

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

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Reserved on: 28th February, 2018

Decided on: 11th September, 2018

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CRL.A. 1091/2017

MOHD RIYAZ

..... Appellant

Represented by: Mr. M.L. Yadav, Advocate.

versus

THE STATE GOVT OF NCT OF DELHI

..... Respondent

Represented by: Mr. Ashok Kr. Garg, APP for
State with SI Yogendra Kumar,
PS Jagatpuri.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal, Mohd. Riyaz challenges the impugned judgment dated 25th September, 2017 convicting him for the offences punishable under Sections 392/397 IPC and Section 25 Arms Act in FIR No. 484/2013 registered at PS Jagatpuri and the order on sentence dated 12th October, 2017 directing him to undergo rigorous imprisonment for a period of seven years and to pay a fine of ₹5,000/- and in default whereof to undergo simple imprisonment for a period of three months for the offence punishable under Section 392/397 IPC and rigorous imprisonment for a period of four years and to pay a fine of ₹2,000/- and in default whereof to undergo simple imprisonment for a period of one month for the offence punishable under Section 25 Arms Act. Mohd. Riyaz was acquitted for offence punishable under Section 307 IPC for the reason prosecution failed to prove that Mohd. Riyaz fired from the revolver towards the complainant, since the complainant stated that Mohd. Riyaz brought out his pistol, but he denied the suggestion of the prosecution that Mohd. Riyaz tried to fire at

him by pointing the pistol at him and pressed the trigger. Further co-accused Ahsan was acquitted by granting the benefit of doubt.

2. Learned counsel for the appellant contends that the offence under Section 397 IPC is not made out as no deadly weapon was used and Tumpa Dass (PW-1) stated that there were two persons on the bike who snatched the chain. There was no identification by the main victim i.e. Tumpa Dass. The identification by the complainant Bhim Sain Arora is highly doubtful. The pillion rider though allegedly brought out the pistol but the same was not shown, as it has been clarified in cross-examination that weapon was not shown but only brought out. Thus, offence prima facie under Section 397 IPC is not made out and at best offence punishable under Section 392 IPC is made out. Furthermore, Kamal Singh (PW-3) also did not identify the appellant.

3. Learned APP for the State on the other hand submits that the appellant was arrested from the spot. Furthermore, recovery of weapon and chain was also effected at the spot. The prosecution case has been proved beyond reasonable doubt by the testimony of the victim and other witnesses.

4. Process of law was set into motion on 29th October 2013 at about 12:21 P.M. when a PCR call was received informing that one boy fled away after snatching the chain and the second boy has been caught who tried to fire from the pistol at C-43, Chander Nagar, Jagatpuri. Aforesaid information was recorded vide DD No. 20A (Ex.PW-4/A) and was entrusted to SI R.K. Jha. He along with Ct. Rateesh reached the spot where some public persons were already gathered and Ct. Subhash was also present who had apprehended one boy who's name was revealed as Mohd. Riyaz. He recorded the statement of Bhim Sain Arora (PW-2) who handed over a

country pistol which was recovered from the appellant vide Ex.PW-2/A on the basis of which FIR No. 484/2013 (Ex.PW-4/B) was registered at PS Jagatpuri for the offences punishable under Sections 307/356/379/411/34 IPC and Section 25/27 Arms Act.

5. Bhim Sain Arora stated that he resides with his family at C-44, West Chander Nagar, Gali No.2, Krishna Nagar, Delhi-110051 and is involved in property and transport business. On 29th October, 2013 at around 12 in the afternoon, one lady was shouting '*chor pakdo..chor pakdo*' in front of his house. He noticed two boys on a motorcycle going at high speed and the said lady was running after them shouting for them to be caught. On hearing the same, he came in front of the motorcycle and pounced on to them due to which the motorcycle fell down and he caught hold of the person sitting behind. Suddenly, the person got up and took out a pistol from his waist and pointed the pistol towards him and pressed the trigger but it did not fire. He then caught hold of the said person. The other person hit him on his leg with the motorcycle and fled away. In the meantime, people from the neighbourhood gathered including Beat Ct. Subhash and the lady who was shouting earlier. The lady informed them that the person he had caught hold off had stolen her chain from her neck. Thereafter, the bystanders started beating the appellant. On inquiry, the person revealed his name to be Mohd. Riyaz. In the meanwhile, someone had called 100 and informed the police of the incident.

6. SI Rajesh Kumar checked the country made pistol and found one live cartridge inside it. On examining the cartridge, he found hit mark of the hammer of the country made pistol. He then prepared the sketch of the country made pistol and cartridge as Ex.PW-2/D and seized the same vide

memo Ex.PW-2/E. He interrogated the appellant and took his cursory search in which a broken piece of golden colour chain was recovered. One female, namely Ms. Tumpa Dass, who was present at the spot, told him that the said piece was a part of her gold chain which was snatched by the appellant. He, thereafter, converted the said piece into a pullanda and sealed it with the seal of JP-31, PS-Jagatpuri, East District and seized it vide memo Ex.PW-1/A. He thereafter prepared the site plan at the instance of Ms. Tumpa Dass vide Ex.PW-14/B. He interrogated the appellant and arrested him vide arrest memo Ex.PW-2/B and conducted his personal search vide Ex.PW-2/C. During investigation, search for the co-accused namely Ahsaan was made but in vain. Recovery of broken half piece of gold chain and a ring was made at the instance of the appellant from House No. 1222, Sarai Phatak wali gali, Balli Marran, Delhi which was lying under the mattress in the bed room. He seized the same vide seizure memo Ex.PW-6/A and then prepared the site plan of the place of recovery vide Ex.PW-6/B.

7. On 9th January 2014, SI Ajeet arrested the co-accused Ahsaan in another case FIR No. 10/2014 of PS Jagatpuri. He formally arrested him vide memo Ex.PW9/A in the present case and recorded his disclosure statement vide Ex.PW-9/B. After the completion of investigation, charge sheet was filed. Charge was framed vide order dated 3rd March, 2014.

8. Tumpa Dass deposed that on 29th October, 2013 at about 12:00 noon, she had gone to buy medicine. On her way back after buying the medicine, two boys came on a motorcycle and the pillion rider snatched the gold chain from her neck and ran away. She raised the alarm and someone informed the police. She stated that she could not see the face of the motorcycle driver or the pillion rider as the chain was snatched from behind. Neither did she note

down the number. She was informed by the police that her chain was recovered from the appellant.

9. Bhim Sain Arora deposed in sync with his statement made before the police. He also stated that he could identify Ahsaan@ Aslam during the TIP as he had already been shown the said person's photograph by the police. He could not see the person properly during the incident as he ran away. During the cross examination he stated that only an oral inquiry was made from him at the spot of the incident and that his statement was recorded later at the police station. He further stated that it was incorrect to suggest that the appellant had tried to fire on him by pointing the pistol at him and pressing the trigger but it did not fire. He also stated that the sketch of the pistol and the cartridge were not made in his presence. He further stated that the photograph of the appellant was not shown to him prior to the TIP.

10. Sh. Kamal Singh (PW-3) stated that he runs a generator business. On the day of the incident he was going to his friend Bhim Sain Arora's house. After parking his vehicle outside the Gali, he was walking towards the house when he heard the noise "*chor pakad liya*" and saw people including a lady running in the Gali. He further stated that people requested him to inform the police and told him that the said thief had a pistol. Thereafter, he informed the police.

11. Dr. Sushil Kumar (PW-5), Casualty Medical Officer, LBS Hospital, Delhi stated that after examining Bhim Sain, he prepared the MLC Ex.PW-5/A and noted abrasions on Left elbow, left knee and right thumb. After examination, he referred him to Department of Surgery for detailed examination, management and opinion.

12. Dr. Mahender Sharma (PW-7), DNB-Urology, Apollo Hospital, Delhi

stated that after going through the MLC of Bhim Sain Arora, he opined the injuries to be simple in nature.

13. Appellant in his statement under Section 313 Cr.P.C. stated that he was called by police for interrogation and thereafter, he was falsely implicated in the present case, however he led no defence evidence.

14. Primary contention of learned counsel for the appellant is that if threat or injury is caused while running away after the offence or if the weapon of offence having not been used, offence under Section 397 IPC is not made out.

15. Section 390 defines robbery and when theft is robbery and when extortion is robbery 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.

Illustrations

16. Section 397 IPC reads as under:

397. Robbery, or dacoity, with attempt to cause death or grievous hurt.—If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

17. A combined reading of Sections 390 and 397 IPC would show that even when carrying away the property after committing the theft, if the offender voluntarily causes or attempts to cause any person death or hurt or wrongful restraint of fear, instant death or of instant hurt or of instant wrongful restraint the same would amount to robbery and when while committing robbery the offender uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt the offence would fall under Section 397 IPC.

18. From the evidence of Bhim Sain Arora, it is evident that when the appellant along with the co-accused was running away with the chain, he came in front of the motorcycle, pounced on them due to which motorcycle fell down and he caught hold of the person sitting behind. Suddenly the pillion rider got up and brought out a pistol from his waist and pointed the pistol towards him and pressed the trigger but it did not fire. He grappled with him and the public persons also gathered at the spot and the pillion rider was overpowered. Even if the appellant did not press the trigger, merely taking out the pistol was sufficient threat to Bhim Sain Arora to cause death or grievous hurt thereby attracting Section 397 IPC.

19. The issue was decided by the Hon'ble Supreme Court in the decision reported as AIR 1975 SC 905 Phool Kumar v. Delhi Admn., wherein it was held that mere showing of the deadly weapon would attract offence under Section 397 IPC. It was held:

4. The last submission on behalf of the appellant was that sentencing him to undergo rigorous imprisonment for seven years under Section 397 of the Penal Code was illegal and he ought to have been convicted under Section 392 simpliciter which would have enabled the Court on the facts of this case to pass a lesser sentence of imprisonment. Reliance was placed upon the majority opinion of the Full Bench of the High Court of Punjab & Haryana in the case of State v. Chand Singh [ILR (1970) 2 Punj and Har 108] . The argument was attractive at the first sight but did not stand our careful scrutiny.

5. Section 392 of the Penal Code provides:

“Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.”

The sentence of imprisonment to be awarded under Section 392 cannot be less than seven years if at the time of committing robbery the offender uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person: vide Section 397. A difficulty arose in several High Courts as to the meaning of the word “uses” in Section 397. The term “offender” in that section, as rightly held by several High Courts, is confined to the offender who uses any deadly weapon. The use of a deadly weapon by one offender at the time of committing robbery cannot attract Section 397 for the imposition of the minimum punishment on another offender who had not used any deadly weapon. In that view of the matter use of the gun by one of the culprits whether

he was accused Ram Kumar or somebody else, (surely one was there who had fired three shots) could not be and has not been the basis of sentencing the appellant with the aid of Section 397. So far as he is concerned he is said to be armed with a knife which is also a deadly weapon. To be more precise from the evidence of PW 16 "Phool Kumar had a knife in his hand". He was therefore carrying a deadly weapon open to the view of the victims sufficient to frighten or terrorize them. Any other overt act, such as, brandishing of the knife or causing of grievous hurt with it was not necessary to bring the offender within the ambit of Section 397 of the Penal Code.

6. Section 398 uses the expression "armed with any deadly weapon" and the minimum punishment provided therein is also seven years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. This has created an anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed in committing it attracts the minimum punishment of seven years under Section 398 if he is merely armed with any deadly weapon, while an offender so armed will not incur the liability of the minimum punishment under Section 397 if he succeeded in committing the robbery. But then, what was the purport behind the use of the different words by the Legislature in the two sections viz. "uses" in Section 397 and "is armed" in Section 398. In our judgment the anomaly is resolved if the two terms are given the identical meaning. There seems to be a reasonable explanation for the use of the two different expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to any fruitful use because it would have been of use only when the offender succeeded in committing the robbery.

20. Appellant was apprehended at the spot along with the weapon of offence and part of stolen chain of Tumpa Dass and evidence of Bhim Sain Arora, which is also corroborated by his MLC, shows that he received abrasions while apprehending the appellant.

21. Learned counsel for the appellant has also highlighted the difference in time of PCR call and registration of FIR. DD No.20A exhibited as Ex.PW-4/A was received at PS Jagatpuri at 12:21 hours, that is, afternoon of 29th October, 2013 whereafter proceedings were carried out at the spot and after recording of the statement of Bhim Sain Arora rukka was sent at 15:00 hours and FIR was registered thereafter vide DD No.22A at 15:30 hours and on receipt back of the FIR appellant was formally arrested at the spot at 4:20 PM i.e. 16:20 hrs. on 29th October, 2013. Hence there is no contradiction in the time of the PCR or the arrest of the accused.

22. In view of the discussion aforesaid this Court finds no error in the impugned judgment convicting the appellant for offence punishable under Sections 392/397 IPC and Section 25 Arms Act or the order on sentence as offence punishable under Section 397 IPC entails a minimum punishment of seven years' imprisonment.

23. Appeal is dismissed.

24. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record and also intimation to the appellant.

25. TCR be returned.

SEPTEMBER 11, 2018
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(MUKTA GUPTA)
JUDGE