

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

CRL.A. 1206/2015 and CRL.A. 5/2016

Reserved on : 01.11.2019

Date of Decision : 11.12.2019

IN THE MATTER OF:

CRL.A. 1206/2015

SHEHZAD

..... Appellant

Through: Mr. Saurabh Kansal and Ms. Pallavi
Kansal, Advocates

versus

STATE

..... Respondent

Through: Ms. Manjeet Arya, APP for State

CRL.A. 5/2016

SUMIT

..... Appellant

Through: Mr. S.S. Hora, Advocate

versus

STATE (GOVT OF NCT OF DELHI)

..... Respondent

Through: Ms. Manjeet Arya, APP for State

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The above-noted appeals arise out of the common impugned judgment dated 8.09.2015 passed by the Additional Sessions Judge-03(NE), Karkardooma Courts, Delhi in SC No. 131/10 arising out of FIR No. 05/09 under Sections 392/394/397/411/34 IPC registered at PS

Harsh Vihar. Both the appellants were convicted for the offence punishable under Sections 394/34 IPC and the appellant Shehzad was also convicted for the offence punishable under Section 397 IPC as well.

2. Vide order on sentence dated 14.09.2015, the appellants were sentenced to RI for 10 years under Section 394 IPC along with fine of Rs. 10,000/- each in default whereof they were directed to undergo SI for one year each. The appellant Shehzad was also sentenced to RI for 7 years under Section 397 IPC. Both the appellants were granted benefit of Section 428 Cr.P.C.

3. The two appeals have been heard together and they are being disposed of by one common judgment.

4. The brief facts as noted by the Trial Court are reproduced as under: -

“It is the case of the prosecution that on 12.01.2009, on receipt of DD no. 4A, HC Ompal and Ct. Anil Kumar went to gali no. 13, D Block East Gokal Pur, Delhi where they came to know that injured had already been removed to GTB hospital by PCR van. They went to GTB Hospital and collected MLC of injured Ct. Ajab Singh with alleged history of assault. Injured was ‘fit for statement’ and IO recorded his statement and started investigation. Accused were arrested in another FIR of same PS and made disclosure of their involvement in this case. Police investigated the matter and recovered looted purse containing I-Card of the injured from a juvenile on the basis of information of both accused in this case. During the course of investigation, accused were arrested.”

5. After completing investigation, the charge-sheet was filed. The charges were framed under Sections 392/394/397/34 IPC to which the appellants pleaded not guilty. During trial, the prosecution examined total of 12 witnesses.

6. Ajab Singh, the complainant/injured was examined as PW-1. Laxmi, his wife, was examined as PW-2. Dr. Parmeshwar and Dr. Amit Gupta, who proved the complainant's MLC and the opinion on the nature of injuries, were examined as PW-3 and PW-11 respectively.

7. HC Anil Kumar (PW-4) and HC Ompal Panwar (PW-7) were the police officials who first reached the spot. HC Ompal Panwar had sent the *Rukka* through Ct. Anil Kumar on the basis of which HC Upender Singh (PW-6) registered the FIR. The Investigating Officer, SI Bhupender Singh was examined as PW-12. To prove the TIP proceedings, Ms. Suchi Laler, MM was examined as PW-10.

8. As per the prosecution case, the appellants after committing the offence in the present case committed another offence. The first offence was committed in the intervening night of 11/12.01.2009 at about 12:30 A.M (night) which resulted in registration of present FIR 05/2009. Thereafter, in the afternoon of 12.01.2009, the appellants committed another offence resulting in registration of second FIR bearing no. 09/2009 under Sections 382/411/34 IPC at PS Harsh Vihar.

9. The appellants firstly came to be arrested in the second case i.e., FIR No. 09/2009. In their disclosure statement, the appellants confessed to having committed the offence in the present FIR no. 05/09 as well. To prove the arrest and investigation in FIR 09/2009, the prosecution examined HC Naresh Kumar, HC Harender Kumar and SI Rakesh Tyagi as PW-5, PW-8 and PW-9 respectively.

MATERIAL WITNESSES

10. *Ajab Singh*, the injured complainant, deposed that after finishing his duty at PS Connaught Place, he reached *Loni* roundabout by TSR from where he started walking towards his house at Meet Nagar, Nand Nagri. When he reached near T.R. Shahni Maruti Showroom, three boys riding a motorcycle suddenly came from his backside and stopped their motorcycle in front of him. One of the boys caught his shirt's collar from backside. When the complainant objected, the other two boys also came down from the motorcycle. While one of them gave a knife blow on the back portion of his right thigh, the other boy removed the purse from his pant's back pocket. When the complainant tried to take back his purse, he was stabbed again on the front portion of his thigh by the same boy who had earlier stabbed on the back portion of his right thigh. The purse contained Rs. 400-500/- and his I-card of Delhi Police. The witness deposed that all the boys were in the age group of 22/23 years. When he reached home in an injured condition, the neighbors gathered. The PCR came and took him to GTB Hospital where his statement (Ex. PW-1/A) was recorded. The witness deposed that he remained in the hospital for four days i.e., up to 16.01.2009.

11. The complainant identified the appellant Sumit as the boy who had held his shirt's collar and the appellant Shehzad as the boy who had stabbed him twice. The third boy, who had removed the purse, being a juvenile, was tried by the Juvenile Justice Board.

12. The complainant also proved the TIP proceedings with respect to both the appellants as well as the case property.

13. The complainant also identified the recovered 'dark brown colored woodland make leather purse' which was exhibited as Ex. PW-1/Article-1. The blood stained 'dark grey pant' having cut mark on the backside along with the blood stained 'inner pajama' having corresponding cut mark was exhibited as Ex. PW-1/Article-2 collectively.

14. During cross-examination, the complainant admitted that he had a mobile. The complainant denied the suggestion given on behalf of the appellant Shehzad that he had falsely implicated him on account of previous enmity. A suggestion was given to the complainant that prior to registration of the present FIR, he had threatened the appellant, Shehzad however, neither any date nor any details of any such prior threat was given or suggested to him.

15. Laxmi (PW-2), wife of the complainant, deposed that in the night of 11/12.01.2009 at about 1:00-1:30 A.M., the complainant reached home in an injured condition and his clothes were blood-stained. She deposed that some person from the neighborhood called police on number 100 and the PCR took the complainant to GTB Hospital. She identified the blood-stained clothes of the complainant i.e., his pant and inner *pajama* and proved their seizure memo as Ex. PW-2/A.

MLC

16. Dr. Parmeshwar proved the complainant's MLC (Ex.PW-3/A) which was recorded on 12.01.2009 at about 2.15 a.m. The following injuries were noted in the MLC:-

1. *Sharp incised wound measuring 3cm x 2cm over posterial aspect of right mid thigh.*

2. *Sharp incised wound measuring 1cm x .5cm lateral aspect of right mid thigh.”*

17. Dr. Amit Gupta proved the opinion on the injuries of the complainant as simple. He identified the signature of Dr. Dua who had given the said opinion.

POLICE WITNESSES

18. Bhupender Singh (PW-11), the Investigating Officer, deposed that he arrested the appellants after they were produced before him by SI Rakesh Tyagi, the Investigating officer in FIR No. 09/2009. The complainant's purse was recovered at the instance of the juvenile.

19. The appellants in their statement recorded under Section 313 Cr.P.C. simply denied the prosecution case.

20. Mr. Saurabh Kansal, learned counsel for the appellant Shehzad assailed the testimony of complainant on the ground that though two injuries were stated to have been received but only one cut mark was observed on his clothes; the blood stained clothes were not sent to FSL; no blood was found on the spot; the weapon of offence was not recovered and despite having a mobile phone, he did not make any call to the PCR. It was also contended that no public witness was examined. It was also contended that the injuries could have been caused by either any key or any such object. In support of his contention, he has relied upon the case of Jitender @ Jeetu Vs. State reported as **2015 SCC OnLine Del 6594** and Mohan Singh vs. State reported as **1987 (13) DRJ 176**.

21. Mr. S.S. Hora, learned counsel for the appellant Sumit contended that firstly, the appellant's disclosure was recorded in FIR No. 05/2009

and then in FIR No. 09/2009. He thus urged that to solve an otherwise blind case, the appellants were falsely implicated to oblige the complainant, who was a policeman. He also submitted that the appellant has already been acquitted in the FIR 09/2009 on failure of witnesses to identify the appellants.

22. Ms. Manjeet Arya, learned APP for the State on the other hand has supported the impugned judgment. She submitted that the statement of the complainant stood corroborated by his MLC as well as by recovery of his purse. She also submitted that the complainant identified his purse as well as the appellants in the TIP proceedings and also in the court.

ANALYSIS

23. The factum of the complainant receiving injuries was first recorded vide DD No.4A. The complainant has deposed that two injuries were inflicted on his thigh. The complainant's injury stood corroborated by his MLC which was recorded within two hours of the incident i.e., at about 2:15 A.M. on 12.01.2009. In view of above, the contention that only one cut mark was visible on the complainant's pant, is inconsequential.

24. The complainant remained in the hospital from 12.01.2009 to 16.01.2009 whereafter, he was taken to the spot on 16.01.2009. The spot was actually a busy road so no blood could be found after 4 days. The incident happened at night time and therefore no public witness could be found.

25. At the time of recording of his statement in *Rukka*, the complainant had given description of the assailants and also stated about

their age group. The appellants were identified by the complainant in the TIP as well as during his deposition in the court. The appellants did not take any objection at the time of TIP proceedings to the effect that they were already shown to the complainant.

26. The offence was committed by the appellants along with the third accused who, being a juvenile, was tried by the Juvenile Justice Board. The case property i.e., the complainant's purse, recovered at the instance of the co-accused, was duly identified by him in the TIP proceedings as well as during his deposition in court.

27. So far as contention of solving the blind case to oblige the complainant is concerned, it is relevant that the complainant was attached with PS Connaught Place whereas the present FIR was registered at PS Harsh Vihar. During complainant's cross-examination, although a vague suggestion was given that the appellants were already known to the complainant and were threatened by the complainant earlier but neither any date nor any detail or description of any threat was given.

28. The contention that disclosures ought to have been first recorded in the present FIR, is devoid of any merit. The appellants were arrested in FIR 09/2009 where they confessed of their involvement in the present FIR as well. The investigating officers of both the cases were different even if the police station was same. Even otherwise, the appellants' disclosure did not lead to any recovery.

29. It was contended that the blood-stained clothes of the complainant were not sent to FSL. In this regard, it is seen that at the time of examination of the complainant when the clothes were produced for identification, it was observed that both the articles were blood-stained

and also had corresponding cut marks on the back side of the thigh. Further, it is no longer res integra that a lapse by the Investigation officer cannot lead to an acquittal if other cogent evidence is available on the record.

30. Ld. Counsel for the appellant Shehzad contended that the appellant was not at the spot on the date of the incident and was rather at Ajmer working at an embroidery factory. It is noted that besides giving such a vague suggestion to the Investigation officer, no evidence was led to prove such a plea. The same is rejected.

31. In so far as, offence punishable under Section 397 IPC is concerned learned counsel for the appellant Shehzad contended the non-recovery of the knife has rendered the conviction under Section 397 IPC unsustainable. It was further submitted that the complainant's injuries were opined to be only '*Simple*' in nature.

32. To answer the above contention, it would be profitable to refer to Section 397 IPC which reads as under:

"Section 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."

33. For the purpose of deciding the controversy in the present case, the relevant portion of Section 397 IPC requires the '*offender to use any deadly weapon at the time of committing robbery*'. The robbery, of removing the purse of the complainant, stands proved. Now, so far as

‘use’ of the ‘deadly weapon’ is concerned, the injuries on the thigh of the complainant stand proved by his testimony, the MLC and the corresponding cut mark on the clothes of the complainant.

34. The controversy stands narrowed down to determine the effect of non-recovery of the knife to sustain conviction under Section 397 IPC.

35. It has come on the record that the when the complainant was assaulted with the weapon of offence, it cut through his pant as well as the inner *pajama*. For the weapon to cut through the two layers of clothing, it has to be a sharp weapon. In the MLC, both injuries on the thigh of the complainant were noted as ‘sharp incisional wounds’ of 3 cm x 2 cm and 1cm x 0.5cm. Further, in the MLC, the nature of weapon causing injuries was opined to be a ‘sharp weapon’. The complainant in his very first statement stated that the injuries were caused by a knife. The complainant was a policeman and cannot be mistaken as to what a knife is. A knife is an article that is typically and characteristically dangerous, the display of which instills fear in an ordinary person.

36. In Phool Kumar v Delhi Administration, reported as **(1975) 1 SCC 797**, Supreme Court held as under:

“5.....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 PW16 “Phool Kumar had a knife in his hand. He was therefore carrying deadly weapon open to the view of the victim sufficient to frighten or terrorize them.....”

37. In Ashfaq v State, reported as **(2004) 3 SCC 116**, where the accused persons were armed with country made pistol and knives. The conviction of the accused persons was upheld for the offence punishable

under Section 397 IPC despite the fact that the knives were not recovered. It was held that:

“8. Thus, what is essential to satisfy the word “uses” for the purposes of Section 397 IPC is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of the victim and not that it should be further shown to have been actually used for cutting, stabbing, shooting, as the case may be.

9....the others were also armed with and used their knives and that knife is equally a deadly weapon ,for the purposes of Section 397... ”

38. In Salim v. State reported as **1987 SCC OnLine Del 408**, the court noted the contention of the appellant that the knife was not recovered. While referring to the observations of Supreme Court in Phool Kumar (supra), the Court held as under:

“9 Then Mrs. Ahlawat submitted that in any case no offence under Section 397 I.P.C. could be said to have been committed inasmuch as it was stated that the accused was armed with a knife only and that the knife had also not been recovered.....This decision of the Supreme Court wherein it is held that knife is a deadly weapon was not referred to in the aforesaid two decisions of this court and the same are not, therefore, a binding precedent. Under Section 397 I.P.C an offender is guilty if he uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person. The words 'deadly weapon' are of common use and do not need any definition or interpretation. The words 'deadly weapon' have also been used in Section 148 Indian Penal Code. Section 324 I.P.C. uses the words 'dangerous weapons' in its heading. It says whoever voluntarily causes hurt by any instrument for shooting, stabbing or cutting, or any instrument which used as a weapon of offence is likely

to cause death, etc., is liable to punishment. In *Lakshmiammal v Samiappa* (AIR 1968 Madras 310), the accused were armed with weapons like knife, hammer, crowbar and spades. It was held that these were undoubtedly deadly weapons. The Concise Oxford Dictionary defines the word 'weapon' as 'material thing designed or used or usable as an instrument for inflicting-bodily harm, e.g. gun, bomb, rifle, sword, spear, stick hammer, poker, horn, claw'. The word 'deadly', according to this Dictionary, means 'causing fatal injury'. Also, according to this Dictionary, 'knife' means 'blade with sharpened longitudinal edge fixed in handle either rigidly.... or with hinge used as cutting instrument or as weapon'. As per Webster's Third New International Dictionary a 'knife' is 'a simple instrument used for cutting consisting of a sharp-edged usually steel blade provided with a handle'. Longman Dictionary of Contemporary English defines 'knife' as 'a blade fixed in a handle used for cutting as a tool or weapon'. These definitions in various dictionaries can be multiplied. We all understand what a knife means and to categorise it or to fix its size for it to be a deadly weapon may not be appropriate. A knife has also been described as a pocket knife, pen knife, table knife, kitchen knife, etc. It cannot be denied that a knife can be used as a weapon of offence. It can cut, it can pierce, it can be deadly. To say that a knife to be a deadly weapon should be of a particular size would perhaps be not a correct statement. In the present case, the evidence shows that the injury was caused to Singh Ram witness by a sharp-edged weapon and there is a statement that the accused Salim was carrying a knife and it was with that knife that the injury was caused to the witness. It would not be necessary for the witness to further state as to that was the size of the knife to attract the provisions of Section 397 I.P.C. as was contended by Mrs. Ahlawat. This contention that case under Section 397 I.P.C. is not made out fails.”
(emphasis added)

39. Similarly, in Seetal v. State (NCT of Delhi) reported as (2014) 215 DLT 60, a coordinate bench of this court held as under:

“19. The resultant position that emerges is that Section 397 would be attracted even if the accused, who possessed a knife during the robbery, does not actually use it to threaten the victim. A victim who has noticed the knife in the hand of the accused would undoubtedly feel threatened. It is possible that the victim may not have noticed what type of knife it is and whether it is capable of causing actually harm. In other words, the actual size or length of the knife would not matter. In Phool Kumar, the Supreme Court noticed the observations of the Bombay High Court in Govind Dipaji More v. State AIR 1956 Bom 353 that if the knife “was used for the purpose of producing such an impression upon the mind of a person that he would be compelled to part with his property, that would amount to using the weapon within the meaning of Section 397.” Therefore, the fact that the knife was not recovered at all, or that the recovered weapon was not shown during the course of trial to the victim, would not matter as long as the eye witnesses to the crime are able to convincingly and consistently recount the fact that they were threatened by the sight of the accused wielding the knife into parting with their belongings.”

(emphasis added)

40. The aforesaid views rendered in Ashfaq (supra), Salim (supra) and Seetal (supra) were followed subsequently in the cases of Sanjay Shankar Swami@) Sanjay Kumar v. State (NCT) of Delhi¹, Imran @ Akhlakh v State², Murlidhar v State³ and Sonu @ Shahnawaz v State⁴. Learned

¹ 2014 SCC OnLine Del 4846

² 2015 SCC OnLine Del 8969

³ 2018 SCC OnLine Del 9401

counsel for the appellant's reliance upon the decision rendered in Mohan (supra) is misplaced in view of the subsequent decision in Ashfaq (supra). Subsequently, the reliance on decision in Jitender (Supra) is also misplaced as the decisions in Ashfaq (supra), Salim (supra) & Seetal (supra) were not brought to the notice of the Court.

41. In the opinion of this Court, the testimony of the complainant, Ajab Singh is cogent, reliable and trustworthy. In view of his testimony, that he was shown knife by the appellant Shehzad, identification of both the appellants in TIP as well as in Court, identification of the case property, complainant's MLC and corresponding cut marks on his blood stained clothes, the conviction of the appellant Shehzad for the offence punishable under Section 397 IPC is upheld. The presence of Sumit at the spot and his involvement in the offence is proved. The conviction of both appellants, Shehzad and Sumit for the offence punishable under Section 394/34 IPC is upheld.

42. Learned Counsel for the appellant Shehzad submitted that the appellant is married and has two minor children. He further submitted that the appellant has been in custody for more than 6 years. Learned counsel for the appellant Sumit submitted that the appellant was about to be married when he was sentenced and have old aged parents. The appellant Sumit is stated to be in custody for more than 6 years. It was also submitted that the appellants are not involved in any other case except in the FIR 09/2009 where an order of acquittal has been passed.

⁴ 2019 SCC OnLine Del 11183

43. In view of the above submission, the sentence of both the appellants for the offence punishable under Section 394/34 IPC is modified to the period already undergone.

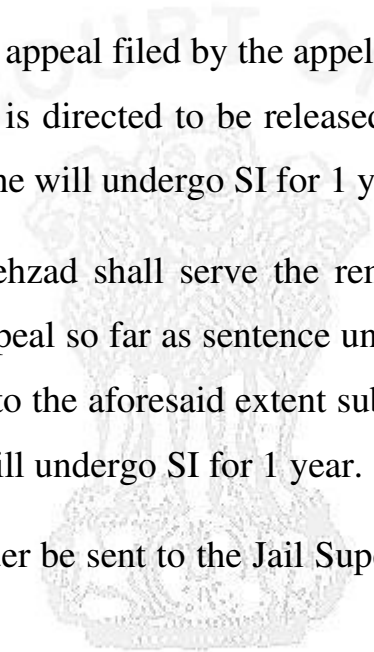
44. The sentence of appellant Shehzad for the offence punishable under Section 397 IPC is upheld.

45. The sentence of fine and the default sentences of both the appellants are maintained.

46. Consequently, the appeal filed by the appellant Sumit is allowed to the aforesaid extent. He is directed to be released subject to payment of fine in default whereof, he will undergo SI for 1 year.

47. The appellant Shehzad shall serve the remaining sentence under Section 397 IPC. His appeal so far as sentence under Section 394/34 IPC is concerned is allowed to the aforesaid extent subject to payment of fine in default whereof, he will undergo SI for 1 year.

48. A copy of this order be sent to the Jail Superintendent and the trial court.


(**MANOJ KUMAR OHRI**)
JUDGE

December 11, 2019