

\$~

\*

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

*Reserved on: 07<sup>th</sup> December, 2020*

*Pronounced on: 14<sup>th</sup> January, 2021*

+ CRL.A.589/2018

ARVIND alias BODY GUARD ..... Appellant

Through: Mr. Anuj Kapoor, Adv.

versus

STATE ..... Respondent

Through: Mr. Izhar Ahmad, APP for State

**CORAM:**

**HON'BLE MR. JUSTICE SURESH KUMAR KAIT**

**J U D G M E N T**

The hearing has been conducted through video conferencing.

1. The present appeal has been filed by the appellant to set aside the judgment of conviction and order on sentence dated 19.03.2018 passed by learned ASJ, East District, Karkardooma Courts, Delhi in SC No.2316/2016 pertaining to FIR No.624/2016, for the offences punishable under Section 392 IPC read with Section 397 IPC, registered at Police Station Shakarpur, Delhi and to acquit the appellant.
2. The case of prosecution is that on 09.06.2016 at about 9.30 am, during emergency duty, ASI Anand Kumar was assigned DD No.9A, who along with Ct. Dinesh reached just ahead of Metro line at Yamuna Bank Railway Line, near Pole No. 1/28, Shakarpur, Delhi, and in the way, he met

complainant Anil Kumar, and with him, they walked towards the said spot, and the ASI Anand Kumar recorded statement of complainant who stated that he was working in a Security Office, at S-559, School Block, Shakarpur and on 09.06.2016, he was coming from Hapur to Delhi by a train and at about 8.00 am when train reached ahead of Metro Line at Yamuna Bank, Shakarpur, it stopped as no signal was received. Since his office was near to the said place, he got down from the train and started walking. In the meantime, train also went away after receiving signal and till then he had walked a little distance. A boy came from behind and asked him as to where he hailed from, and thereafter that boy took out a knife and asked him to take out whatever he was having with him. The said boy took a sum of Rs.7,000/- from his 'Pithoo Bag' (the bag hanging on his back) and took out his mobile phone make Nokia Lumia 730 (from left pocket of his pant) forcibly, however, that boy returned him, (the complainant) two SIMs No. 9212412810 and 9410454970 after taking out from the said mobile.

3. On the basis of the said statement of the complainant Anil Kumar, the ASI got registered the FIR, and during investigation, the site plan of scene of occurrence was prepared. Thereafter, on 25.08.2016, on an information of the secret informer, ASI Anand Kumar along with Ct. Harender and informant reached at Laxmi Nagar Metro Station, where the appellant was pointed out by the secret informer and he was arrested in the case. Thereafter, a request was made for conducting his TIP, to which the appellant refused before the concerned MM. During police custody remand of the appellant, the mobile phone of the complainant and the knife used in the commission of the offence could not be recovered. On 27.08.2016, the complainant came to the Police Station to hand over the copy of his mobile

bill where he identified the appellant at the Police Station. After completion of investigation, the charge-sheet was filed.

4. Vide order dated 09.12.2016, the Trial Court framed charges against the appellant for the offences under Sections 392/397 IPC to which he pleaded not guilty and claimed trial.

5. In order to substantiate its case, the prosecution has examined as many as 7 witnesses in the case, whose depositions inter-alia would be discussed.

6. The appellant was examined under Section 313 Cr.P.C, wherein he denied all the allegations levelled against him as false and claimed himself to be innocent and having been falsely implicated in the case. He opted not to lead any evidence in his defence.

7. PW4 ASI Vinod Kumar was the duty officer, who proved copy of the FIR as Ex.PW4/A on the basis of the rukka Ex.PW2/A, the certificate under Section 65B of the Evidence Act as Ex.PW4/B and proved DD No.9A dated 09.06.2015 as Ex.PW4/C.

8. PW5 Sh. Shishir Malhotra, the Nodal Officer, of M/s Aircel Ltd, deposed that the mobile phone numbers 9212412810 and 9410454970 were not found operational during the period from 09.06.2016 to 05.09.2016 and from 29.08.2016 to 05.09.2016 respectively as per IMEI No. 357168066773544 and IMEI No. 353894070528921. PW6 Sh. Subhash Kumar Mishra, Metropolitan Magistrate, proved application for conducting TIP of the appellant as Ex.PW6/A, besides the TIP proceedings as Ex.PW6/B whereby the appellant had refused to join the TIP.

9. PW7 ASI Anand Kumar, the IO, has proved receiving of DD No.9A dated 09.06.2016; going to the spot of occurrence with Ct. Dinesh; meeting

complainant there; recording the statement of the complainant; preparing rukka Ex.PW7/A; handing over the same to Ct. Dinesh for registration of the FIR; preparing of site plan of the spot as Ex.PW2/B; a secret information dated 25.08.2016 reaching gate No.2, Laxmi Nagar Metro Station and apprehending the appellant at the pointing out of secret informer; arresting the appellant; recording the disclosure statement Ex.PW7/B and arresting him vide memos Ex.PW3/A and Ex.PW3/B; on 26.08.2016 moving the application for TIP before the concerned MM; refusing to join the TIP by the appellant; obtaining police custody remand of the appellant; preparing pointing out memo of the place of occurrence by the appellant vide memo Ex.PW7/C; the complainant identifying the appellant at the Police Station on 27.08.2016 and the complainant providing mobile bill which is Ex.PW7/D.

10. In his cross-examination on behalf of the appellant, PW7 stated that DD No.9A was received by him at 9.30am and he admitted that in the said DD at the top, the date is written as 09.06.2015. He further deposed that the complainant met them on the way at a distance of ½ km before the spot and he had contacted the complainant on his mobile phone. He admitted that no DD entry was recorded for the secret information and he left for the Laxmi Nagar Metro Station at 1.00 am where Ct. Harinder met him and the appellant arrived at the spot from where he was arrested around 1.25 am. It took five to ten minutes while interrogating the appellant and preparing the memos. He left the Laxmi Nagar Metro Station at about 1.40 am. He could not join any public person or any official of the Metro Station during the said proceedings. He further deposed that he returned to Police Station at 2.50 am, where DD entry was recorded to that effect but he neither remember the DD number nor he placed the copy of the same on the judicial

record. He admitted that the complainant had come to the Police Station with copy of the bill of mobile of his own in the morning time, but he did not make any seizure memo of the same.

11. PW2 Sh. Anil Kumar, the complainant, deposed that on 09.06.2016, he was working in a office at Shakarpur School Block, located at S-561. On that day, he had boarded train from Hapur Railway Station and reached Delhi at around 8.00 am. The train had not reached the destination, however, stopped just ahead of Metro Bridge, Yamuna Bank as there was no signal for the train. Sensing the situation, he got down from the train because his office premises was near to that place. Thereafter, when he was coming towards Yamuna Metro Bridge, one person came from behind and pointed the knife on his person aiming his chest. The said person questioned him as to from where he (the complainant) hailed and directed him to hand over whatever articles he had. That person was the appellant who took out Rs.7,000/- from his purse which he had kept in his bag. The appellant also removed his mobile phone, make Nokia Lumia 730 from his left side pant pocket. The phone was operational on mobile phone Nos. 9212412810 and 9410454970. Appellant removed both the SIMs from the said mobile phone and handed over the same to him (the witness). Thereafter, the appellant went away towards Yamuna Bank.

12. PW 2 further deposed that at about 8.30 am, he reached his office and from there dialed at number 100 to the police from the mobile phone No. 9212412810 by inserting the said SIM in another instrument which was lying in the office. After making the call, he reached under Yamuna Metro Bridge at about 9.00 am, and that at about 9.45 am, ASI Anand and Ct. Dinesh reached there, to whom he narrated the incident, and then, he went to

the spot with the said police official and had shown the spot where incident had occurred. Again they came to a place under Yamuna Bridge where his statement was recorded, which bears his signature at point A, and the same is Ex.PW2/A. The IO had prepared the site plan of the spot at his instance, which is Ex.PW2/B bearing his signature at point A. On 27.08.2016, he went to Police Station Shakarpur with his ID and bill of mobile phone. At that point of time, the appellant was found sitting in the Police Station, whom he had identified him (the appellant) before the IO. He gave his ID and bill of mobile to the IO, and the photocopy of the same are Mark PW2/A and PW2/B respectively. He admitted that none of his articles could be recovered by the police.

13. In his cross-examination, PW2 replied that he had not provided ticket/document of the train regarding his journey on 09.06.2016 from Hapur to Delhi to the police as it was MST Pass. Further admitted that he had not given the photocopy of the MST Pass to police. He stated to the police in his statement Ex.PW2/A that he had gone to his office and from there he dialed at number 100 from his mobile phone No. 9212412810 by inserting the SIM in another instrument, which was lying in the office. However, he was confronted with his statement Ex.PW2/A, where it was not found so recorded, but he volunteered that the same might not have been recorded in his statement by police. He further admitted that he had not stated in his statement to the police regarding age, height and features of the offender who had committed the offence, but police had informed him regarding arrest of the appellant in this case. Further admitted that he went to Police Station on 27.08.2016 on his own and was not called by the police on that day. The police had not prepared seizure memo of documents when

he handed over the documents Mark PW2/A and PW2/B. During his further cross-examination, he deposed that he had stated to police in his statement that the appellant took out Rs.7,000/- kept in his purse which was lying in his bag and that the appellant had pointed knife at his chest. However, he was confronted with his previous statement Ex.PW2/A, wherein factum of purse lying in Pithoo bag was not mentioned, but he volunteered that the said facts were not recorded in his statement by the IO.

14. Learned APP, while opposing the present appeal, has submitted that the appellant has not only been identified by the complainant/victim, but his role has been defined clearly in his deposition. The incident is dated 09.06.2016 at about 8.00 am. The Court can take judicial cognizance of the fact that in the month of June it is not only hot but sufficient shining sun light at 8.00 am and the place of occurrence was not a regular way but was a lonely place. The appellant as per deposition of PW2 (the complainant) came from behind and pointed the knife on his person aiming at chest, which means the appellant was face to face with the complainant, and thereafter, the appellant questioned about the native place of the complainant and directed him to hand over whatever articles the complainant was having with him. The said act of the appellant in the day light and that too he being face to face with the complainant, talking to him, asking him to hand over the articles at the point of the knife and thereafter taking out the purse from the bag of the complainant, removing Rs.7,000/- and mobile phone, thereafter removing both the SIMs from mobile phone and handed over the same to the complainant and certainly the appellant was not either in a muffled face or hide his identity. All this, must have taken a considerable time facilitating the complainant not only to see his (appellant's) face but his

face must have been imprinted in the mind of the complainant. All the said facts narrated by the complainant as PW2 in his deposition have remained unrebutted on the record in his cross-examination on behalf of the appellant.

15. Learned APP further submitted that in the above said circumstances, even if the appellant was arrested on 25.08.2016, it cannot be inferred that the complainant may not have remembered his face in his memory. In such a situation, even there was no need of conducting a TIP of the appellant which would have been of the corroborative value only. On the other hand, he denied the suggestion as wrong that on 25.08.2016 police had shown him the appellant. He further denied the suggestion that he had identified the appellant in the Court at the instance of the IO or that the appellant had not committed any offence with him or that he was not present on 09.06.2016 at the time and place as deposed by him. He positively asserted in the cross-examination that he had gone to Police Station on 27.08.2016 of his own and he was not called by the police on that day. Merely the facts that he has not mentioned in his complaint to the police Ex.PW2/A that the knife was pointed out by the appellant at his chest or the purse lying in his bag are not so material improvements. The prosecution case cannot be thrown away on that account. Even in the complaint Ex.PW2/A, he got recorded that the appellant took out a knife and asked him to hand over whatever he had.

16. It is further submitted that the contention that handing over the two SIMs to the complainant after taking out the same from the robbed mobile, was against the human course of conduct and as to why the appellant would return the same, if at all he has robbed the mobile itself. In a given circumstance, how a particular person shall act in which manner, depends upon the nature and circumstances of each case and no prediction can be

given in this regard. If the knife would not have been there in the hands of the appellant, probably, the complainant might have fought with him or at least protested against robbing him. But in the said circumstances, he might have been so frightened that he could not dare to resist even against the conduct of the appellant. Similarly, the appellant might not have been requiring the SIMs or he might have been taking extra precaution not to be arrested or chased due to the location of the mobile phone if the SIMs had remained inserted in the mobile. Thus, the said arguments on behalf of the appellant do not come for his help.

17. Regarding the contention on behalf of the appellant that the complainant did not call the police from the spot where he was robbed and first he had gone to his office and thereafter he called the police and as such it is a delayed reporting to the police and possibility of manipulation and afterthought cannot be ruled out. This contention has been suitably uprooted by the deposition of the complainant PW2 in his examination-in-chief and cross-examination. Also when he deposed that at about 8.30 am, he reached his office and from there, dialed at number 100 from mobile phone number 9212412810 by inserting the said SIM in another instrument which was lying in the office. Moreover, in answer to question put in cross-examination, he again repeated that he had stated to the police in his statement EX.PW2/A that he had gone to his office and from there, he dialed at number 100 by inserting the said SIM in the instrument lying in his office. Although PW2 was confronted with his previous statement Ex.PW2/A, where it was not found so recorded, but PW2 volunteered that the same might not have been recorded in his statement by the police. The time gap

between the incident and reporting to the police is so short that the possibility of manipulating or concocting a false story cannot be inferred.

18. Next contention that the mobile phone allegedly robbed and the knife used in the incident were not recovered, is again futile in view of the fact that the incident is dated 09.06.2016 and the appellant was arrested on 25.08.2016. Thus, during this period he was having sufficient time to dispose of the said two articles.

19. Further argument that bill of the mobile phone not proved on the record may be a lapse on the part of the IO but certainly the complainant is not having any control over the way of investigation. He had done whatever he could do by producing the copy of retail invoice of the mobile phone, which is computer generated, to the IO and the same is mark PW2/A. It was for the IO to collect the evidence with regard to the said copy of retail invoice, which the IO has not done. But for the said lapse on the part of the IO, the deposition of PW2 cannot be thrown away and rejected.

20. Learned APP further submitted that admittedly, the complainant PW2 and the appellant were unknown to each other and there was no previous any kind of dealing or enmity between them. The complainant was not having any axe to grind against the appellant nor he was having any motive to falsely implicate him. His deposition has been corroborated by DD No. 9A Ex.PW4/C which proves that the matter was promptly reported by the complainant to the PCR from the mobile phone number 9212412810 and it mentions the spot as under the Akshardham Bridge where there was a U-turn and while going towards Delhi, the complainant was looted, at the point of knife, of his Rs.7,000/- and a mobile phone. His deposition is further corroborated by the deposition of the IO PW7 ASI Anand Kumar, who on

receipt of said DD No. 9A Ex.PW4/C along with Ct. Dinesh proceeded for the said spot and in the way he met the complainant Anil Kumar and from there they reached the said spot. No other reason has been assigned or pointed out to this Court for false implication of the appellant on behalf of the complainant. Even in his statement under Section 313 Cr.P.C, there is mere denial of all the incriminating evidence put to him which was against him on the record. He did not lead any defence evidence to rebut or to create a dent in the story of the prosecution. Thus, the present appeal deserves to be dismissed.

21. Heard learned counsel for the parties and perused the material on record.

22. On perusal of the evidence on record, the facts discussed inter alia emerged that the rukka (Ex. PW-2/A) which is the first recorded information about the alleged offence does not contain any description about the appearance of the offender/thief. PW2 Anil Kumar (the complainant) admits in his cross-examination that he had not informed the police about the age, height and features of the offender. Even the fact that the knife was pointed at the chest is missing from the rukka, however, PW2 (the complainant) makes this improvement only during his examination-in-chief. The rukka records that the offender came from behind and the alleged incident is said to have happened in a jiffy. Thus, there is no doubt that the complainant got only a fleeting opportunity to see the offender. Moreover, the appellant is said to have been arrested pursuant to secret information received by the police. However, both PW7 (IO) and PW3 (accompanying Ct.) admit that the purported secret information was never recorded in writing. PW3 even states that he is not aware if the IO conveyed the purported secret

information to senior police officials. Also PW7 (IO) admits that there was no record made about the secret information received.

23. PW7 states that before affecting arrest, PW3 Ct. Harender met him at the Metro Station at 1:10 am. PW3 Ct. Harender states that he had left the police station during the relevant night when arrest was made just prior to 12 midnight. He further admits that the IO never made any telephonic contact with him prior to meeting him. Thus, if admittedly the PW7 (IO) and PW3 were not present in the Police Station together, then there is no explanation forthcoming as to how PW3 was conveyed the purported secret information about the appellant's presence at the Metro Station. It is not the IO's case that the secret information was received while PW3 was still at the Police Station.

24. PW3 Ct. Harender states that he was on duty from 12 midnight to 6 am on 25.08.2016, and it is during this time at about 1:30 am the appellant was arrested pursuant to receipt of secret information. Thus, PW3 speaks of the night intervening 24-25<sup>th</sup> August, 2016, whereas, PW7 ASI Anand Kumar (the IO) states that he was on emergency duty on 25.08.2016 from 8 pm to 8 am, when the arrest was made. Thus, suggesting that the arrest was made on the night intervening 25-26<sup>th</sup> August 2016. The arrest memo records the date/time of arrest as 25.08.2016 at 1:30 am, supporting PW3 Harender's version, but the purported disclosure statement of the appellant (Ex. PW-7/B) indicates overwriting where date is written at the bottom of the page. The remand documents (@ pg 102 of LCR) also bears overwriting on the date.

25. It is pertinent to mention here that PW7 states that the appellant was taken for medical examination, however, his MLC has not been made part of the record.

26. There are question-marks about purported secret information that the alleged incident is of 09.06.2016, but the purported secret information leading to the appellant's arrest is received 2.5 months later. This, by itself, does not inspire confidence. Admittedly, the alleged incident is said to have happened near the railway line. It is not the prosecution version that there was any eyewitness to the alleged incident. In such circumstances, who the secret informer was, how he got information about the appellant's involvement in the case, about his whereabouts etc. are all unexplained, and do not inspire confidence. Moreover, there is no reason as to why the appellant would go to Metro Station in midnight when the metro services are not even functional or any person present over there.

27. Furthermore, the secret informer is said to have accompanied the police to the Laxmi Nagar Metro Station, where on the pointing out of the secret informer, the appellant is said to have been arrested. It appears that there was no attempt made to conceal the identity of the secret informer from the appellant herein. As such, non-examination of such person, whose identity the police itself did not attempt to conceal from the appellant, raises strong doubts about the reliability of the purported secret information.

28. In case of *Peeraswami v. State of NCT of Delhi*, 2007 (95) DRJ 363, this Court held as under:

“...6. Thus the initial DD which was recorded by SI Raj Kumar talks of three things. One that he received information through an informer but before recording the same, he conveyed it to Inspector Ashok Tyagi and before

*the information was recorded, Inspector Ashok Tyagi conveyed it to senior officers and also sent it in writing to them. When Inspector Ashok Tyagi appeared as PW-14 in the court, he deposed that when he was present in his office along with other staff on 5th January, 2001 at around 11.30 am, SI Raj Kumar received a secret information on telephone and he conveyed the telephonic message to him. The information was that Peeraswmi and his wife Chambai, appellants, used to deal in smack and charas at their residence. He conveyed this information to his senior officials. In cross examination he admitted that he had not sent the information to his senior officers in writing and he only conveyed this information orally. He had not recorded the secret information on a paper. DD Ex.PW5/A recorded at 11.30 am, is not the information received by Sub Inspector Raj Kumar but is a detailed information recorded after deliberations giving who did what. Had SI Raj Kumar received the information and recorded it directly in DD, he could not have mentioned that he had informed about the information to his senior officials and his senior officials had in turn informed it to further senior officials and even sent a copy. When the information had not been recorded by Sub Inspector Raj Kumar, how it could have been sent to senior officials in writing. Section 42(1) of the Act casts a duty upon the police official to reduce the information in writing whenever commission of an offence in respect of narcotic drugs or narcotic substances comes to his knowledge. After he reduces down the information in writing, he has a duty to send a copy of the information to his superior officers within 72 hours. In fact, Section 42 of the Act prescribes detailed procedure as to how a police official has to proceed when he receives an information. This procedure is not a mere formality for the sake of it but it provides a safeguard against false implication of persons. Section 42(1) of the Act mandates a police officer to necessarily record the information in writing and Section 42(2) casts a duty*

*upon a police officer who takes down the information in writing to forthwith sent a copy of information to his immediate superior officials. In the present case, it is admitted by PW-14 that no copy of the information was sent by him to his senior officers. PW2, who appeared from office of DCP has specifically stated that only a report under Section 57 of the Act regarding this case, was received in the office of DCP from Special Staff. He proved this report as Ex.Pw2/A and stated that no other document in respect of this case was received.*

*7. The manner in which DD Ex.PW5/A has been recorded, casts doubt on the receipt of information itself. This doubt is further fortified from the testimony of PW-14, who stated that SI Raj Kumar had received telephonic information and communicated the same to him whereas Sub Inspector Raj Kumar stated that the information was received through a secret informer. The other factors which throw doubt on the story of prosecution is that the secret informers are nourished by the police to receive informations about the crimes. They are never brought face to face before the accused persons because that puts their lives in danger, neither their identity is disclosed to the courts and courts also do not insist upon their identity. But in the instant case, it is testified by Sub Inspector Raj Kumar that despite the fact that secret informer had given specific address where the trade of smack and charas was being carried out, the secret informer was made a part of the raiding party. He was taken to the spot and he also pointed out to the appellant Peeraswmi and at his pointing out the appellants were arrested. If the identity of the secret informer was not so secret and he could accompany police party up to the house and come face to face with the appellant, there is no reason why he could not have been produced in the court for deposition. The entire story of secret informer in fact is falsified from the testimony of PW14, who stated that the information was received on telephone.....”*

29. PW2 (the complainant) has deposed that on 27.08.2016, he went to the Police Station to handover the bill of the stolen mobile phone to the police. At that time, the appellant was present in the Police Station and he identified him as the offender. It seems that this is not a coincidence, but was part of the prosecution plan so that the appellant could be identified by the complainant.

30. From the above facts, it is established that the complainant, who had only got a fleeting glance of the offender during the incident, was informed and convinced by the police that the police had found the offender, and the complainant in his zeal to assist the police 'solve' the case, identified the appellant as the offender.

31. It is pertinent to note that on 26.08.2016, the IO moved an application for conducting the TIP of the appellant, however, he refused it. In his statement u/s 313, Cr.P.C. at Q. no. 14, the appellant has answered that he refused TIP as he had been shown to the witness at the Police Station. The same was also suggested to the PW2 (complainant) during his cross-examination. As such, the magical appearance of PW2 on 27.08.2016 was meant only to overcome this refusal, since the appellant had already been shown to the complainant.

32. Admittedly, the stolen phone has not been recovered from the appellant, or at all. As such, other than the weak identification by the appellant, which itself was based on a fleeting and momentary glance, there is nothing on record to connect the appellant to the crime in question.

33. Further important to note that the complainant has nowhere disclosed about the kind of knife that was allegedly used by the offender. Moreover,

no knife has been recovered. As such, the conviction u/s 397, IPC cannot be sustained since there is no proof that a 'deadly weapon' was used.

34. In case of **Ghanshyam @ Bablu v. State**, Crl. A. 757/2007, this Court observed as under:

*“19. Insofar as their conviction under Section 397 IPC is concerned, in the absence of any recovery of the deadly weapon at the instance of the appellants, punishment for 7 years cannot be sustained. Reference can be made to the judgment delivered by this Court in the case of Rakesh Kumar Vs. The State of NCT of Delhi. Some observation made in that case are reproduced hereunder:*

*2. Mr. Sumeet Verma learned Amicus Curiae representing the appellant has pressed only one submission in support of the appeal though the grounds of appeal challenged the conviction on several grounds. The ground now being pressed is that at best the case can be said to have been made out against the appellant under Section 392 IPC, but not under Section 397 IPC. The basis of this contention is that according to the prosecution case, the appellant had used a deadly weapon, i.e. a knife while committing robbery along with his accomplices, but the prosecution has not been able to establish that the knife used by the appellant was in fact a deadly weapon within the meaning of the term appearing under Section 397 IPC. In support of his contention, he has placed reliance on a decision of this Court in the case of Charan Singh v. The State 1988 Crl.L.J. NOC 28 (Delhi) wherein the Court considering a similar situation held that in the absence of recovery of knife, which was allegedly used at the time of commission of the robbery/dacoity, it cannot be presumed that the knife so used was a deadly weapon. The Court observed as under in this regard:-*

*"At the time of committing dacoity one of the offenders caused injury by knife on the hand of the victim but the said knife was not recovered. In order to bring home a charge under S.397 the prosecution must produce convincing evidence that the knife used by the accused was a deadly weapon. What would make knife deadly is its design or the method of its use such as is calculated to or is likely to produce death. It is, therefore, a question of fact to be proved by the prosecution that the knife used by the accused was a deadly weapon. In the absence of such an evidence and particularly, the non-recovery of the weapon would certainly bring the case out of the ambit of S.397. The accused could be convicted under S.392."*

*3. On the other hand, Mr. Sunil K. Kapoor appearing for the State has submitted that the Trial Court returned a positive finding about the appellant having used a deadly weapon at the time of commission of the robbery and, therefore, a case under Section 397 is squarely made out. Mr. Kapoor has vehemently urged that in view of the statement of PW-3, learned Court was fully justified in recording conviction against the appellant under Section 397 IPC.*

*4. This Court having considered the facts and circumstances of the case, and the material brought on record and the submissions made on behalf of the parties is of the view that since in the present case, prosecution has not been able to establish the dimensions of the knife and to recover and produce the same at the time of trial, it will not be appropriate to raise a presumption that the knife so used by the appellant was in fact a deadly weapon within the meaning of the term. There are knives of hundreds of type available in different length and width. It is true that PW3 in his examination stated that it was a butcher's knife which was used by the appellant. But in*

*the cross-examination, he could not give the exact description or the length of the said knife. He has only stated that the length of the knife was more than 6". The prosecution in this case has not tried to find out and record the length or the description of the knife whether it was a spring operated knife (batandar) or a large knife which can be considered to be a deadly weapon within the meaning of the term used under Section 397 IPC. The Court is, therefore, of the considered opinion that even though the sentence of the appellant for the offences under Section 392 IPC is based on the material brought on record, the conviction of the appellant for the offences under Section 397 IPC cannot be upheld and the appellant is entitled to benefit of doubt on that count.*

*5. In the result, the appeal is partly allowed. While maintaining the conviction of the appellant for the offences under Section 392 IPC, the conviction of the appellant under Section 397 IPC is hereby set aside. The appellant was awarded 7 years rigorous imprisonment for the offence under Section 397, out of which, he has already undergone a sentence of almost 6 years and 8 months and, therefore, this Court is of the opinion that ends of justice will adequately be met if the sentence of the appellant is restricted to the period already undergone by him and that would be considered to be a sentence awarded to him under Section 392 IPC."*

35. As per prosecution itself, the bill of the mobile phone has not been duly proved. Only photocopy of the same was produced as is clear from the examination-in-chief of PW2 and also the cross-examination of PW7. Importantly, the police did not even prepare any seizure memo for taking into its possession the bill of the mobile phone. This gives further credence to the plea that the complainant's appearance at the Police Station on

27.08.2016 was meant only to overcome the appellant's refusal of TIP since he had already been shown to the witness.

36. In addition to above, even the PCR call was not proved. PW4 proves the making of the DD no. 9A by him, but the PCR form has not been produced or proved.

37. In view of above recorded facts and appellant herein was a vagabond, I have no hesitation to place on record that the appellant was easy to implicate for 'solving' the case. The Trial Court has overlooked all the evidence discussed herein. Thus, from the above discussion, it cannot be said that the prosecution had established the appellant's guilt beyond reasonable doubt. The appellant ought to be given benefit thereof, however, Trial court failed to do so.

38. Accordingly, I hereby set aside the judgment of conviction and order on sentence dated 19.03.2018 passed by the Trial Court.

39. Consequently, the appellant is acquitted and discharged from all the charges.

40. The appeal is, accordingly, allowed and disposed of.

41. The Jail Superintendent concerned is hereby directed to release the appellant forthwith, if not required in any other case.

42. Pending application, if any, stands disposed of.

43. The judgment be uploaded on the website of this Court forthwith.

**(SURESH KUMAR KAIT)**  
**JUDGE**

**JANUARY 14, 2021/rk**