

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

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Reserved on: 5th February, 2018
Decided on: 28th February, 2018

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CRL.A. 824/2017

TASLEEM

..... Appellant

Represented by: Ms. Manika Tripathy Pandey,
Advocate (DHCLSC) and
Mr. Ashutosh Kaushik,
Advocate

versus

STATE (NCT OF DELHI)

..... Respondent

Represented by: Mr. Amit Gupta, APP for the
State with Inspector Suresh
Chand and ASI Puran Singh,
PS Gokul Puri.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal, Tasleem challenges the impugned judgment dated 5th December, 2016 convicting him for offence punishable under Section 392/34 IPC in FIR No. 490/2012 registered at PS Gokul Puri and the order on sentence dated 9th December, 2016 directing him to undergo rigorous imprisonment for a period of three years and six months and to pay a fine of ₹500/- and in default whereof to undergo simple imprisonment for a period of two months for the offence punishable under Section 392 IPC. In the above noted FIR Tasleem and Saleem were apprehended at the spot and tried for offences punishable under Section 392/397/34 IPC however, during the course of trial Saleem absconded and was declared a proclaimed offender. Thus pursuant to trial, only Tasleem was convicted and the proceedings qua Saleem would be revived after his re-arrest.

2. Learned counsel for the appellant contends that there are glaring

contradictions with respect to the number of people involved in the offence. Gyan Chand (PW-1) and Rishi Pal (PW-8) stated that there were two persons committing theft, however, Lucky (PW-6) stated that there were three persons running towards the drain. There are contradictions with regard to the recovery and use of iron cutter. Gyan Chand stated that the appellant had shown him the iron cutter but in his cross-examination, he stated that the iron cutter was recovered from the co-accused. Lucky and Rishi Pal do not mention about the appellant showing the iron cutter. Thus, use of the iron cutter by the appellant has not been proved therefore, at best, the offence made out is under Section 379 IPC. There was no recovery from the appellant and in view of the contradictory stands of the alleged eye witnesses, appellant be acquitted.

3. Learned APP for the State on the other hand submits that Rishi Pal is the main witness in the present case and he informed Gyan Chand. Testimony of Rishi Pal is consistent and only two accused were involved in the incident. He identified the iron cutter also.

4. Process of law was set into motion on 17th December 2012 at about 2:25 A.M. when a PCR call was received stating that "*pradhan wali gokul puri gali no. 3 block 2, chor pakkad rakhe hai*". Aforesaid information was recorded vide DD No. 4A (Ex. PW-10/A) and was entrusted to SI Arvind Kumar. He along with Ct. Satish went to the spot and met the complainant Gyan Chand @ Raka. He and other public person produced two thieves before them, whose names were revealed as Tasleem (appellant herein) and Saleem. SI Arvind Kumar recorded the statement of Gyan Chand @ Raka wherein he stated that he was a resident of H.No. 28, Gali No. 1, A Block, Pradhan Wali Gali, Johripur, Delhi and worked as a Rickshaw Puller. Sushil

s/o Sh. Kanak Singh, aged 38 years worked as a rehri puller and resided in his neighborhood. Both of them parked their rickshaw and rehri in a gali outside Sushil house and locked the same by an iron chain. On the day of the incident at about 2:00 A.M., his neighbor Rishi Pal s/o Amar Singh R/o H.No. 170/3, Gali No.3, A block Pradhan Wali Gali, Johri Pur, Delhi called him out of his house and informed him that two persons were taking their rickshaw and rehri. He came out of his house and noticed that his rickshaw and Sushil's rehri were missing from outside Sushil's house. Thereafter, he and Rishipal shouted '*chor chor*' while running towards the Naala Road, Johripur, where they saw two men taking his rickshaw and Sushil's rehri. He identified his rickshaw and Sushil's rehri and tried to stop them but the person who was taking his rickshaw threatened him with an iron cutter. In meantime, many public persons gathered there and stopped both of them as a result of which both the persons again tried to assault them with the iron cutter. However, since many persons had gathered there, both of them were apprehended. In the heat of the moment, some public people started beating the two thieves which resulted in injuries to them. Meanwhile, someone called 100 and the PCR reached the spot. Thereafter, the police personnel inquired about their names and addresses which they revealed to be Saleem and Tasleem.

5. On the basis of the aforesaid statement (Ex. PW-1/A), FIR No. 490/2012 (Ex. PW-10/D) was registered at PS Gokal Puri for the offences punishable under Section 379/411/34 IPC. SI Arvind Kumar took into possession rickshaw (Ex. P1) and rehri (Ex. P1-A) vide seizure memo Ex.PW-6/B. He had also seized the scooty bearing DL 5S AB 6745 vide seizure memo Ex.PW-6/A and the cutter vide seizure memo Ex.PW-6/C. He

prepared the site plan at the instance of the complainant vide Ex.PW-11/A. He noticed two loose pieces of chain lying near the spot and seized the same vide seizure memo Ex.PW-1/E. He thereafter interrogated Tasleem and Saleem and arrested them. Both the accused persons were taken to GTB Hospital as they had sustained injuries. Rehri, scooty and rickshaw were mechanically inspected and the mechanical inspection report were proved as Ex. PW-9/A, Ex.PW-9/B and Ex. PW-9/C respectively.

6. After the completion of investigation, charge sheet was filed under Sections 392/397/411/34 IPC. Saleem was declared proclaimed offender vide order dated 17th April, 2015. Vide order dated 6th August, 2015, charge was framed against the appellant for offences punishable under Sections 392/397/34 IPC.

7. Gyan Chand @ Raka was examined as PW-1 in Court. He deposed in conformity with his statement made before the police.

8. Sushil @ Sheelu (PW-7) deposed that on 16th December 2012, he along with Gyan Chand @ Raka had parked their rickshaw and rehri in Gali No.3 and locked the same with the help of iron chain. At around 2:00 A.M. he heard noise from Gali No.3. On reaching the spot he noticed several public persons were there and it came to his notice that rickshaw of Gyan Chand @ Raka was missing. On reaching his parent's house in Gali No. 3, he saw his rehri was parked there.

9. Rishi Pal stated that he was a TSR driver by profession. On the night of the incident at about 1:30/2:00 A.M., he came out of his house to urinate and noticed two persons were cutting the chain of the cycle rickshaw and rehri. He, thereafter, raised alarm due to which the two men started to run towards the Nala. People from his locality including Gyan Chand came out

of their houses on hearing the alarm and chased the aforementioned two people. One out of them was overpowered by the public, who was identified as Tasleem.

10. Lucky stated that on the intervening night of 16th and 17th December 2012, he was performing his duty as guard/chowkidar at Nala Road, Johripur, Delhi. At around 1:30 A.M., he heard alarm raised by public persons '*chor chor*' from the side of Gali No.1. Three persons were running towards Nala Road and they were being chased by the public persons. He also chased the thieves and overpowered two boys out of three. He identified Tasleem in court.

11. MVI Tasnimuddin Siddiqui (PW-9) proved the mechanical inspection report of rehri, scooty and rickshaw vide Ex. PW-9/A, Ex.PW-9/B and Ex. PW-9/C respectively.

12. Tasleem in his statement recorded under Section 313 Cr.P.C. stated that he has been falsely implicated. On the day of the incident i.e. 16th December, 2012 at about 1:00 A.M., he was coming back from a marriage party of his friend Vipin who resided in Gokal Pur village and now has shifted to Aligarh, UP. He stated that he saw some men were beating two people. He intervened to stop them. Suddenly, they started beating him as a result of which he fell down and one of them fled from the spot. Due to the beating, he became unconscious and woke up in the hospital. Thereafter, the police took him to the Police Station and registered a false case against him.

13. Contention of learned counsel for the appellant that there is an apparent contradiction in the testimony of the witnesses as the complainant Gyan Chand @ Raka saw two persons running whereas other witnesses saw that three persons were running deserves to be rejected for the reason Gyan

Chand @ Raka was the first person who came outside and saw that the rickshaw and the rehri parked outside the house of Sushil was missing. On his and Rishi Pal's shouting 'Chor Chor' while running other people also joined. Even Rishi Pal stated that he saw two people running. It is only Lucky who was performing the duties of the guard/chowkidar at Nala Road, Johripur, Delhi and joined the people after he heard alarm being raised by the public persons of 'Chor Chor' from the side of Gali No. 1 stated that he saw three persons running towards Nala Road. Thus whether the third person was the public person or an accused was not in the knowledge of Lucky. Lucky has clarified that after public persons chased two boys were over powered at the spot. It is thus apparent that there were only two boys who were involved in the incident and were apprehended on the spot, that is, Tasleem and Saleem.

14. Contention of learned counsel for the appellant that since no weapon was used or shown at the time of committing theft, hence only Section 379 IPC only is made out and not Section 392 IPC deserves to be rejected. In this regard it would be appropriate to note Section 390 IPC which reads as under:

"390. Robbery.—In all robbery there is either theft or extortion.

When theft is robbery.—Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

When extortion is robbery.—Extortion is "robbery" if the

offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.”

15. Section 390 IPC which defines robbery thus provides that in order to commit theft or while carrying away or attempting to carry away property obtained by theft, if the offender voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint or fear of instant death or of instant hurt or instant wrongful restraint, the same would be robbery and not theft. In the facts of the present case while the appellant and co-accused while fleeing away with the stolen goods i.e. rickshaw and rehri were being chased, the weapon of offence which is a deadly weapon was shown and an instant fear of hurt was caused to the complainant and other person. Thus the offence falls within the ambit of Robbery as defined under Section 390 IPC punishable under Section 392 IPC.

16. The above noted issue also arose before the Division Bench of the Bombay High Court in the decision reported as 1997 Cri LJ 3988 State of Maharashtra v. Vinayak Tukaram Utekar wherein the Court repelling a similar contention held:

25. In our judgment inasmuch as during his act of taking away the property obtained by the theft Respondent Vinayak caused hurt to the informant, his act would fall within the ambit of section 390, Indian Penal Code.”

26. *Our view is fortified by the decision of the Apex Court reported in 1980 Supp SCC 344 : AIR 1980 SC 788, Kusho Mahton v. The State of Bihar cited by S.R. Borulkar learned counsel for the appellant in both the appeals. We intend reproducing the relevant portion from the same. It reads thus:*

“After hearing counsel for the parties, we are of the opinion that the appellants have been rightly convicted under section 395, Indian Penal Code, because while carrying away the stolen property they exploded cracker to frighten the inmates of the house who wanted to pursue them.

(Emphasis supplied)

27. *We are in respectful agreement with the said judgment of the Apex Court.*

28. *Mrs. Revati Dere with her characteristic ingenuity urged that the crucial words used in section 390, Indian Penal Code are “for that end”. She urged that if the end is in order to the committing of the theft or in committing the theft or in carrying away or attempting to carry away property obtained by theft and the offender causes any injury etc. the offence would certainly be robbery. But she urged that in this case a perusal of the evidence of the informant clearly indicates that the intention of the respondent in assaulting the informant Hemant Holkar with a knife was only to extricate himself from his clutches and not to ensure his taking away of the property which he had snatched from the informant.*

29. *We are afraid that Mrs. Revati Mohite Dere is cutting it indeed too fine. Common sense admits of no dispute that a person who would commit a robbery would also attempt to run away with stolen articles with the utmost promptitude and if the victim or witnesses would try to obstruct this design of his he would assault them with the weapon with which he is armed. Therefore, the contention of Mrs. Dere, on the facts of this case, that the respondent Vinayak gave a knife blow to the informant only to extricate himself from his clutches and not to*

accomplish his design of carrying away the gold buttons which he had obtained during the course of theft cannot be accepted.

30. We wish to emphasise that in most of the cases where an offender obtains a property during theft and when the victim or witnesses try to catch him the offender tries to run away and if armed with a weapon assaults them, both the facets namely:—

(a) in attempting to carry away property obtained by theft the offender causing hurt to the person who is trying to foil his attempt; and

(b) the normal instinct of self-preservation on account of which the offender tries to run away and foil the bid of the person who endeavours to thwart it by assaulting the said person, may co-exist.

To ignore facet (a) in our judgment, would cause gross miscarriage of justice.

31. There can be no quarrel that knife is a deadly weapon within the ambit of expression “deadly weapon” as used in section 397, Indian Penal Code.

32. For the said reasons we find no merit in the submission of Mrs. Revati Mohite Dere and find merit in the submission of Mr. Borulkar that respondent is guilty of an offence punishable under section 397, Indian Penal Code.

33. Not only do we feel that the Respondent Vinayak is guilty of an offence under section 397, Indian Penal Code but he is guilty of an offence punishable under section 394 read with 397, Indian Penal Code.

34. It is significant to point out that section 397, Indian Penal Code only provides that if the offender while committing robbery or dacoity is armed or uses a deadly weapon etc. he shall not be awarded a sentence of less than seven years R.I. It deals with robbery/dacoity of a more serious nature than that

referred to in sections 394 and 395, Indian Penal Code respectively.

35. Mrs. Revati Dere learned counsel for Respondent Vinayak urged that since no charge was framed for an offence under section 394, Indian Penal Code, we would not be justified in convicting the said Respondent under the said count. We regret that we cannot accede to her contention. It is significant to point out that all the elements of an offence under section 394, Indian Penal Code are included in the offence under section 397, Indian Penal Code. Both of them contemplate of robberies with hurt. In our view, the offence under section 394, Indian Penal Code is a minor offence in relation to that under section 397, Indian Penal Code.

17. In the present case, the appellant has not been convicted for offence punishable under Section 397 IPC though charged and in the absence of any leave to appeal on the said count by the State, this Court is refraining from commenting on the same. However, considering the evidence on record as noted above and the legal position, this Court finds no illegality in the impugned judgment of conviction and order on sentence.

18. Appeal is accordingly dismissed.

19. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

20. TCR be returned.

(MUKTA GUPTA)
JUDGE

FEBRUARY 28, 2018
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