

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

% Reserved on: 20th February, 2018
Decided on: 7th May , 2018

+ **CRL.A. 21/2017**

AAMIR Appellant

Represented by: Mr. Abhishek Dhingra,
Advocate.

versus

THE STATE (GOVT. OF NCT OF DELHI) Respondent

Represented by: Mr. Hirein Sharma, APP for
the State.

+ **CRL.A. 508/2017**

FAHAD Appellant

Represented by: Mr. Anwesh Madhukar and Mr.
Pranjal Shekhar, Advocates.

versus

THE STATE (GOVT. OF NCT OF DELHI) Respondent

Represented by: Mr. Hirein Sharma, APP for
State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Appellants by the impugned judgment dated 17th November, 2016 have been convicted for offences punishable under Sections 392/34 IPC whereas appellant Aamir has also been convicted for offence punishable under Section 397 IPC. Vide order on sentence dated 23rd November, 2016 the appellants have been directed to undergo rigorous imprisonment for a period of one year for offence punishable under Section 392 IPC and a fine of ₹10,000/- each in default whereof to undergo simple imprisonment for a

period of six months. Appellant Aamir has been directed to also undergo rigorous imprisonment for seven years and to pay a fine of ₹15,000/- in default whereof to undergo simple imprisonment for six months. On realisation of the amount, compensation of ₹5,000/- each from the fine amount imposed from Fahad and Javed and ₹10,000/- from Aamir has to be awarded to the complainant.

2. By the impugned judgment Javed was also convicted for offence punishable under Sections 392/34 IPC and awarded imprisonment for a period of one year. In the appeal filed by Javed being CrI. Appeal No. 212/2017 he did not challenge his conviction and prayed that he be released on period already undergone. Criminal Appeal No. 212/2017 was disposed of by this Court on 3rd August, 2017, directing release of Javed on the period already undergone hence by the present judgment this Court is only required to decide the appeals filed by Aamir and Fahad only.

3. Challenging the conviction learned counsel for appellant Aamir contends that the present is a typical case of Police Station proceedings. There are material contradictions in the testimony of the witnesses. The impugned judgment is silent as to how Section 392 IPC is attracted when there is no evidence that the weapon of offence, that is, ustara was used. Appellants in their statements under Section 313 Cr.P.C. stated that they were falsely implicated. Case of the appellants was that they were standing at Mithai Pul at about 9.30 PM when police came and apprehended them as they were drinking at public place and falsely implicated in this case which fact has not been considered by the learned Trial Court. Even the complainant has not identified Aamir as the person who put ustara on his neck. The allegations against Aamir are limited to the extent that ustara was

recovered from Aamir. Further the sketch of ustara is dated 27th September, 2014. There is no explanation why the accused was not searched despite hours of custody. Despite number of public witnesses being available at the spot, they were not joined in investigation. Though the police witnesses stated that the statement of the complainant was recorded at the spot, however, the complainant stated that his statement was recorded at the Police Station and all proceedings was conducted at the police station.

4. Learned counsel for appellant Fahad contends that the appellants were admittedly beaten by the public persons but no public person was examined nor any action taken against them. Even the Investigating Officer was not examined. The recovery has not been proved against the appellants as the same was not sealed. The moharar malkhana who received and deposited the case property was not examined. The mobile phone allegedly recovered did not belong to the complainant. Owner of the mobile phone was also not examined.

5. FIR No. 285/2014 was lodged at PS Lahori Gate on the complaint of Ranjit Kumar Yadav who stated that he was a native of Village Birne, H. No. 63, PS Ganwah, Distt. Giridih, Jharkhand, aged 21 years, currently residing at, 2658/61, Jain Building, 2nd Floor, Naya Bazar, Delhi-110006. He was residing in Delhi since 2009. On the day of the incident, i.e., 26th September, 2014, at about 9:30 PM, he was going to Naya Bazar from Siraspur via Tis Hazari and had reached Pili Kothi, at Pul Mithai, when three boys who were aged between 22-28 years came from the front side. He stated that one of them put an ustra on his neck and threatened to hit him with the same. Later on, he came to know his name as Aamir. Another boy caught hold of his hand at his back, whose name he later on came to know as

Fahad, who took his mobile and money from the pocket of his shirt. He stated that his mobile phone was of make Samsung having No. 9818918521 and of black color whereas the money he took was ₹230. After robbing him, they ran towards Teliwar crossing. The complainant raised hue and cry, on which public persons caught hold of all three of them and started beating them. In the meantime, police also came there. Police had recorded his statement at Police Station vide Ex.PW5/A. Ranjit Kumar Yadav further put his signatures on the relevant documents prepared. During investigation, police demanded the bill of his robbed phone, which he did not have as he had misplaced it.

6. Ranjit Kumar Yadav appeared in the witness box as PW-5 and deposed in sync with his statement on the basis of which rukka was recorded and also identified the accused and the case property.

7. HC Prempal Diwakar who appeared as PW-2 deposed that on 26th September, 2014, he was on beat patrolling duty along with Ct. Nagesh, Ct.Sandeep and Division Officer SI Jitender. At about 9:30 PM, when they reached at Pul Mithai, near Avantika Bai Crossing, they saw a crowd collected. They saw three persons being beaten by the public. After rescuing the three persons, complainant, namely, Ranjit Kumar, who was present at the spot, got his statement recorded. During the search of accused Aamir, one ustra having partly cut blade was recovered from the right side pocket of his kurta. Thereafter, the search of Fahad was conducted and one mobile phone of Samsung make along with an amount of ₹230 was recovered from the right pocket of his pant. Complainant identified the mobile phone and cash stating that they belonged to him. The ustra recovered from accused Aamir was kept on a blank sheet of paper and its sketch was prepared vide

Ex. PW2/A. Ustra was closed and kept into a cloth pulanda by SI Jitender and was sealed with the seal of JK. The pulanda was seized vide seizure memo Ex.PW-2/C. SI Jitender prepared the tehrir on the statement of complainant and gave the same to Ct. Nagesh for getting the case registered. After registration of FIR, investigation was conducted by SI Jitender, who prepared the site plan and after making enquiry from the accused person, arrested them vide memos Ex.PW-2/G, Ex.PW-2/H and Ex.PW-2/J, all bearing the signatures of the witnesses. HC Prempal Diwakar identified the case property during his deposition. In cross-examination, he stated that the accused were taken to the hospital for medical examination and treatment before being taken to the Police Station.

8. Version of HC Prempal Diwkar is corroborated by Constable Nagesh Kumar (PW-3) and Constable Sandeep (PW-4) who were on patrolling duty with him. They also identified the case property.

9. HC Harshay appeared as PW-1 and deposed that he was posted as Duty Officer at PS Lahori Gate on 26th September, 2014 from 4.00 PM to 12.00 midnight. At about 9.15 PM SI Jitender vide the departure entry proceeded for patrolling in the area along with Constable Sandeep and Constable Nagesh and at about 11.45 PM he received the rukka from Constable Nagesh sent by SI Jitender for registration of FIR Ex.PW-1/B. He also deposed about the certificate issued under Section 65B of the Indian Evidence Act vide Ex.PW-1/D in support of the computerized FIR registered.

10. Constable Jagpal appeared as PW-6 and stated that he was posted as Munshi/Assistant with MHC (M) of PS Lahori Gate. As per the record on 27th April, 2014 SI Jitender Kumar had deposited one sealed pullanda duly

sealed with the seal of JK containing ustra with blade, one mobile phone of make Samsung and cash amount of ₹230 along with personal search articles of the accused persons vide entry No.2589 in Register No.19. Copy of the said entry was exhibited as Ex. PW-6/A.

11. As regards the non-examination of SI Jitender, the orders passed by learned Trial Court reveal that SI Jitender initially appeared before the learned Trial Court on 24th November, 2015 on being summoned, when the learned Presiding Officer was on leave however, thereafter he could not appear as he was on a long medical leave. The order sheet dated 10th August, 2016 notices that SI Jitender was hospitalized and discharged on the said date only. Vide order dated 24th September, 2016 again it was noted that SI Jitender was having problems in his heart and had developed complications in his brain, thus was unable to come to Court and depose. On seeing the medical report of SI Jitender, the learned Trial Court noted that it was not possible to examine the Investigating Officer in the Court in near future and closed the prosecution evidence on 24th September, 2016. Thus no adverse inference can be drawn against the prosecution for non-examination of SI Jitender, the investigating officer.

12. As regards the non-examination of Moharar Malkhana is concerned, Constable Jagpal (PW-6) who was the Assistant Moharar Malkhana appeared in the witness box and deposed on the basis of the record maintained. Despite opportunity this witness has not been cross-examined. Hence, his testimony has gone unchallenged. Thus non-examination of Moharar Malkhana is also not fatal to the prosecution case.

13. The two major contentions of learned counsels for the appellants are that there are material contradictions in the testimony of the witnesses and

that entire proceedings including the statement of the complainant was recorded in the Police Station contrary to the version of the police officers. On behalf of appellant Aamir it was also argued that the ingredients of Section 397 IPC were missing as the complainant did not depose about the use of weapon of offence.

14. As regards the contradictions pointed out in the testimony of the witnesses it may be noted that in the examination-in-chief Ranjit Kumar Yadav stated that the police came at the spot and recorded his statement at PS vide Ex.PW-5/A which bore his signatures at point 'A'. The ustara was recovered by the police officials from the accused and the sketch prepared vide Ex.PW-2/A bearing his signatures at point 'C'. The seizure memo was prepared vide Ex.PW-2/B bearing his signatures at point 'D'. He also signed all the arrest memos, personal search memos etc. Though in cross-examination this witness reiterated that his statement was recorded at Police Station however, in cross-examination he also stated that it was wrong to suggest that the police prepared the documents on their own and he signed on their asking. This witness was given the suggestion that other documents were also prepared at the spot which he denied.

15. Except stating that his statement was recorded at the Police Station, this witness has fortified the entire case of the prosecution. Further the witness is also confused as to whether the statement was recorded at the spot or PS for this reason in respect of the suggestion as to whether any other statement was recorded at the spot, this witness stated that he did not remember the same. It has also come in the cross-examination of Constable Sandeep (PW-4) that they were patrolling in the area at Pili Kothi at about 9.15 PM when the incident took place and the distance of Police Post Pili

Kothi and the spot was 400-500 meters. Thus the complainant having got confused due to the proximity of the Police Post which was nearby with the police station cannot be ruled out.

16. Though learned counsels contended that there were major contradictions in the testimonies of the witnesses but none except the one noted above has not been pointed out.

17. As regards the contention of appellant Aamir that Section 397 IPC is not attracted it would be relevant to note that Ranjit Kumar Yadav in his testimony clearly stated that when he was going to Naya Bazar from Siraspur via Tis Hazari and had reached Pili Kothi, at Pul Mithai, three boys came from his front side, who were aged between 22-28 years and one boy put ustara on his neck and threatened to hit him with the same. Later he came to know the name of the said person as Aamir. This portion of the testimony of Ranjit Kumar Yadav has gone unchallenged despite the fact that this witness was recalled for cross-examination after an application under Section 311 Cr.P.C. was filed on behalf of Aamir and Javed. Thus the witness has clearly deposed about the use of the weapon, which is one of the necessary ingredients of the offence punishable under Section 391 IPC.

18. Objections of learned counsel for the appellant that the ownership of mobile phone has not been proved deserves to be rejected as no cross-examination of the witness was conducted and from the testimony of the witnesses it is evident that the appellants were apprehended at the spot and the recovery of the mobile phone and ustra was made immediately after the incident from the appellants.

19. In view of the evidence on record, this Court finds no error in the judgment of conviction passed by the learned Trial Court. As regards the

order on sentence, since offence under Section 397 IPC stands proved beyond reasonable doubt against Aamir the sentence awarded to appellant Aamir being seven years rigorous imprisonment, the minimum prescribed for the said offence, the same cannot be modified.

20. As regards Fahad sentence of rigorous imprisonment for a period of one year has been awarded to him and the appellant has undergone more than eight months imprisonment including remissions and thus entitled to parity with Javed who had similar role and has also been released on period already undergone. Crl. Appeal No.21/2017 filed by Aamir is dismissed and Crl. Appeal No. 508/2017 filed by Fahad is disposed of releasing him on the period undergone. Sentence of Fahad had been suspended by this Court vide order dated 12th May, 2017. Personal bond and surety bond of Fahad are discharged. No fine be deposited by Fahad.

21. Copy of the judgment be sent to the Superintendent Mandoli Jail for updation of the records. Trial Court record be sent back.

(MUKTA GUPTA)
JUDGE

May 7th, 2018
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