

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 06.01.2020

+ **CRL.A. 582/2016 & CRL.M.C. (BAIL) 1593/2019**

ABID

..... Appellant

versus

STATE

..... Respondent

Advocates who appeared in this case:

For the Appellant: Mr Pramod Kr Dubey, Ms Supriya Juneja, Ms Harpreet Kalsi, Mr Anurag Andley, Mr Prince Kumar, Mr Nirvikar Singh, Ms Akansha Mehta and Ms Chestha Jetley.

For the Respondent: Ms Kusum Dhalla, APP for State with SI Rahul, P.S. Bhajanpura.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal impugning a judgment dated 07.05.2016 passed by the Ld. ASJ, Karkardooma Courts (hereafter 'the impugned judgment'), whereby the appellant was convicted for committing offences under Sections 392/397 of the Indian Penal Code, 1860 (IPC) for stealing a mobile phone while using a deadly weapon, i.e. knife. The appellant also impugns an order on sentence dated 12.05.2016, whereby the appellant was sentenced to seven years of rigorous imprisonment under Section 397 of the IPC.

The appellant was also sentenced to seven years of rigorous imprisonment under Section 392 of the IPC. The appellant was sentenced further with a fine of ₹1,000/- under Section 392 of the IPC, and in default of the same, six months of simple imprisonment. Both sentences were to run concurrently.

2. The appellant has challenged the judgment, *inter alia*, on the ground that the knife found in the possession of the appellant is not a 'deadly weapon', since it was not intended to be used by the appellant as a deadly weapon. Merely possessing a knife was not enough to attract the offence under Section 397 of the IPC. In the present case, the prosecution had failed to prove that the appellant had used the knife in his possession as a 'deadly weapon'.

3. The present case arises from FIR bearing no. 536/2015, under Sections 392/397/379/506/411 of the IPC, registered with PS Bhajanpura. The case of the prosecution is that on 21.04.2015, at about 12:20 pm, at Shop No. A-131, Main Yamuna Vihar Road, near Bada School Delhi, the appellant had committed theft of one black mobile phone (make QMI Model M7) belonging to one Suhaib. Suhaib had put his phone on charging inside the said shop. The appellant tried to escape along with the phone from the spot. When Suhaib tried to stop him, the appellant pointed a knife at him. Thereafter, Suhaib raised an alarm and public persons tried stopping the appellant. The appellant waved his knife/*churri* towards the public persons also. The public chased him and managed to apprehend him. The stolen mobile phone and the knife were recovered from the

possession of the appellant. The appellant was thereafter arrested by the police and a chargesheet was filed under Sections 392/397/411 of the IPC.

4. On 19.08.2015, the Court framed charges under Sections 392/397/411 of the IPC, to which the appellant pleaded not guilty. The prosecution examined six witnesses to prove its case. The appellant did not prefer to lead any evidence in defence.

5. The Trial Court held that the testimonies of PW3, PW4 and PW5 were consistent and corroborated the fact that the appellant had committed the theft of a mobile phone belonging to Suhaib and had used a weapon i.e. knife/*churri* while attempting to carry away the property obtained by theft. The court accepted the prosecution's case that the appellant had put the complainant and other persons in instant fear of hurt or death, as provided under Section 390 of the IPC. On the basis of the said finding, the Trial Court had held that the accused had committed the offence of robbery as defined and convicted the appellant under Section 397 of the IPC.

Evidence

6. Before proceeding further, it is relevant to briefly examine the evidence led by various witnesses.

7. Ct Pradeep Gaur was examined as PW1 and he stated that on 21.04.2015, DD No. 27A was assigned to SI Pramod. PW1 and SI Pramod reached the aforesaid spot and met the complainant Aslam (PW3). The complainant produced one boy (appellant herein) and

stated that he had snatched the mobile phone. A dagger and a mobile phone were in his possession and he was apprehended with the help of public persons. The statement of Aslam was recorded and a *rukka* was prepared. PW1 took the same and went to the Police Station for the registration of the FIR.

8. The complainant, Aslam, was examined as PW3 and he stated that he and his brother Amir, used to work at his father's shop (Shop No. A-131, Main Yamuna Vihar Road near Bada School). Suhaib was a worker at the said shop and on 21.04.2015, PW3 and Suhaib were present in the shop. At 12 noon, Suhaib had put his phone for charging. At 12:20 pm he went to take water from a nearby tap, and on returning, he found that the appellant had taken the mobile of Suhaib and was running away. He threw the water bottle he was carrying at the appellant, as a result of which he fell down. When he tried to overpower him, the appellant took out a knife and showed the same towards him; hence, he could not catch hold of him. The accused ran towards Ghonda Chowk while waving his knife. When he raised an alarm, public persons overpowered the appellant. His elder brother, Amir came back and thereafter he made a call to 100 number.

9. Suhaib, was examined as PW4 and he stated that on 21.04.2015, at about 12 noon, he had put his phone (QMI Model No. M7) for charging. At the said time, he was present in the shop and Aslam (PW3) had gone to fill water in his bottle. He saw the appellant remove his charger and when he tried to protest, the appellant showed a knife at him and threatened to kill him. PW3 threw a bottle at him

and he fell. The appellant also showed the knife to PW3 and ran away. He stated that someone had called Amir and he had made a call at 100 number. He stated that public persons had apprehended the accused.

10. Amir, the brother of the complainant, was examined as PW5 and he deposed that on 21.04.2015, at about 12-12:15 noon, he received a call of one person who asked him to come to his shop. On reaching his shop, he found that a person was being beaten by the public. He was told by his brother Aslam (PW3) and Suhaib (PW4) that the appellant had committed robbery. Thereafter, he called the police at 100 number.

11. SI Pramod Kumar was examined as PW6 and he deposed that 21.04.2015, at about 12:40, he was assigned the contents of DD No. 27A. He along with Ct. Pradeep reached the shop where public persons had gathered. One Aslam (PW3) had produced the appellant and told them that he had stolen the phone of his employee Suhaib, which was charging in his shop. He had thrown his water bottle at him but he ran away on showing a knife. He was later apprehended by the public. PW6 recorded the statement of PW3 which is marked as Ex. PW-1/B.

12. In his statement under Section 313 of the CrPC, the appellant stated that he was passing through the main road in front of the shop of the complainant, when he was suddenly stopped by the complainant and other persons on the pretext that there had been may incidents of robbery and theft and he might be one of the accused persons. He pleaded his innocence, however, he was given a beating and handed

over to the police. He stated that the mobile phone and the knife had been planted on him.

Reasons and Conclusion

13. PW-3 and PW-4 are material witnesses and the case of the prosecution, essentially, rests on the testimony of these witnesses. The said witnesses are consistent in their testimonies that the appellant had lifted the mobile phone from the shop (shop no. A-131, Main Yamuna Vihar Road). The shop belongs to the father of PW-3. Suhaib (PW-4) was an employee at the said shop. PW-3's brother (Amir) who deposed as PW-5, used to work in the shop as well. PW-3, PW-4 and PW-5 had testified that on the given date, the father of PW-3 and PW-5 (the owner of the shop) was not present. PW-5 was also not present in the shop at the material time and he had gone to a place nearby to repair a refrigerator. Thus, at the material time, only PW-3 and PW-4 were present at the shop and both of them were consistent in their testimony that the appellant had lifted the mobile phone from the said shop. The mobile phone being recovered and produced before PW-1 and PW-6 (police officials), who had gone to the spot.

14. Given the evidence obtaining in this case, there is no doubt that the appellant had stolen the mobile phone.

15. However, one of the principal questions to be addressed is whether the appellant could be convicted of an offence under Section 397 of the IPC, that is, robbery or dacoity with the attempt to cause death or grievous hurt.

16. Section 397 of the IPC is reproduced below:-

“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. PW-3 does not allege that the appellant had used the knife while committing the theft. According to the testimony of PW-3, the appellant had lifted the mobile phone from the shop and had started to run away. Thus, he had committed the theft without brandishing or using any weapon. PW-3 had deposed that he had thrown a water bottle at the appellant while he was running away. Resultantly, the appellant had fallen down. PW-3 had tried to overpower him and at that stage, he had threatened PW-3 with a knife.

18. Here, there is an inconsistency between the testimonies of PW-4 and PW-3. PW-4 had stated that he had seen the appellant remove the charger from his mobile phone and the appellant had, thereafter, lifted the mobile phone and had started to go towards Ghonda Chowk. He stated that he had raised an alarm and the accused had showed a knife and threatened to kill him. This testimony is not corroborated by the testimony of PW-3. He had not testified to PW-4 (Suhaib) raising any alarm. According to him, the appellant had shown the knife only when PW-3 had attempted to overpower him after he had fallen down. This is contrary to PW-4's testimony that the appellant had shown a

knife and threatened to kill him while lifting the mobile phone from the shop.

19. It is also relevant to refer to the statement of PW-3 (Ex.PW-1/B) recorded at the material time. In his statement, PW-3 has stated that the appellant had removed the mobile phone from charging and after stealing the same, the appellant was moving away from the shop. At that stage, he had thrown a bottle of water at the appellant, resultantly, the appellant had stumbled and had fallen on the ground. He, thereafter, got up and started running away. PW-3 had stated that he raised an alarm and at that stage, the appellant had brandished the knife (*chaku hawa mein lehrata hua*) and had run away threatening them not to follow. He has stated that he had been apprehended by the public while he was running away. PW-3's testimony is slightly inconsistent with his earlier statement before the police. In his testimony, PW-3 had claimed that he had attempted to overpower the accused (appellant) himself, however the appellant managed himself and had taken out a knife from his waist and showed the same to him.

20. The case of the prosecution that the appellant had stolen the property by showing a knife cannot be accepted. PW-4 had also deposed that the appellant had lifted the mobile phone from the shop and had started to go towards Ghonda Chowk. He claimed that he had raised an alarm and the accused had shown a knife to him and extended threats to kill him. As noticed above, this testimony is contrary to the testimony of PW-3 and is also not in conformity with the statement of PW-3 recorded at the material time (Ex.PW-1/B).

21. The testimony of PW-5 also does not throw any light on the question whether the appellant had used the knife at the time of committing the theft. PW-5 had arrived at the spot after the appellant was apprehended by the public.

22. In *Titir Dusadh v. State of Bihar: (1966) AIR Pat 453*, a Coordinate Bench of the Patna High Court, held that the use of violence helped the accused make his escape, but was not done with the purpose of helping removal of the stolen article. In light of the same, the Patna High Court had held the accused guilty of theft and not robbery and had accordingly modified his sentence. The relevant portion of the judgment is given hereunder:

“36. In the instant case, it would appear that theft was already committed by one of the co-thieves other than the appellant by removal of the box. The appellant was not found carrying any stolen article, nor was Sipahi Dusadh. These two alone had used violence on P.Ws. 1, 4 and 5, while the latter tried to catch them. It may be that the action of Sipahi Dusadh and the appellant in assaulting their chasers helped the thief carrying away the box to make good his escape; but it cannot necessarily be said that the use of violence by Sipahi Dusadh and the appellant was calculated to help the removal of the stolen article.

37. The use of violence could also be to enable Sipahi Dusadh and the appellant to escape. Now if both the views are possible one favourable, to the appellant should be accepted, as was held also in *Himatsing Shivsing v. State of Gujarat, 1962 (2) Cri LJ 415 (Guj)*. In the circumstances of the case, I would find the appellant guilty of theft only and not of robbery, as found by the learned trial Court I would therefore, alter his conviction from S. 394 to one under S. 380 of the Penal Code, 1860 and sentence him to three years'

rigorous imprisonment. With this modification in the sentence as mentioned above, the appeal is dismissed.”

23. In ***Ravinder Pasawan v. State: 2014 (1) JCC 78***, a coordinate Bench of this Court had confirmed the finding that the accused had tried snatching a chain from the victim and when she tried catching hold of him and raising an alarm, he whipped out a knife and two other accomplices had pushed her. While considering the appeal under Section 397 of the IPC on the said facts, this Court held as under:

“12. As regards, the submission that recovery of knife from the possession of the appellant has not been believed by the learned Trial Court, same is devoid of substance, inasmuch as, no finding has been given by the learned Trial Court regarding recovery of knife from the possession of the appellant. The charge against the appellant was also under Section 397 IPC, however, since there was no evidence to prove that at the time of snatching the chain from Bhagwan Devi, the appellant had used the deadly weapon, therefore, use of deadly weapon at the time of committing robbery was not proved. That being so, he was convicted only for offence under Section 392 IPC.”

24. In ***Swapan Kumar Khan v. State of WB: (2104) Cal 1 LT 299***, a Division Bench of the Calcutta High Court had held that Section 397 of the IPC is an offence of a higher degree as compared to Section 394 of the IPC and in absence of grievous injury, conviction under Section 397 of the IPC, is unwarranted.

“7. It is needless to say that Section 397 of the Code is an offence of higher degree compared to Section 394 of the said Code and as such there cannot be conviction on two counts i.e. both Sections 394 and 397 of the Code.

The Trial Court naturally erred in convicting the appellants before us on both counts. This Court has already held that the prosecution has failed to prove before the Ld. Trial Court that actually Shamim received any grievous injury and naturally the conviction u/s 397 was unwarranted.”

25. In ***Suresh Kumar v. State: (1989) ILR I Delhi 82***, a coordinate Bench of this Court while coming to the finding that the appellant had snatched the golden chain from the complainant’s neck and had voluntarily caused hurt to PW1, held that the provisions of Section 397 of the IPC would not be applicable since the appellant had not used the dagger while committing the robbery.

“1... It is true that at the time of commission of the robbery the witnesses do not say that appellant was having any dagger in his hand visible to the victim or to the witnesses. It is only when appellant had run away from the spot, was being followed and had recited near the railway lines that appellant had threatened the pursuing constable and the public witness with the dagger in his hand and had also caused injury to the constable with that dagger...

2 ..Thus he has definitely committed an offence punishable under Section 394 I.P.C. Provisions of Section 397 I.P.C. would not be applicable to the facts of the present case because at the time of committing the robbery the appellant had not used the dagger. Appellant could be guilty of such culpability if the appellant was carrying the dagger in the full view of the victim at the time of the commission of the robbery. Such was the case of *Phool Kumar v. Delhi Administration*, 1975 Crl. Law Journal (1) In the said case the accused at the time of committing the robbery was carrying in his hand

knife open to the view of the victims and it was held that it was sufficient to bring home the culpability of the accused under Section 397 I.P.C. It was also held that any other over act such as brandishing of the knife or causing of grievous hurt with it is not necessary to bring the offender within the ambit of Section 397 IPC. In Thavasi, 1972 CrL. Law Journal 445 (2) the facts were that no deadly weapon was used at the time of committing the robbery but the said weapon was used for inflicting injuries only when the accused was about to be apprehended by an overwhelming crowd. It was held that provision of Sections 397 of the Act were not applicable in as much as the deadly weapon was not used while committing the robbery. This judgment on all fours applies to the facts of the present case. The dagger in question was not open in the hand of the appellant at the time of committing the robbery, so he cannot be punished with the help of Section 397 I.P.C.”

26. In ***Vishal v. State of NCT of Delhi: CrL. A. 648/2011 decided on 20.01.2014***, a Coordinate Bench of this Court observed as under:-

“5. Besides above, conviction with the aid of Section 397 IPC was not proper as no ‘deadly’ weapon was used by the appellant at the time of committing robbery. The incident of alleged robbery had taken place inside the bus where none of the offenders used any deadly weapon to overawe or scare the complainant. The appellant was not found in possession of any robbed/stolen article and did not use knife (a) in order to the committing of the theft; or (b) in committing the theft; or (c) in carrying away or attempting to carry away property obtained by theft, to attract Section 390 IPC when theft becomes robbery under above noted circumstances. The knife was allegedly taken out by the appellant when he was being chased to avoid his apprehension. In ‘Queen Empress v. Beni’, (1901) ILR 23 All 78, wherein Henderson, J. Held that “where

several persons were found endeavouring to break into a house, and some of them, being armed, used violence, but only in attempting to escape being arrested it was held that they could not properly be convicted under Section 397 read with Section 511 of the Penal Code, 1860.”

27. In *Ajay @ Munna v. State: Crl.A. 14/2016 decided on 16.06.2017*, a Coordinate Bench of this Court observed as under:-

“Upon hearing and on perusal of impugned judgment, order on sentence, appellant’s Nominal Roll and the evidence on record, I find that the pre-requisite to attract Section 397 of IPC is that a weapon has to be used to facilitate the commission of offence of robbery or dacoity. It is amply clear from the evidence of complainant (PW-1) and that of public witness (PW-5) that appellant had not shown the ‘knife’ to complainant prior to robbing him of his mobile phone. Strangely, after appellant had robbed complainant of his mobile phone, he had shown „knife“ to complainant. It has come in the evidence of complainant that such a course was adopted by appellant to facilitate his escape from the spot and this endeavour proved unsuccessful as appellant was apprehended at the spot. There is no doubt that the offence of robbery has been committed by appellant and so, his conviction for the offence under Section 392 of IPC Crl.A.14/2016 is well deserved. However, the evidence on record does not reveal that appellant had shown or used the „knife“ before robbing complainant and so, provision of Section 397 of IPC is not attracted to the instant case. Quite evidently, in the evidence of public witness or complainant’s evidence, it has not come that appellant had shown the “knife” prior to robbing complainant of his mobile phone. So, trial court has erred in convicting appellant with the aid of Section 397 of IPC.”

28. In view of the above, this Court is unable to accept that the appellant had committed the offence punishable under Section 397 of the IPC. Accordingly, his conviction under Section 397 of the IPC is set aside.

29. The appellant has been sentenced to serve rigorous imprisonment for a period of seven years for committing an offence punishable under Section 397 of the IPC. The appellant has already undergone sentence for a period of over four years and eight months, as on date. He is now required to serve a further period of approximately one year and one month. The appellant does not have any criminal antecedents. Admittedly, he is not involved in any other criminal case. Further, the appellant was approximately twenty-two years of age at the time of commission of the said offence.

30. Considering the aforementioned mitigating circumstances as well as the facts relating to commission of offence, this Court is of the view that the sentence awarded to the appellant for the offence under Section 392 of the IPC is harsh and excessive.

31. In view of the above, this Court considers it apposite to reduce the said sentence to the period already served. The appellant is directed to be released forthwith.

32. The appeal is disposed of in the aforesaid terms. The pending application is also disposed of.

VIBHU BAKHRU, J

JANUARY 06, 2020/ MK