

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

% Reserved on: 5th July, 2018
Decided on: 15th November, 2018

+ **CRL.A. 927/2017**

ARIF Appellant
Represented by: Mr. M.R. Chanchal, Advocate.
versus

THE STATE GOVT OF NCT OF DELHI Respondent
Represented by: Ms. Meenakshi Dahiya, APP
for the State

+ **CRL.A. 1015/2017**

WAHID Appellant
Represented by: Mr. Prashant Diwan with Mr.
Brajesh Dwivedi, Advocates.
versus

THE STATE GOVT OF NCT OF DELHI Respondent
Represented by: Ms. Meenakshi Dahiya, APP
for the State

+ **CRL.A. 1132/2017**

ANSHU Appellant
Represented by: Mr. Sandesh Singh Bagga,
Advocate.
versus

THE STATE GOVT OF NCT OF DELHI Respondent
Represented by: Ms. Meenakshi Dahiya, APP
for the State

+ **CRL.A. 5/2018**

NARENDER @ BHOLA Appellant
Represented by: Mr.V.K. Mishra, Advocate.
versus

THE STATE GOVT OF NCT OF DELHI Respondent

Represented by: Ms. Meenakshi Dahiya, APP
for the State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By these appeals, appellants challenge the impugned judgment dated 16th August, 2017 convicting the appellants Arif, Wahid, Anshu and Narender @ Bhola for the offences punishable under Section 392 read with Section 397 IPC and Arif, Anshu and Narender @ Bhola also for the offence punishable under Section 25 Arms Act in FIR No. 512/2011 registered at PS Nand Nagri and the order on sentence of dated 19th August, 2017 directing the appellants to undergo rigorous imprisonment for a period of seven years and to pay a fine of ₹5,000/- each and in default whereof to undergo simple imprisonment for a period of two years for the offence punishable under Section 392 read with Section 397 IPC. Arif and Narender @ Bhola were further directed to undergo rigorous imprisonment for a period of one year and to pay a fine of ₹1,000/- each and in default whereof to undergo simple imprisonment for a period of three months for the offence punishable under Section 25(1B) Arms Act and Anshu was directed to undergo rigorous imprisonment for a period of three years and to pay a fine of ₹2,000/- and in default whereof to undergo simple imprisonment for a period of six months for the offence punishable under Section 25(1) Arms Act.
2. Assailing the conviction, learned counsel for Arif submits that no independent witness has identified Arif. Weapon of offence was not recovered, however, planted on him. Thus, reasonable doubt is created on the prosecution case.

3. Learned counsel for Wahid submits that Wahid has not been convicted for the offences punishable under Section 411 IPC and Arms Act but for offences punishable under Sections 392/397 IPC. Prosecution case is that Wahid used a deadly weapon which is screw driver in the present case. It is urged that screw driver cannot be termed as a deadly weapon, thus, conviction under Section 397 IPC cannot be sustained. Reliance is placed upon the decision of this Court reported as 2015 (3) JCC 1955 Rajeev Chawla v. State. Learned Trial Court failed to give any finding on deadly weapon in the impugned judgment. No test identification parade was conducted. All the witnesses were highly confused with respect to the sitting position of the appellants in the Gramin Sewa, thus, the prosecution case is not established. Insp. Narender Singh Rana (PW-13) deposed that there was recovery of screw driver from Tahir. However, Tahir has not been made accused in the present case. Insp. Narender Singh Rana did not depose that the screw driver was recovered from Wahid. Mohd Imtayaz (PW-1) was declared hostile on the point of recovery of weapon of offence. Appellants were arrested at the instance of Mohd. Imtayaz, however, no independent witness was associated though the arrest was from the bus stop. Mohd Imtayaz during his cross-examination stated that he saw the appellants twice, once on the day of occurrence and secondly in Court only. No call detail records (CDRs) have been collected.

4. Learned counsel for Anshu submits that Anshu was not arrested from the spot. Date of incident is 3rd December, 2011, however, he was arrested on 5th December, 2011. Secondly, though the case of the prosecution was that there was recovery of money from Anshu, but he was acquitted for the offence punishable under Section 411 IPC. Out of seven prosecution

witnesses, only three witnesses could identify Anshu but there are major contradictions in the testimonies of those witnesses. Thus, benefit of doubt should be granted to Anshu.

5. Learned counsel for Narender @ Bhola, in addition to the arguments advanced by learned counsel for Wahid, submits that it is impossible that 10-12 persons can be accommodated in the Gramin Sewa. Furthermore, if the appellants were carrying the weapon of offences, they would have kept it clandestinely. Investigation has not been conducted properly. No relationship has been proved between the appellants.

6. Per contra, learned APP for the State submits that the prosecution case hinges on the testimony of seven independent witnesses namely Mohd. Imtayaz, Mukesh (PW-2), Imran (PW-3), Shakil Ahmed (PW-5), Dinesh (PW-6), Jane Alam (PW-12) and Mohd. Shafiq (PW-14). Mohd. Imtayaz has supported the prosecution case in his examination-in-chief. It was further submitted that even if screw driver is not a deadly weapon but the cumulative effect of knife/churra, katta and screw driver has to be seen. Shakil Ahmed stated that all the four appellants threatened the complainant and the co-passengers by showing the weapons. Since all the appellants were arrested on the pointing out of Mohd. Imtayaz, there was no requirement of test identification parade. Tahir is not an accused in the present case and his name appears to have been mentioned as a typographical error.

7. Process of law was set into motion on 4th December, 2011 at 12:45 A.M. when information was received stating that 4-5 boys have run away with 4-5 mobile phones and ₹500/- on the pointing out of knife in a gramin sewa vehicle bearing no. DL 2W 2949. Aforesaid information was recorded

vide DD No. 3B (Ex. PW-4/A). SI Rajeev Kumar (PW-15) along with Ct. Brij Bhushan (PW-8) reached the spot where they met SI Azad Singh of PS Jyoti Nagar, complainant Mohd. Imtayaz and other passengers of Gramin Sewa. He recorded the statement of Mohd. Imtayaz wherein he stated that he was a resident of House No. 412, E-Block, Gali No. 3, Shri Ram Colony, Kachi Khajuri, Delhi and had a shop of toys in Sector-4, Vaishali, Uttar Pradesh. On 3rd December, 2011 at 11:00 P.M., he sat in a Gramin Sewa (DL-2W-2949) from Anand Vihar Bus Stand to go home. At around 11:15 P.M., when Gramin Sewa reached near Gagan Cinema, three boys boarded the Gramin Sewa from the back and one boy boarded from the front. Three boys, who boarded the Gramin Sewa from the rear, were short in height, medium built and had wheatish complexion. The boy who boarded from the front was tall in height, medium built and had fair complexion. One more passenger boarded Gramin Sewa from Nand Nagri Depot. Around 11:25 P.M., when Gramin Sewa reached Ashok Nagar Flyover, Nand Nagri, he saw that the boy, who was of short height and was sitting next to him, had a knife with him. The boy took out Mohd. Imtayaz's phone, Model Micromax Q5, Mobile No. 9871416488 and ₹10,000/- from his pant. The other two boys with short height, who were sitting in front of him, too had knife and pistol with them and the boy with tall height sitting in front, next to driver's seat had a screw driver with him. The four boys then made Gramin Sewa stop at Gol Chakkar Flyover and ran towards Bhajanpura. It was later noticed that mobile phones and money was stolen from pockets of other four passengers as well. Gramin Sewa driver then took all passengers to police vehicle stationed near Ambedkar College. All passengers and driver informed the police officials about the incident. On the basis of the aforesaid

statement (Ex.PW-1/A), FIR No. 215/2011 (Ex.A1) was lodged at PS Nand Nagri for the offence punishable under Section 382/34 IPC.

8. Thereafter, SI Rajeev Kumar (PW-15) prepared the site plan Ex. PW-1/B at the instance of Mohd. Imtayaz. He also recorded the statements of other victims. Thereafter, he tried to search for accused persons and case property, but in vain. After recording statement of witnesses, Section 392/34 IPC was also added.

9. Further investigation of the case was handed over to Insp Narender Singh Rana (PW-13). On 5th December, 2011, he along with SI Rajeev, HC Mursaleen (PW-10), Ct. Jasbeer, Ct. Kushal Pal and complainant Mohd. Imtayaz reached main road in front of Nand Nagri DTC Depot where Imtayaz pointed out towards four young men i.e. Arif, Wahid, Narendra and Anshu and stated that they had robbed him and others in Gramin Sewa. He, with the help of staff, apprehended the accused persons and interrogated them. After interrogation, all accused persons were arrested vide arrest memos Ex. PW-10/A to PW-10/D. He recovered one screw driver from accused Tahir, Katta from appellant Anshu, one Knife each from appellant Narendra and Arif. He prepared sketches of the weapons recovered i.e. Knife from Arif (Ex. PW-1/G), Knife from Narendra (Ex. PW-1/E), Screw driver from Wahid (Ex. PW-1/L), Katta from Anshu (Ex. PW-1/J). He recorded disclosure statements of all the appellants vide memos Ex. PW-10/J to Ex. PW-10/M respectively. Thereafter, they returned back to the police station and recorded statement of witnesses and deposited case property at malkhana in sealed condition. Total amount of ₹4,500/- was also recovered from possession of the appellants for which pullanda was prepared and sealed vide memo Ex. PW-10/1.

10. On 6th December, 2011, Insp Narender Singh Rana along with Dinesh, Mukesh and Imtayaz went to Loni, D-Block, Vikas Kunj along with the appellants. One mobile phone was recovered from the slab from ground floor room from the house of Narender at his instance, which was identified by Dinesh to be belonging to him. Pullanda of mobile phone was prepared and sealed vide memo Ex. PW-6/A. Thereafter, Arif led them to his native village, Behata, from where one mobile phone was recovered lying below mattress in the room, which was identified by the Mukesh (PW-2). Said mobile phone was seized vide seizure memo Ex. PW-2/A.

11. Further investigation of the case was handed over to SI Rajeev Kumar (PW-15) on 18th December, 2011. After the completion of investigation, charge sheet was filed.

12. Mohd. Imtayaz deposed in conformity with his statement recorded by the police. He stated that Wahid had put a knife on his chest and Narendra and Anshu were sitting beside Wahid, whereas Arif was sitting beside the driver. Wahid snatched his purse. He also stated that the police had asked him to produce the copy of the receipt of the mobile phone vide which he had purchased. Next day of the incident, when he was going to the police station, he saw the appellants standing at the bus stop of Nand Nagri. He told the police about the appellants standing at the bus stand. Consequently, police went to the bus stop and apprehended the appellants. During his further examination-in-chief, he denied the recovery of currency notes, knife, katta, screw driver and mobile phone from the appellants in his presence at the time of their arrest. During his cross examination, he stated that the investigating officer obtained his signatures on blank papers and had not recorded his statement. He also stated that he saw the appellants on the

day of occurrence and thereafter in Court. He further stated in cross examination by learned counsel for the appellants except Arif that appellants were arrested in his presence at about 9:45 P.M.

13. Mukesh deposed in sync with the testimony of Mohd. Imtayaz with respect to the occurrence of the incident. He also stated that the appellants robbed him of his Nokia mobile phone and ₹2,000/-. He failed to identify the appellants present in the Court. He further stated that his mobile phone was not recovered at the instance of Arif from his house in his presence. He stated that he put his signature on seizure memo of mobile phone make Nokia Model 1209 (Ex. PW-2/A) on the asking of police.

14. Imran reiterated the same facts about the incident. He further stated that he was robbed of his purse containing ₹495/- and his mobile phone make Samsung No. 9811334812 by showing a screw driver. He stated that the appellants present in the Court were not the boys involved in the incident of robbery. He voluntarily stated that he could not see the faces of the said boys.

15. Shakil Ahmed stated that he was working as conductor/helper of the Gramin Sewa 2949 at the time of the incident. He corroborated the facts relating to the incident. He identified all the appellants present in the Court. He pointed out towards Anshu and stated that he put katta on the right side of his back whereas Wahid had put knife on the neck of the driver. He further pointed out towards Narender and stated that he was carrying screw driver and threatened him and the passengers that no one should move or raise alarm. He pointed out towards Arif stating that he was carrying knife and threatened the passengers to hand over all their belongings and cash. Appellants forcibly robbed cash and mobile phones from five passengers.

He correctly identified churra/knife (Ex. P1) used by Wahid, katta (Ex. P2) used by Anshu, knife (Ex. P3) used by Arif, screw driver (Ex. P4) used by Narender. During his cross-examination, he stated that it was possible that the churra Ex.P1 may have been used by Narender and the screw driver by Wahid and due to the lapse of time, there may be some confusion regarding the same.

16. Dinesh corroborated the testimony of Shakil Ahmed. He correctly identified all the appellants present in the Court, weapons of offence and the case property. He correctly identified the mobile phone of black colour make China G60, YE Mobile Ex. P5 stolen from him.

17. Ajay Jain (PW-11) stated that on 9th June, 2010, he sold one mobile phone to Imtayaz for a sum of ₹4,100/-. Photocopy of the bill Ex.PW-1/C bears his signature. Original bill book was not available as the shop got closed in the year 2011-12.

18. Jane Alam stated that he was working as driver of the Gramin Sewa DL 2W 2949 at the time of the incident. He corroborated the incident. He further stated that the person sitting next to him on front seat had put screw driver on his stomach and threatened him to stop the vehicle and not to move. He stated that the four persons who had robbed the passengers were not present in the Court.

19. Mohd. Shafiq corroborated the testimony of other witnesses with regard to taking place of the incident. He also stated that the appellants gave beating to passengers on point of knife and katta. ₹500/- and mobile phone of make Videocon were snatched from his possession. He could not identify those four persons who have robbed him as well as other passengers. He could not say whether the appellants present in the Court were involved in

the said incident or not. During his cross-examination, he voluntarily stated that due to dark, he could not see the faces of those four culprits.

20. All the appellants in their statements recorded under Section 313 Cr.P.C. stated that they were innocent and police falsely implicated them in the present case. They were lifted from their houses and demanded illegal gratification which their parents could not fulfill.

21. From the testimony of the complainant, victims and the driver of the Gramin Sewa vehicle it is evident that when the appellants sat in the Gramin Sewa vehicle each one of them was possessing an arm whether a katta, knife or screw driver and on showing the same, they robbed the passengers.

22. Learned counsel for the appellants have heavily relied on the testimony of the complainant Mohd. Imtayaz who supported the case of the prosecution qua the incident but not with regard to weapon of offence used by the appellants and their arrest in his presence for which he was cross-examined by the learned APP. However, it would be appropriate to note certain parts of the cross-examination on behalf of the appellants wherein Imtayaz admitted that the accused were caught by the police in his presence at about 9.45 at night time. He denied the suggestion of the defence counsel that they were not arrested in his presence or that nothing was recovered from them or he was intentionally identifying them at the instance of I.O. or that no dagger was recovered. The incident took place on 13th March, 2012 and the complainant was examined for the first time in Court on 28th May, 2013. He was not even in a position to give the exact date or the year hence minor variations as to which accused was holding which weapon of offence are bound to take place. Part testimony of the complainant is further strengthened by the testimony of the other victims namely Mukesh, Imran,

Shakil Ahmed, Dinesh, Jane Alam and Mohd. Shafiq, the other co-passengers, victims and the bus driver who all deposed about the incident. Though Mukesh and Imran failed to identify the appellants however, Shakil Ahmed, Conductor/helper of the Gramin Sewa and Dinesh identified the appellants in Court.

23. One of the primary contentions of learned counsel for the appellant Wahid is that allegedly, Wahid used a screw driver which is not a deadly weapon and hence his conviction under Section 397 IPC cannot be sustained. As held in the decision reported at AIR 1975 SC 905 Phool Kumar v. Delhi Admn. a person who uses the deadly weapon can only be convicted for offence punishable under Section 397 IPC however, in this case since the four appellants used four different weapons and committed the robbery together, the overall impact of the weapons has also to be seen. Thus, even if one of the appellants was having screw driver which has been held not to be a deadly weapon in view of the other accused having knives/pistol, the effect on the mind of the victim would be as of a deadly weapon.

24. In view of the discussion as aforesaid and the testimony of the victim/helper and driver of the Gramin Sewa and other prosecution evidence on record this Court finds no infirmity in the impugned judgment of conviction dated 16th August, 2017 and order on sentence dated 19th August, 2017.

25. Appeals are accordingly dismissed.

26. Copies of the judgment be sent to Superintendent Central Jail Tihar for updation of the Jail record and intimation to the appellants.

27. Trial Court record be returned.

(MUKTA GUPTA)
JUDGE

NOVEMBER 15, 2018
‘rk’

