

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

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Reserved on: 14th August, 2019

Decided on: 10th January, 2020

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CRL.A. 434/2016

MUKESH @ VICKY

..... Appellants

Represented by: Aditya Wadhwa and Harshitha
K. Reddy, Advocates

versus

STATE

..... Respondents

Represented by: Amit Gupta, APP for the State
with SI Madan Lal

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this appeal, appellant Mukesh @ Vicky challenges the impugned judgment dated 7th December 2011 wherein he was convicted for offence punishable under Section 397 IPC in FIR No. 190/2009 registered at PS Dwarka and the order on sentence dated 7th December 2011 whereby the appellant was directed to undergo rigorous imprisonment for a period of seven years and to pay a fine of ₹10,000/-, in default whereof to undergo simple imprisonment for a period of three months.

2. Assailing the conviction, learned counsel for the appellant contends that the differing statements of the complainant belies the case of the prosecution. There are various contradictions in her complaint, her statement before the police and her statement before the court. He contends that the complainant has increased the articles looted from her and her friend Deepak in each of her statements. The complainant in her complaint mentioned about a girl who was tall, thin and fair complexioned while in her later statements there is no mention of the said girl. He further contends that there

was no mention of the use of knife in the complaint and it was only a later improvement which casts a doubt on the credibility of the version regarding use of knife. Seizure of the knife took place in the police station, whereas the arrest of the appellant as per the prosecution was from the jhuggi, which also casts doubt on the case of the prosecution. Eyewitness Deepak turned hostile and did not support the case of the prosecution. He further contends that the proceedings with respect to the seizure of cheque and knife from the accused are suspicious. The cheque was seized from a jhuggi at Sanjay Basti, Timarpur. There is no mention of the cheque in the complaint. Lack of site plan from where the seizure of the cheque was made and absence of public witness at the time of seizure casts a serious doubt regarding the said recovery. Even recovery of the gold bangle and alleged pointing out by the accused Amarjeet is highly suspected. He further contends that no adverse inference can be drawn from the refusal of the appellant to join the TIP.

3. Per contra, learned APP for the State submits that the complainant in her testimony has explained the so-called contradictions in the statement made before the police and the complaint made. He further contends that the complainant has explicitly identified the appellant in the court. The recovery of cheque was duly proved by PW-11 and PW-13. Further, the cheque belonged to the complainant which fact has also been duly proved. The jewellery items were duly identified by the complainant in TIP proceedings.

4. Brief facts of the case are that on 1st April 2009, at about 4:28 P.M., information was received that *“Plot No. 51, MIG Flat, Sector 14, Pocket -B, gadi vala phone aur paise lekar bhaag gaya”*. Aforesaid information was recorded vide DD No.22 (Ex.PW-6/A) and was assigned to ASI Ashok Kumar. He along with Ct. Chhotey Lal Singh reached at the house of the

complainant and thereafter he along with the complainant reached at the spot. He recorded the statement of the complainant wherein she stated that she works as a teacher in R.P. Memorial School, Mohan Garden and after completion of her duty at around 2:30 P.M. she took a bus from Dwarka Mor and got down from it near NSIT corner. She started walking towards her house and reached near Sector 15 at about 3:05 P.M. After crossing the road leading towards Sector 14, she started walking alongside the footpath and when she reached the bus stand, she saw one white colour Maruti Van parked over there. She stated that one man was sitting on the driver's seat and another man was sitting on the rear seat of the car. A boy and a girl were also standing near the car, who stopped her and enquired about some address which was written on a piece of paper. While she was going through the said paper, the person sitting inside the van snatched her purse and all three of them fled from the spot in the van. There was a Nokia phone model 2905, ₹500, two golden bangles, three rings and two golden bangles in her purse. They fled towards Karola Mor. She stated she can identify all those accused persons, if shown to her. The girl was tall and slim with fair complexion and having long hairs. The complexion of boy was dark having curly hairs and medium built body. Aforesaid statement was recorded vide Ex.PW-2/A. On the basis of the aforesaid statement, FIR No. 190/2009 (Ex.PW-1/A) was lodged at PS Dwarka for the offences punishable under Sections 356/379/34 IPC. The site plan was prepared at the instance of the complainant vide Ex. PW-2/C.

5. The complainant gave her supplementary statement and in view of the said statement Section 392 IPC was added during the course of investigation. Search for accused was made but in vain. On 4th April 2009,

supplementary statement of the complainant and one Deepak were recorded. In her supplementary statement, she stated that her complaint was not true and she hid some facts. She informed about the incident to her husband who told her to give correct facts to the police. She further stated that the actual incident took place at Kamla Nehru Vatika, Maurice Nagar, not Dwarka, where she was sitting with her friend, Deepak and that five to six men gathered around them. One boy with short height took out the knife and threatened them to give all their valuables. One boy was standing at a distance and keeping an eye. One boy with long hair looted her two Karas, three Rings and two Tops and the other light weight boy, took her purse containing ₹500/-, DTC pass and one PNB Cheque. One medium height boy looted her friend Deepak's purse. The boy with wheatish complexion snatched her mobile phone. All of them threatened them not to make any noise or phone call to anyone and thereafter, they ran from the spot. After recording of this supplementary statement the investigation was handed over to Inspector Sudhir.

6. On 4th April 2009, Inspector Sudhir recorded the statements of Babu Lal and Santosh Kumari and thereafter it was revealed that mobile phone No. 9250034306 was mobile phone of Babu Lal (PW-7) which had been stolen and various calls were made from said number to 9210355139, number of PW-9 which was given to her by the accused Gaurav. It is pertinent to mention that various calls were made from 9310431193 (stolen mobile phone of the complainant) to 9250034306. On 5th April, 2009 Inspector Sudhir along with SI Pankaj Malik, SI B.S. Gulia, SI Balbir Singh and other police officials reached Sanjay Basti, Timarpur from where the accused persons namely Gaurav, Mukesh @ Vicky (appellant herein), Hans

Gaurav and Rajeev were apprehended who were then taken to PS Dwarka. On search of the appellant one *buttondar* knife was recovered from his right pocket. The sketch of the knife was prepared vide Ex. PW-11/A. The knife was sealed and seized vide seizure memo Ex. PW-11/B. On search of Gaurav one mobile phone with SIM card bearing no. 9250034306 was recovered. Gaurav told that he made telephonic call from this number on the looted mobile bearing No. 9810481193, which was in possession of his friend Ramu. The phone was sealed and seized vide seizure memo Ex. PW-11/C. The accused persons namely Mukesh @ Vicky, Gaurav, Rajeev and Hans Gaurav were arrested vide arrest memos Ex. PW-13/A, Ex. PW-13/B Ex. PW-13/C and Ex. PW-13/D respectively. Their personal search was conducted vide memos Ex. PW-13/E, Ex. PW-13/F Ex. PW-13/G and Ex. PW-13/H respectively and their disclosures statements were recorded vide Ex. PW-13/J, Ex. PW-13/K Ex. PW-13/L and Ex. PW-13/M respectively.

7. On 6th April 2009, the appellant along with Hans Gaurav, Gaurav and Rajeev led the police team to the place of occurrence and pointing out memos were prepared vide memos Ex. PW-11/D, Ex. PW-11/E, Ex. PW-11/F and Ex. PW-11/G respectively. Thereafter, they reached house of the appellant at B-205, Sanjay Basti, Timarpur from where he produced one cheque of PNB bank which had been looted from the complainant. The cheque was seized vide seizure memo Ex. PW-11/H. From the house of the accused Rajeev at Sanjay Basti ₹1000/- and one golden ring were recovered. They were sealed and seized vide seizure memo Ex. PW-11/J. Thereafter from the house of accused Hans Gaurav ₹500 and one pair of gold earrings were recovered from the bag which was hanging on the wall. The same were sealed and seized vide seizure memo Ex. PW-11/K. From the house of

accused Gaurav at Nehru Vihar, Timarpur one ladies' purse which was lying behind a box in his jhuggi was recovered. On checking the said purse one DTC bus pass of the complainant was recovered. The purse was sealed and seized vide seizure memo Ex. PW-11/L.

8. Thereafter, accused Gaurav and the appellant pointed out to shop no. 45, Kishore Market, Kingsway Camp, Delhi under the name M/s. Sheetla Jewellers where Amarjeet was present. The accused persons were produced before the court and were sent to Judicial Custody. Statements of witnesses were recorded. On the same evening Amarjeet went to the police station. He was interrogated and arrested vide arrest memo Ex. PW-13/N, his personal search was conducted vide memo Ex PW-13/O and his disclosure statement was recorded vide Ex. PW-13/P.

9. On 7th April 2009, SI Sudhir along with SI Pankaj Malik, Ct. Amarjeet along with the accused Amarjeet reached at the shop of Amarjeet where two Karas which he had purchased from the appellant and the accused Gaurav were recovered. The same were sealed and seized vide seizure memo Ex. PW-13/Q. Amarjeet was produced before the court and was taken into Judicial Custody.

10. On 13th April 2009, the appellant, Rajiv, Gaurav Hans and Gaurav refused to participate in the judicial TIP. On 23rd May 2009 an application was filed for conducting judicial TIP of the case property (Ex. PW-14/A) and the judicial TIP was conducted on 26th May 2009 wherein the complainant correctly identified her bangles (Ex.P2), golden coloured Tops (Ex.P4), golden coloured Ring (Ex.P3) and blue coloured bag (Ex.P4).

11. On completion of investigation, charge sheet was filed. Charge was framed against the appellant, Amarjeet, Hans Gaurav, Gaurav and Rajeev

for the offences punishable under Sections 395/34 IPC, the appellant was additionally charged for the offence punishable under Section 397 IPC vide order dated 27th July 2010.

12. Anju (PW-3), complainant deposed that on 1st April 2009 she along with her friend Deepak was sitting in a park near Delhi University, North Campus. At around 01:00 P.M. around four to five persons came at that spot and asked them as to what they were doing there. One of them took away her earrings, one diamond ring, two other gold rings, two gold bangles and her black colour Nokia mobile phone. The other boy showed knife to them and threatened to kill them, in case they raise their voices. Another person took away all the articles lying in her hand bag, that is, one small purse containing one blank cheque of PNB, ₹500 in cash and her DTC pass. They forcibly got the blank cheque signed by her. The same persons also took away a golden ring of her friend Deepak as well as some cash, which she doesn't remember. Thereafter, those persons left that place and she along with her friend returned to their respective homes. She narrated the said incident to a member of Residence Welfare Association. She called her husband who advised her to report the matter to the police. The association member, her neighbour made a call to police. Police reached at around 04:00-04:30 P.M., she was scared and frightened at that time, so she did not narrate the incident correctly to the police and informed the police that incident took place in Dwarka. She stated that her husband advised her to narrate the incident truthfully to the police and after about a week she narrated the said incident correctly to the police. She stated that she showed the place of incident to the police and handed over the photocopy of the bill of her mobile phone. In the beginning of June 2009, she received a phone

call from the police station asking her to identify the stolen articles. She identified the articles looted from her, that is, a pair of kara, one ring, one pair of tops and one small purse. She obtained the said articles from the court on *superdari*. She further stated that the appellant had shown knife to them. She correctly identified her bangles (Ex.P-2), golden coloured Tops (Ex.P-4), golden coloured Ring (Ex.P-3), blue coloured bag (Ex.P-4), the cheque (Ex.P-5) and also a DTC Pass (Ex.P-6) shown to her in Court. In her cross-examination, she stated that she told the police that her diamond ring was also snatched by the assailants and that they threatened to kill them if she made any noise. She further stated to the police that the assailants further forced her to sign the blank cheque lying in her purse and took away one golden ring and some cash of Deepak. She further stated that she was unable to recollect as to when and where she saw the assailants and articles robbed from her. She stated that the articles Ex. P-1 to P-4 belong to her even though there was no identification mark on the same. She used to wear those articles and had not handed over any receipt with respect to the said articles to the police. She further stated that police did not prepare any site plan in her presence.

13. Deepak (PW-4), friend of the complainant stated that he did not remember the exact date of the incident, however the incident took place one and a half or two years ago. On the day of incident, he along with the complainant were sitting in the park near Delhi University, when three to four persons came and snatched ornaments of the complainant and also took away cash of ₹200 to 300 from him. Thereafter, he was not in contact with the complainant. About four to five days later after the said incident he came to know that the police had apprehended the assailants. Police made

inquiries from him and he narrated the said incident. In his cross-examination by the learned APP for the state he stated that he narrated the incident truthfully to the police when inquiries were made from him. He stated that the incident took place on 1st April 2009 and he could not say whether the assailants were five or six in number. He stated that the assailants immediately encircled them. He further stated that he had not stated to the police that one of the assailants who had blackish appearance with short height, had shown knife to them. He further stated that one of the assailants had shown knife to them, but he was not sure about the height and appearance the same. The person who was holding knife had asked them not to make noise. He further stated to the police that one of the assailants had taken away the purse of the complainant, but he was not sure whether he stated that the height of the assailant was short. He further stated that one of the assailants had taken away cash of ₹200 or ₹400 from him. He and the complainant became frightened after the said incident and returned to their respective homes.

14. Mukesh @Vicky in his statement recorded under Section 313 Cr.P.C. stated that the articles were shown to the complainant in the police station before conducting TIP. He further stated that he was falsely implicated in the case as he was the bad character of the area and was not having good relations with the SHO concerned.

15. By the impugned judgment of conviction Gaurav, Hans Gaurav @ Tannu and Rajeev @ Raj were also convicted for offence punishable under Section 395 IPC and Amarjeet @ Vaid was convicted for offence punishable under Section 412 IPC. Rama was declared a proclaimed offender. The role assigned to the appellant being that he also showed the knife the appellant

has been convicted by the learned Trial Court for offence punishable under Section 397 IPC. Appeals filed by Gaurav, Hans Gaurav and Amarjeet @ Vaid have already been disposed of by this Court vide judgment dated 19th May, 2014 sustaining the conviction of appellants Gaurav and Hans Gaurav @ Tannu for offence punishable under Sections 392/34 IPC and setting aside the conviction and sentence of Amarjeet @ Vaid for offence punishable under Section 412 IPC. The reason why Gaurav and Hans Gaurav's conviction was modified for offence punishable under Section 395 to one under Section 392/34 IPC was that the prosecution could not exactly tell the number of accused as to whether there were four or five, however, as regards offence punishable under Section 397 IPC once a weapon is used for commission of either robbery or dacoity the said person is liable to be convicted under Section 397 IPC. No doubt, initially the complainant stated that the incident took place at Dwarka however, she soon clarified and stated the correct facts immediately within three days clarifying how and where the entire incident took place. The version of the complainant was further fortified by recovery of the mobile phone with the SIM card and recovery of her jewellery which was duly recovered at the instance of the co-accused including her cheque book which duly corroborated her version. Version of the complainant was duly corroborated by Deepak, PW-4 her friend who was accompanying her.

16. Contention of learned counsel for the appellant that there is no mention of showing of the knife by the appellant by the complainant is incorrect. The complainant in her supplementary statement wherein she has given the complete narration of the incident along with the place of incident has clearly stated about the showing of the knife and taking a blank cheque

which was got signed from her. As noted above merely because after the arrest, the appellant was taken to the police station where recovery of the knife was made would not create doubt on the case of the prosecution. Contention of learned counsel for the appellant that the person committing robbery will take a cheque belies the logic deserves to be rejected for the reason the cheque can also be encashed.

17. Contention of learned counsel for the appellant that the knife was not identified by the complainant or connected with the offence and hence he could not be convicted for the offence punishable under Section 397 IPC deserves to be rejected. For a conviction for offence punishable under Section 397 IPC it is not necessary that the same knife has to be recovered. It is not the case of the prosecution that the knife recovered at the time of arrest of the appellant was the same knife which was used in the commission of the offence. In 2018 SCC Online 9401 Murlidhar Vs. State following the decision of Supreme Court in Phool Kumar vs. Delhi Administration 1975 (1) SCC 797 it was held:

“21. Subsequently, in Ashfaq, following Phool Kumar the Supreme Court held that for a conviction under Section 397 IPC what is relevant is the ‘use’ of the weapon and not the recovery thereof. In Ashfaq, the weapons used were a country-made pistol and knives. The weapons used by the accused were not recovered. The Supreme Court then observed:

“7. So far as the contention urged as to the applicability of Section 397 IPC and the alleged lack of proof of the necessary ingredients therefor, is concerned it proceeds, in our view, upon a misconception that unless the deadly weapon has been actually used to inflict any injury in the commission of the offence as such, the essential ingredient to attract the said provision could not be held to have been proved and substantiated. We are of the view that the said

claim on behalf of the appellants proceeds upon a too narrow a construction of the provision and meaning of the words “uses” found in Section 397 IPC. As a matter of fact, this Court had an occasion to deal with the question in the decision reported in Phool Kumar v. Delhi Admin. and it was observed as follows: (SCC p.800, para 6)

“6. Section 398 uses the expression ‘armed with any deadly weapon’ and the minimum punishment provided therein is also 7 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 7 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.”

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 further plea that one accused alone, was in any event in possession of the country-made pistol and the others could not have been vicariously held liable under Section 397 IPC with the assistance of Section 34 IPC overlooks the other vital facts on record found by the Courts below that the others were also armed with and used their knives and that knife is equally a deadly weapon, for purposes of Section 397 IPC. The decision of the Division Bench of the Bombay High Court relied upon turned on the peculiar facts found as to the nature of the weapon held by the accused therein and the nature of injuries caused and the same does not support the stand taken on behalf of the appellants in this case. The provisions of Section 397, do not create any new substantive offence as such but merely serves as being complementary to Sections 392 and 395 by regulating the punishment already provided for dacoity by fixing a minimum term of imprisonment when the dacoity committed was found attendant upon certain aggravating circumstances viz., use of a deadly weapon, or causing of grievous hurt or attempting to cause death or grievous hurt. For that reason, no doubt the provision postulates only the individual act of the accused to be relevant to attract Section 397 IPC and thereby inevitably negates the use of the principle of constructive or vicarious liability engrafted in Section 34 IPC. Consequently, the challenge made to conviction under Section 397 even after excluding the applicability of Section 34 IPC does not merit countenance, for the reason that each one of the accused in this case were said to have been wielding a deadly weapon of their own, and thereby squarely fulfilled the ingredients of Section 397 IPC, de hors any reference to Section 34 IPC.”

22. *Thus the Supreme Court, despite the non-recovery of the weapons, upheld the conviction under Section 397 IPC”.*

18. For the discussion aforesaid and the fact that the version of the complainant as stated in the supplementary statements has been deposed by her is duly corroborated by the recoveries of the blank cheque at the instance of the appellant which was duly proved and recoveries from the co-accused and the mere fact that the weapon of offence was not identified by the complainant or connected with the offence committed would not be a ground to acquit the appellant for offence punishable under Section 397 IPC. Thus this Court finds no error in the impugned judgment of conviction and order on sentence.

19. Appeal is accordingly dismissed.

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

21. TCR be returned.

(MUKTA GUPTA)
JUDGE

JANUARY 10, 2020
‘sk’/‘vn’