

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 22.10.2020

+ **CRL. A. 258/2020 and CRL.M. (BAIL) 413/2020**

KAILASH @ BALLI

.....Appellant

Versus

STATE (NCT OF DELHI)

..... Respondent

Advocates who appeared in this case:

For the Appellant :Ms Supriya Juneja, Advocate (DHCLSC).

For the Respondent :Mr Ravi Nayak, APP for State.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed this appeal impugning a judgment dated 30.11.2019 whereby he was convicted for offences punishable under Sections 392 and 397 of the Indian Penal Code, 1860 (IPC) and Section 25 of the Arms Act, 1959 (hereafter 'the Arms Act'). The appellant also impugns the order on sentence dated 30.11.2019, whereby the appellant was sentenced to seven years of rigorous imprisonment along with a fine of ₹1,000/- and in default of payment of fine to undergo imprisonment for a further period of one week for the offences punishable under Sections 392 and 397 of the IPC. In addition, he was sentenced to three years of simple imprisonment for committing the offence under Section 25 of the Arms Act along with a fine of ₹1,000/-

and in default of payment of fine to undergo further imprisonment for one week. Both sentences were directed to run concurrently.

2. The appellant was prosecuted pursuant to registration of the FIR (FIR bearing no. 364/2015 under Sections 398/397/411 of the IPC and Section 25 of the Arms Act) registered with PS Ranjit Nagar. The said FIR was registered on 18.06.2015 on the basis of the statement made by a young man named Gyaneshwar (complainant). He was aged about nineteen years.

3. The complainant stated that four months ago, he had fever and was diagnosed as suffering from tuberculosis. He was being treated for the same. He stated that his doctor had advised him to go for early morning walks at about 05:00-06:00 am. He stated that pursuant to the said advice, he used to take a daily walk at 05:00 am every day in Satya Park, which is located about 400 to 500 meters away from his residence. He stated that on that date (that is, on 18.06.2015), he had gone to Satya Park at about 05:00 am and after taking one round of the park, he sat down on the ground underneath a tree. He was approached by a boy (the accused) who enquired from him as to what he was doing there. He responded by telling him that he just sitting down and not doing anything. At that point, he had his phone in his hand and was listening to music on the same. He stated that that boy asked him for his mobile and attempted to snatch it away from him. He stated that he pushed that boy, who fell down. Thereafter, the accused got up and took out a small knife from the pocket of his jeans. He opened the said knife by pressing a button and thereafter, attacked him and took his mobile away. He

alleged that the accused pushed him and left the spot. He further stated that he followed the accused and when he was near the main gate, he saw two police officials. He rushed towards them and told them about the incident. At that time, the accused had only gone a short distance away. The said police officials ran and apprehended the accused. They searched him and recovered the phone (Micromax A-106, black and white colour, with IME No.911401151902382 and 911401152402887) with the SIM of Aircel bearing no.9716143289. On enquiries, the accused disclosed his name as Kailash @ Balli and he stated that he was a resident of K-139, Kathputli Colony.

4. Pursuant to the aforesaid FIR, the accused was charged with the commission of an offence punishable under Sections 392/397/411 of the IPC and Section 25 of the Arms Act. The accused pleaded not guilty and the matter was set down for trial.

5. During the course of the trial, the prosecution examined six witnesses.

6. The prosecution's case rests mainly on the testimony of the complainant and the two policemen, Ct. Jamaludeen and Ct. Pawan, who had apprehended the accused and recovered the complainant's mobile phone and a knife from him.

7. Sh Gyaneshwar, the complainant, was examined as PW-1. He stated that he was suffering from Tuberculosis in the year 2015 and on the advice of his doctor, he used to go for morning walks. He testified that on 18.06.2015 at about 06:00 a.m., he went to Satyam Park for his

morning walk. After taking one round, he sat down under a tree and started listening to songs on his mobile phone. In the meantime, a person (the accused) came there and asked him (PW-1) to show the mobile phone. PW-1 testified that on his declining to do so, the accused entered into a scuffle with him. He produced a knife and showed the same to him. He, being so threatened handed his mobile phone (make Micromax) to the accused. The accused took the mobile phone and proceeded to the gate of the park. PW1 testified that he pursued the accused and when he reached the main gate, he saw two police officials coming towards the main gate. He informed them about this incident. Thereafter, the police officials apprehended the accused. They searched him and recovered PW-1's mobile phone and a small knife. Thereafter, they (PW1, accused and the police officials) went to the police station. PW-1 stated that his statement (Ex.PW1/A) was recorded at the police station. He testified that the police official seized the mobile phone and prepared the seizure memo (Ex.PW1/B). He identified his signatures on the same. He also identified his signatures on the seizure memo pertaining to the knife recovered from the accused. He stated that the knife recovered from the accused was sealed in a *pullanda*. The police arrested the accused and PW1 identified his signatures on the arrest memo (Ex.PW1/D). He stated that thereafter, he received his mobile phone on furnishing the *superdarinama* (Ex.PW1/E). PW1(Ex.PW1/F) produced the original bill of his mobile phone and its photocopy was taken on record. The Additional PP sought permission and was allowed to put leading questions to PW1 regarding the manner of assault and the site plan.

8. In response to the questions put by the learned APP, PW1 deposed that the accused had taken out a knife and opened it with the help of a button and attacked him (*mere upar war kiya*). He affirmed that that the accused grabbed him and snatched his mobile phone (*ek hath se pakad kar mera mobile phone chin liya*). In his cross-examination, he affirmed that several other public persons were present in the park and, that there were public persons near him at the time of the incident. He stated that neither did he raise any alarm during the incident nor did he ask for help from those public persons. He stated that though those persons were looking at him, they did not come forward to help him. He stated that the accused was apprehended on the main road outside the park. The police officials had pursued the accused on foot by walking briskly. The police officials had not joined any public person in the proceedings at this stage. The accused was taken to the PS on a motorcycle by the police officials. PW-1 denied that he had gone to the PS on the same motorbike. Thereafter, PW-1 stated that he went to his house and then went to the PS along with his mother. He affirmed having signed the sketch of the knife and the site plan.

9. SI Kamlesh Kumar, PS Ranjit Nagar, deposed as PW-2. He stated that on 18.06.2015, he was present in the PS at around 06:00 a.m., when Ct. Jamaludeen and Ct. Pawan came there along with the accused and the complainant Gyaneshwar. He stated that Ct. Pawan was holding the accused and Ct. Jamaludeen produced a mobile phone and a knife stating that the same were recovered from the possession of the accused. PW-2 stated that he recorded Gyaneshwar's statement. He stated that

he prepared the sketch of the knife (Ex.PW 2/A). The said knife was seized vide seizure memo (Ex.PW1/C). Thereafter, he prepared a *pullanda* of the said knife and sealed it with the seal of RTNGR-II. He stated that he deposited the case property in the *malkhana*.

10. He testified that thereafter, he along with the complainant (PW1) went to Satya Park, Pandav Nagar where he prepared the site plan (Ex.PW2/D) at the instance of the complainant. The complainant gave him a photocopy of the bill of the mobile phone. In is cross-examination, he stated that he handed over the *rukka* to the duty officer at about 06:30 a.m. He received a copy of the same at about 07:30 a.m. after the FIR had been registered. He stated that after sealing the *pullandas* in the PS, he immediately deposited the same in the *malkhana* and the seal of RTNGR-II remained in his possession. He denied preparing the arrest memo and personal search memo of the accused. He denied taking the accused's signatures on blank papers. He stated that he reached the place of the incident at about 09:00 a.m. along with Ct. Pawan. At the spot, he made enquiries from 4-5 persons present there but they were unaware about the incident. He denied having prepared the site plan at the PS.

11. Ct. Pawan Ahlawat, PS Prasand Nagar, deposed as PW-4. He stated that on 18.06.2015, he was posted at PS Ranjit Nagar. On that date, he was on patrolling duty at Satya Park, Pandav Nagar along with Ct. Jamaluddin. At the park's main gate, one boy came running towards them and pointed towards another boy who was running towards Janki Dass Hospital and told them that the boy running towards Janki Dass

Hospital had snatched his mobile phone after showing him a knife. Thereafter, they caught the boy at Janki Dass Hospital. Ct. Jamaluddin conducted the apprehended boy's search and recovered one mobile phone of the make Micromax, one knife, one wrist watch and a black wallet containing ₹110/-. PW- 4 stated that he and Ct. Jamaluddin took the two persons (the complainant and the accused) to the PS and produced them before SI Kamlesh Kumar. He stated that SI Kamlesh Kumar prepared the sketch of the knife, prepared the *pullanda* of the knife and sealed it with the seal of RTNGR-II. In his cross-examination, he confirmed that on the date of the incident several persons from the general public were present at Satya Park as well as at the spot where they apprehended the accused. He stated that they tried to join public persons in the proceedings however no one acceded to their request. He affirmed that at about 05:45 a.m., all four of them went to the PS on foot. He denied that the complainant had gone to his house to procure the mobile phone's bill and the same had been called from his house by the complainant. His mother had brought the same. He further denied that the seal was kept by the IO himself and stated that the same was deposited in the *malkhana*.

12. ASI Jamaluddin, PS Pul Prahlad Pur, was examined as PW-5. He stated that on 18.06.2015, he was posted at PS Ranjit Nagar and was on patrolling duty along with Ct. Pawan. At Satya Park, they found one person running towards them. Upon approaching them, the person told them that his mobile phone had been robbed on a knife point. Upon apprehending the accused, they found one mobile phone of Micromax

make from the right pocket of his pant and one '*buttondar*' knife from the left pocket of his pants. Thereafter, he stated that the complainant and the accused were taken to the PS. He stated that after completing the formalities at the PS, the complainant was taken to the spot of the incident by the IO and the site plan was prepared. In his cross-examination, he stated that he requested public persons to join the investigation but none of them agreed and left from the area. He denied the suggestion that the receipt of the mobile phone was handed over to the IO by the complainant. The complainant had procured the same from his home. He did not remember who brought the same from the complainant's home.

13. Ms Juneja, learned counsel appearing for the appellant contended that it is apparent from the testimony of PW1 that it is not entirely consistent with his statement on the basis of which the FIR was registered. She stated that in his earlier statement, the complainant had not made any allegations that the accused had demanded the mobile phone. He had merely stated that the accused had enquired as to what was the complainant doing in the park and thereafter, had attempted to snatch the mobile phone. She further submitted that there is a material inconsistency in the testimonies of the two official policemen (PW4 and PW5) and the testimony of PW1. She stated that PW1 had categorically denied that he had gone to the police station along with the two police officials. However, PW4 and PW5 had testified that they had taken PW1 to the PS along with them. PW1 had clarified that he had first gone home for about five minutes and then to the police station along

with his mother. Ms Juneja submitted that in addition to the above, there is also material inconsistency as to how the accused was taken to the PS. She stated that whereas PW1 had stated that the police officials had taken the accused to the police station on a motorcycle, while PW4 and PW5 had stated that they had proceeded to the police station on foot. Next, she submitted that there is also an inconsistency in the testimony of PW2 and PW4. Whereas PW2 had testified that the seal of RTNGR-II remained in his possession after sealing the *pullandas*. PW4 had testified that the IO had deposited the seal in question in the *malkhana* after sealing the *pullandas*.

14. The contentions advanced by Ms Juneja are unpersuasive. In his examination-in-chief PW1 had clearly stated that he along with the police officials and the accused had gone to the police station after the accused was apprehended. In his cross-examination, he had stated that he had not gone to the police station on the motorcycle, but was asked to reach there separately. He had stated that from the park, he had gone to his house and after five minutes had reached the PS with his mother. The inconsistency in the said statement is not material. It possibly arises out of PW1's understanding. He has not disputed that after the accused was apprehended, they (the police officials, the accused and him) had gone to the Police Station. However, that does not mean that they had walked together all the way. He too had proceeded to the police station although taking a minor detour to his home which he had explained was about 400-500 meters away from the park where he was robbed. The

variance in the testimonies on the question whether the accused was taken on a motorcycle or on foot is also not material.

15. The contention that there is material inconsistency in the statement of the complainant, on the basis of which the FIR was registered, and his testimony is also unpersuasive. His narration of the events clearly indicates the manner in which the offence was committed. In his statement, he had stated that he had finished one round of the park and was sitting under a tree. He stated that he had a mobile phone in his hands and was listening to music. At that stage, the accused had approached him and had enquired as to why he was sitting there. He stated that thereafter, he tried to snatch his mobile phone. In his testimony, he stated that the accused had asked him to show his phone and, on his refusal, had attempted to snatch the same.

16. It is clear that the accused and the complainant had asked a few questions and thereafter, attempted to snatch the phone. On the complainant resisting to give the same, he had threatened him with the knife (which was operated by a button). Clearly, the language of the initial statement made by the complainant and his testimony recorded later is not expected to be identical. However, there must be consistency as to the description of the manner in which the offence was committed. In this case there is no inconsistency in that regard.

17. The minor discrepancy whether the seal had been deposited with the *malkhana* or had remained with the IO is not material. This is so because there is good evidence that the appellant had used the knife in committing the offence. The testimony of PW1 is unambiguous.

Further, the testimony of police witnesses as well as PW1 clearly establishes that the knife used by the appellant was recovered from him. More importantly, recovery of the weapon used is not a necessary requirement to establish an offence punishable under Section 397 of the IPC and the fact that it is established that it was used is sufficient to convict the accused under section 397 of the IPC[see decision of the Supreme Court in *Ashfaq vs State (Govt. of NCT of Delhi): 2004 (3) SCC 166* and decisions of this court in *Imran v. State CRL.A. 1351/2013 decided on 22nd April, 2015*; *Seetal v. State (NCT of Delhi): (2014) 215 DLT 60*; *Murlidhar vs State: CRL.A. 279/2002 decided on 1st June 2018*; and *Sonu @ Shahnawaz v State (Govt. of NCT of Delhi): CRL.A. 1141/2017 decided on 19th November 2019*]

18. The contention that non-joining of public witnesses raises doubts as to the case set up by the prosecution is unmerited. This Court finds no reason to doubt the testimony of Police witnesses as well as the testimony of the complainant (PW1). Joining public witnesses in all proceedings is not mandatory but the same is done to add credibility to the proceedings. However, in cases where the prosecution has been able to establish its case beyond reasonable doubt on the basis of the testimony of the official witnesses and other evidence, non-joining of public witnesses would not be fatal to the case.

19. In *Kalp Nath Rai v. State: AIR 1998 SC 201*, the Supreme Court had explained “*If the evidence of the police officer is found acceptable, it would be an erroneous proposition that court must reject the*

prosecution version solely on the ground that no independent witness was examined”. In the present case, in addition to the testimony of the official witnesses, the testimony of the complainant also establishes the prosecution’s case.

20. This Court has examined the evidence in this case and concurs with the decision of the Trial Court to convict the appellant for the offences punishable under Sections 392/397 of the IPC and Section 25 of the Arms Act.

21. This Court also finds no reason to interfere with the sentence awarded to the appellant which in any view is the minimum sentence that can be awarded for an offence punishable under Section 397 of the IPC.

22. The appeal is unmerited and is, accordingly, dismissed. All pending applications are also disposed of.

OCTOBER 22, 2020
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VIBHU BAKHRU, J