



2024 : DHC : 1882



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

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Date of Decision: 28.02.2024

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CRL.A. 888/2002

AYUB

..... Petitioner

Through: Mr.D.S. Bangari, Advocate

Versus

STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Laksh Khanna, APP for State
with Insp. Puneet

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. The present appeal has been instituted under Section 374 Cr.P.C. against the impugned judgment of conviction dated 03.10.2002 and order on sentence dated 04.10.2002 passed by the Ld. Addl. Sessions Judge, Delhi in the case arising out of FIR No.353/2000 registered under Sections 392/397/394/34 IPC at P.S. Khajoori Khas. Vide aforesaid judgement and order on sentence, the appellant was convicted for the offence punishable under Section 392/34 read with Section 394 IPC and was sentenced to undergo rigorous imprisonment for a period of seven years and to a fine of Rs 5000/-. In default of payment of fine, he was directed to undergo rigorous imprisonment for one year. He was also convicted for the offence punishable under Section 397/34 IPC and was sentenced to undergo rigorous imprisonment for a period of seven years alongwith a fine of Rs 5000/-. In



default of payment of fine, he was directed to undergo further rigorous imprisonment for a period of 1 year. Benefit of Section 428 Cr.P.C. was given and both the sentences were directed to run concurrently.

2. It is pertinent to note that alongwith the appellant, co-accused namely *Ashraf* was also convicted and sentenced in similar terms. The appeal filed by *Ashraf* being Criminal Appeal No. 925/2002 has been abated vide order dated 28.02.2024 on account of his death. It is further noted that the third accused could not be traced during trial and was eventually declared a proclaimed offender.

3. The facts relevant for the adjudication of the present case, as noted by the trial court, are as follows-

On 26.12.2000, the complainant was returning to his house on his cycle, when at about 11pm at Rajiv Nagar, the complainant was apprehended by the three accused who dragged him away from the road and gave leg and fist blows to him. Rs 11000/- which were being carried by the complainant in his right pocket were also taken away and he even received knife blows on his back, shoulder and fingers.

The complainant subsequently approached the police and stated that he would be able to identify the three culprits if the same were produced before him. On 17.01.2001 SI Lekh Raj Singh to whom the investigation of the case had been transferred w.e.f 31.12.2001 received a message from SI J.K. Singh of PS- Bhajanpura regarding the arrest of accused person Ayub and Ashraf @ Guddu in another being FIR 17/2001 registered u/s 186/353/307/34 and subsequently, the accused confessed to having committed the offence and was arrested. Chargesheet was then framed u/s 392/397/394/34 IPC.

4. The prosecution examined eleven witnesses in support of its case. The appellant, in his statement recorded under Section 313 Cr.P.C, claimed false



implication and alleged that he had been apprehended by the police of P.S. *Khajoori Khas* in connivance with the police of P.S. *Bhajanpura*.

5. The injured/complainant *Krishan Kant Dwevedi* was examined as PW4. He completely supported the prosecution case and also identified both the accused persons in court. The relevant extract of his testimony reads as under:-

“In the last year in the month of December I was coming from market, at about 11:00 pm I came on cycle near Shri Ram Colony there were three boys, they asked me to stop and I stopped one of them picked up my tie, a sum of 11,000/- were lying in the pocket of my coat. They took away those amount. Those notes were in rupees 1000/500 in currency notes. They asked me that I was having more money- I told them that I have nothing else except those Rs 11000/-. Thereafter they took out knife and started striking it against me towards my back, left hand and they also gave me beatings with fists and legs. They dragged me towards a Kikker tree. I received KANTAS of-KIKKER injuries. They brought out my shoes, socks etc. They also watched my wrist watch and then they gave me fists blows. I touched their feet and asked them to leave me and whatever you want to take anything from me you can take. After looking the people standing in the court the witness states that his life would become endangered. If I recognise those culprits I would be murdered outside the court. The accused present in the court are the same persons. I do not remember their names. One motorcycle police man had come to the spot again said one ordinary person had come, he also tried to attack him with knife but he sent back. The accused ran away. Police from red light came there. My statement was recorded by the police which is ExPW4/A which bears my sign at point A. I received back the cycle from the police.”

6. A perusal of the above testimony would show that at the time when Rs.11,000/- was taken out from his pocket, the complainant was neither



shown the knife nor was he aware of the same. It was only after the said money had been taken and the accused persons demanded more money that the knife was shown to the complainant. More importantly, the statement nowhere mentions which of the accused persons was carrying the knife or which of them inflicted the injuries with the knife. As already established through judicial decisions, Section 397 IPC cannot be invoked against all the accused persons with the aid of Section 34 IPC.¹

To invoke Section 397, it is essential that the deadly weapon is used by the accused i.e., the said weapon should be within the vision of the victim or atleast the victim should be aware of the existence of such deadly weapon so as to be capable of creating a terror in the mind of the victim. One cannot say that in the present case at the time of commission of the offence, the knife was shown to the complainant such that it created a terror in the mind of the victim compelling him to part with the currency notes.

7. The said issue stands well settled by the decision in Ashfaq v. State (Govt of NCT of Delhi)², wherein the Supreme Court held as under:-

“xxx

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

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

¹ Ganesan v. State represented by Station House Officer, (2022) 15 SCC 634

² (2004) 3 SCC 116



xxx”

8. Even this Court in the case of Anil Kumar v. State (NCT of Delhi)³ has categorically stated that-

“xxx

14. Indisputably, the complainant did not see or realise that a deadly weapon i.e., knife was being used, and thus the offence in terms of Section 397 IPC cannot be made out, in as much as the money was taken from the pocket of the complainant before the knife could be seen by the complainant. In light of the above, appellant's conviction is upheld qua the offence under Section 392 IPC however, he is acquitted of the offence under Section 397 IPC...

xxx”

9. In light of the aforesaid including the fact that the knife came into the picture only after the complainant had already been robbed off the currency notes, appellant's conviction under Section 397 IPC is untenable and consequently set aside.

10. Insofar as appellant's conviction under Section 394 IPC is concerned as already noted above, testimony of injured is not specific as to which of the accused inflicted the injury. Regardless of that, learned counsel for the appellant, on instructions from the appellant, states that he does not wish to challenge the same. He however, prays that the sentence awarded to appellant be modified to the period already undergone by him.

11. The nominal roll of the appellant has been placed on record which shows that as on 21.12.2020, the appellant has already undergone a sentence of 4 years, 9 months and 3 days and has satisfactory jail conduct. The



incident took place about 25 years back. Appellant was just below 21 years of age at the time of commission of offence. It is stated that the appellant is the sole bread earner of the family. The appellant is also not found involved in any other case.

12. Considering the entire factual matrix as discussed above, appellant's conviction under Section 392/34 read with Section 394 is upheld however, the order on sentence is modified to the period already undergone. The appellant is directed to pay the fine as imposed failing which he shall undergo the default sentence. His bail bonds are cancelled and surety is discharged.

13. The appeal is disposed of in above terms.

14. Copy of this judgment be communicated to the concerned trial court as well as the concerned Jail Superintendent.

MANOJ KUMAR OHRI
(JUDGE)

FEBRUARY 28, 2024

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³ Decision dated 22.02.2024 passed in CRL.A.885/2002