, pulled him inside the district park near a police booth by showing a knife to him and thereafter robbed ₹6,000/- and ATM card from him. After robbing, the complainant; appellant ran away from there. The complainant made a call at number 100, pursuant whereof PW6 SI Pawan Kumar and PW4 HC Moti Lal reached the spot. PW6 recorded statement (Ex.PW5/A) of PW5 Rajesh Saket, wrote a rukka (Ex.PW6/A) thereon and send the same to police station per hand PW4 HC Moti Lal on

the basis whereof Duty Officer PW1 HC Sandeep Kumar recorded FIR No.25/2017 (Ex.PW1/B) at police station Maurya Enclave. Efforts were made to search the appellant on that date but he could not be apprehended.

Appellant was apprehended by PW7 SI Badami Lal on 20.01.2017 on receiving information from a secret informer. A knife Ex.P-1 was recovered from the appellant which was sealed in a pullanda and thereafter seized vide seizure memo Ex.PW3/A, after making a sketch (Ex.PW3/B) of the knife. Appellant was arrested vide arrest memo Ex.PW3/C. PW3 HC Venu K.P. was present along with PW7 SI Badami Lal when appellant was apprehended and arrested. He witnessed the proceedings conducted by PW7 SI Badami Lal. Pointing out memo Ex.PW3/F was prepared after appellant pointed out the place of incident, i.e. place where he had robbed the complainant. PW.8 Sh.Apoorv Sarvaria, learned Metropolitan Magistrate, North-West District, Rohini Courts, Delhi conducted the TIP proceedings in jail; wherein PW5 Rajesh Saket identified the appellant as the same person who had robbed him. Sealed pullanda was deposited in Malkhana and necessary entries were made in Malkhana register by PW9 ASI Prakash.

Learned Trial Court has scrutinized the testimonies of the witnesses; more particularly that of victim PW5 and has found these to be trustworthy

and reliable. Trial Court has held that from the deposition of PW5 Rajesh Saket, it stands proved that appellant had robbed ₹6,000/- and ATM card from PW5 Rajesh Saket on 16.01.2017 at about 08:30 p.m., on the point of knife. From the statements of PW3 and PW7, prosecution succeeded in proving that appellant was arrested on 20.01.2017 and a knife was recovered from him.

Learned counsel for the appellant has vehemently contended that learned trial court has erred in convicting the appellant on the sole testimony of complainant PW5, who is an interested witness, without corroboration of any public witness. As per PW7, appellant had dragged him in a park, where police booth was there, but surprisingly complainant did not raise any alarm to draw the attention of the police official present in the police booth. It was a public place thus, public witnesses would have also been present. This conduct of PW5 is highly suspicious and makes him unreliable. PW5 has stated that ₹6,000/- and ATM card was stolen; whereas PW6 SI Pawan Kumar has deposed that ₹5,000/-, one mobile phone, chain and ATM card were stolen. Nothing was recovered from the appellant. This also creates a doubt about the whole prosecution version. It is further contended that appellant was shown to PW5 in the police station, thus, TIP proceedings are

meaningless. As per PW5 he was never taken by police in search of accused; whereas as per PW4, HC Moti Lal took complainant (PW5) in search of accused to G.P. Block jhuggies. This material discrepancy also makes the prosecution story suspicious. Arrest of the appellant by PW7 in presence of PW3 is also doubtful.

Learned APP has contended that victim PW5 Rajesh Saket has fully supported the prosecution version. His testimony has remained unshattered in his cross examination. There is no reason as to why his testimony may not be accepted. It is further submitted that PW5, in his cross examination, has clarified that he could not raise alarm as he was frightened since appellant had shown him a knife. PW5 has clarified that no police official was present in the police booth nor any public witness was present at the spot. Accordingly, non-examination of public witness would not be fatal. There is no law that statement of victim is to be discarded only because no public witness had been examined. It is further submitted that opportunity was granted to appellant to cross examine the witnesses inasmuch as material witnesses were even cross examined at length. The Trial Court has rightly convicted the appellant by accepting the unimpeached testimony of witnesses particularly that of PW5.

I have perused the statement of victim PW5 Rajesh Saket and find that he has fully supported the prosecution version. While deposing in Court, he has fully corroborated his statement Ex. PW5/A recorded by the investigating officer on the basis of which FIR was recorded. PW5 has categorically deposed that on 16.01.2017, he was returning home from Prashant Vihar and when he reached near police booth, City Park Hotel, Pitampura Delhi, one person stopped him, showed him a knife, pulled him inside the District park and forcibly took out ₹6,000/- from his shirt's pocket and ATM card from his pant's pocket. He called at 100 number. Police officials reached there. They tried to search the accused but he could not be apprehended. He has deposed that he was called to Tihar jail where he had identified the accused. PW5 identified the appellant as the same person who had robbed him. He had also identified the appellant in TIP. PW8 the learned Metropolitan Magistrate has proved the TIP proceedings. Testimony of PW5 has remained unshattered in his cross examination. PW5 has clarified in his cross examination that he could not raise alarm as he got frightened as knife was shown to him. He further clarified that no police official was present there at the time of incident. He also deposed that no public person was present in the park as it was night time. He denied that he

had falsely identified the appellant. He denied that appellant was shown to him prior to the TIP proceedings.

For the above discussion, I am of the view that trial court has rightly accepted the testimony of PW5. Testimony of PW5 is sufficient to prove that appellant had robbed ₹6,000/- with ATM card from him. PW5 has clarified that no public person was present, therefore, question of examining any independent witness by the prosecution does not arise. Merely because PW6 has stated that ₹5,000/- was robbed by the appellant is not sufficient to disbelieve the statement of victim PW5 Rajesh Saket, who has deposed that ₹6,000/-and ATM card were robbed, inasmuch as prosecution case also proved ATM card was robbed. There is no inconsistency in the statements of PW4 and PW5, as PW5 has stated that “they tried to search for the accused” that is in sync with the statement of PW4 that they took PW5 with them in search of accused. Offence under Section 392 IPC stands proved.

Learned counsel for the appellant has next contended that no knife was recovered on the date of incident. Appellant was arrested after four days. The knife recovered from the appellant was not shown to PW5 Rajesh Saket. No evidence was led to prove that same knife was used. It remained unproved that the knife, which was used while robbing PW5, was a deadly

weapon.

A perusal of section 397 IPC shows that the same would be attracted against such accused only who at the time of committing robbery or dacoity, had used any 'deadly weapon' or had caused grievous hurt to victim or attempted to cause such hurt. In the present case, no attempt was made to cause any injury to complainant nor had complainant suffered any injury. Knife was only shown which would amount to use of a knife at the time of robbery. However, as it has remained unproved that knife recovered from the appellant was used by him at the time of committing robbery, it cannot be said that appellant had used a 'deadly weapon' at the time of committing robbery. In my view the ingredients of section 397 IPC are not attracted in the facts of this case.

In **Charan Singh vs. State, 1998 CrL.L.J. NOC 28 (Delhi)**, it was held that in order to bring home a charge under 397 IPC, the prosecution must produce convincing evidence that the knife used by the accused was a 'deadly weapon'. What would make knife deadly is its design or the method of its use as is calculated to or is likely to produce death. It is, therefore, a question of fact which is required to be proved by the prosecution that the knife used by the appellant was a deadly weapon and in absence of such

evidence and particularly non-recovery of the weapon, would certainly bring the case out of the ambit of section 397 IPC. Similar view has been expressed in **Rakesh Kumar vs. State, 2005 (1) JCC 334**.

Accordingly, the benefit of doubt goes in favour of appellant resulting in his acquittal under section 397 IPC. The ingredients of offence under section 27 of the Arms Act also remained unproved since prosecution has failed to prove that PW5 had used the knife recovered from him while committing robbery on 16.01.2017. The appellant is acquitted under section 27 of the Arms Act as well. However, his conviction under section 25 of the Arms Act is upheld since the recovery of knife at the time of his arrest on 20.01.2017 stands proved by the unchallenged testimonies of PW7 SI Badami Lal and PW3 HC Venu K.P.

For the foregoing reasons, the conviction of appellant and the sentences awarded to him under Section 397 IPC and Section 27 of the Arms Act are set aside. Conviction and sentences awarded to appellant under Section 392 IPC and Section 25 of the Arms Act are confirmed. All the sentences shall run concurrently and benefit of Section 428 Cr.P.C. shall be given to appellant.

Appeal is disposed of in the above terms.

Crl.M.B. No.1086/2018

Application is disposed of as infructuous.

A.K. PATHAK, J.

JULY 10, 2018

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