



2024:DHC:9363



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

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Reserved on: 11th September 2024

Pronounced on: 02nd December 2024

+ **CRL.A. 455/2024 & CRL.M.(BAIL). 816/2024**

RAVI KUMAR

.....Appellant

Through: Mr. Anwesh Madhukar (DHCLSC),
Ms. Prachi Nirwan, Advocates

versus

STATE (NCT OF DELHI)

.....Respondent

Through: Mr. Pradeep Gahalot, APP for the
State with SI Praveen Kumar PS:
Malviya Nagar

**CORAM:
HON'BLE MR. JUSTICE ANISH DAYAL**

JUDGMENT

ANISH DAYAL, J.

CRL.A. 455/2024

1. This appeal has been filed under Section 374(2) read with Section 482 of the Code of Criminal Procedure 1973 ('**Cr.P.C**') for setting aside the impugned judgement dated 22nd May 2023, and order on sentence dated 14th July 2023 passed by Additional Sessions Judge (FTC)-02 ('**ASJ**'), South District Saket in SC NO. 135/2017 , FIR No. 730/2016 under Sections 392/397/34 of the Indian Penal Code 1860 ('**IPC**') and Section 25 of the Arms Act 1959 registered at Police Station ('**PS**') Malviya Nagar.

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2. Appellant was convicted under Sections 392, 397, and 34 IPC while being acquitted under Sections 25 of the Arms Act and 411 IPC. The sentence includes rigorous imprisonment for seven years under Section 397 IPC, fifteen months under Section 392 IPC, and a fine of Rs.10,000, with Rs.5,000 allocated towards prosecution expenses.
3. Appellant has undergone the sentence for two years four months and nineteen days and as per the SCRB Report and Nominal Roll, has no previous involvement, and his jail conduct was reported as satisfactory.
4. Appellant challenges the conviction, contending that prosecution failed to establish guilt beyond a reasonable doubt, with numerous contradictions in the evidence and procedural lapses.

Factual Background

5. As per the case of prosecution, on 28th October 2016, the complainant, Mr. Wahid Ali, was returning from work. At approximately 8:30 P.M, as he reached near Gurudwara, Sheikh Sarai, Phase-II, Delhi, three individuals accosted him. One of the assailants brandished a knife at the complainant, while another forcibly removed his wallet, and a third took his mobile phone. When the complainant sought help from a nearby auto-rickshaw driver, the latter left the scene due to being threatened with a knife by the accused.
6. Subsequently, the auto-rickshaw driver returned with a police official and succeeded in apprehending one of the accused, identified as Javed. During this process, another victim, Mr Kamlesh Pandey, approached and reported that the same assailants had robbed him of two mobile phones and Rs.4,200 by threatening him with a knife.
7. On the basis of information provided by the apprehended accused, Javed, the police apprehended the remaining two accused, namely Ravi (appellant) and



Gaurav, from Hauz Rani, Malviya Nagar. Both were identified by the victims on the spot. A case was registered, and investigation initiated.

8. During the investigation, the accused persons were formally arrested. Two mobile phones and Rs.1750 were recovered from their possession, along with the knife used in the commission of the offence, which was recovered from the possession of appellant/accused. After the conclusion of the investigation, chargesheet was filed against all three accused persons for commission of offence under Sections 392, 397, 411, 34 IPC and 27 of the Arms Act, 1959 (“*Arms Act*”)

9. Statements of witnesses were recorded, and other evidence was collected. Subsequently, a chargesheet was filed against the accused, including the appellant, under Sections 392, 397, 411, and 34 of IPC and Section 25 of the Arms Act which was framed against appellant separately.

10. Kamlesh Pandey and Wahid Ali testified about the sequence of events and identified the accused in court. Both victims corroborated the use of a knife by Ravi Kumar (appellant) to threaten them during the robbery. Statements by the Investigating Officer (*‘IO’*) and supporting police personnel confirmed the recoveries made and the arrests. Bystanders, including a TSR driver who intervened, confirmed the accused’s apprehension at the scene. Documentary evidence included recovery memos, seizure reports, call detail records (*‘CDRs’*), and certificates under Section 65B of the Indian Evidence Act.

11. Prosecution during the trial emphasized that victims' testimonies were consistent and credible. Accused were apprehended soon after the incident, and the recovered items matched those reported as stolen. The knife used by appellant was contended to fall within the scope of “deadly weapon” under Section 397 IPC.



12. The Trial Court convicted all three accused under Section 392 IPC, holding that prosecution successfully proved the robbery and involvement of the appellant.

13. Appellant was additionally convicted under Section 397 IPC for using the knife during the robbery. The Court found the knife qualified as a “deadly weapon” as it was used to instil fear and subdue the victims. Co-accused Javed and Gaurav Kumar were held liable under Section 34 IPC for acting in concert with appellant to commit the robbery. Appellant was sentenced to rigorous imprisonment (RI) for seven years under Section 397 IPC and an additional fifteen months under Section 392 IPC, with a fine of Rs.10,000, with Rs.5,000 allocated towards prosecution expenses.

Submissions on behalf of Appellant

14. Counsel for appellant submits that, to establish an offence under Section 392 IPC, prosecution is required to prove the following essential ingredients: (a) the act of carrying away or attempting to carry away property, (b) the offender voluntarily causing or attempting to cause death, hurt, wrongful restraint, or fear of instant death or hurt to any person during such act. Furthermore, under Section 397 IPC, the offence becomes an aggravated form of robbery if the offender, while committing robbery as defined under Section 392 IPC, either uses a “deadly weapon,” causes grievous hurt, or attempts to cause death or grievous hurt to any person.

15. Counsel further contends that the facts required to be proved for the prosecution to establish charges under Sections 392 and 397 include:

a. That, the victim had to part from his property at the instance of the accused.



b. That the accused person voluntarily caused or attempted to cause death or hurt or wrongful restraint or fear of instant death/hurt in order to cause the victim to part with his property.

c. While doing the aforesaid act, a deadly weapon was used.

16. The essential elements to be proved are enumerated as follows:

i. It was the appellant/accused at whose instance, the property was taken away from the ownership/possession of the victim. In other words, the identity of the accused is to be proved.

ii. The possession/ownership of the property is to be proved.

iii. Therefore, the recovery of the property taken away, establishes and strengthens the contention that the property was actually robbed.

iv. That, act of threat or attempt to voluntarily cause death or hurt or wrongful restrain or fear of instant death/hurt was committed by the Appellant.

v. In order to do the aforesaid, the appellant/accused used a “deadly weapon”. Therefore, the use of the weapon is primarily established by the recovery of such a weapon.

17. Counsel’s primary contention is that neither the identity of appellant has been conclusively established nor the identity of so-called robbed articles or their recovery, has been established during trial. Additionally, nothing has been placed on record to corroborate allegations that the victims were assaulted, beaten, or subjected to a knife attack. Furthermore, neither the use of a deadly weapon nor its recovery has been proven. In light of these circumstances, the offences under Sections 392 and 397 IPC, do not appear to be made out.





18. Prosecution examined a total of 12 witnesses. Wahid Ali (PW-2/complainant), Kamlesh Pandey (PW-3), and Vineet Kumar Tiwari (PW-4) were presented as victims of the alleged robbery. Rakesh Prasad (PW-5), the auto driver. Head Constable Mukesh (PW-6), Constable Budhi Prakash (PW-7), Head Constable Dharamvir (PW-8), and Sub-Inspector Suraj (PW-12/Investigating Officer) were police officials. Additionally, Pawan Singh (PW-9), Amit Sharma (PW-10), and Ajay Kumar (PW-11) were nodal officers representing various telephone companies.

19. Counsel further highlighted that one Constable Rajender, who initially reported that “*a thief has been apprehended near Gurudwara Sheikh Sarai,*” was not examined by prosecution. As the first person at the scene, his testimony would have been pivotal in clarifying the sequence of events and the transformation of a case of theft into one of robbery. Moreover, as per the testimony of Kamlesh Pandey (PW-3), it was a shopkeeper who made the initial call to the police. However, this shopkeeper was also not produced as a witness. Additionally, there is no PCR call record available on record to establish or verify the content and timing of the call allegedly made by the shopkeeper, nor is there any evidence regarding the observations made by the PCR team upon arrival at the scene. In light of these omissions and inconsistencies, the veracity of the prosecution’s case warrants careful judicial scrutiny.

Identity of the appellant not proven beyond reasonable doubt

20. Prosecution during the trial relied upon the statements of Kamlesh Pandey (PW-3), Rakesh Prasad (PW-5) and Constable Budhi Prakash (PW-7) who had failed to identify the appellant and no Test Identification Parade (“*TIP*”) of the accused persons was conducted.

21. Kamlesh Pandey (PW-3), one of the victims of the robbery, in his statement, recorded that the appellant/accused and co-accused gave severe



beatings to him along with breaking his SIM card and forcefully driving his car to some distance and alighting his car. Even after being in such proximity to appellant/accused for a substantial amount of time, it was categorically stated by him in Trial Court that *“None of the robbers are present today in Court.”*

22. Vineet Kumar Tiwari (PW-4) was also one of the victims of the robbery, but as per his testimony, it is clear that he was not robbed by the appellant or other co-accused persons. and clearly gave a testimony stating, *“I cannot identify those three robbers as there was darkness and they were muffled face”*. Counsel for the appellant points out that even PW-4 has failed to identify the accused and even raises doubt regarding the story of prosecution where there was no mention of appellant’s muffled face.

23. Constable Budhi Prakash (PW-7), being part of the police team that reached the spot and arrested appellant and other accused persons, even after being in such close proximity, gave a testimony stating, *“I cannot identify any of the accused”*.

24. Apart from the above testimonies, one major point of contention raised by the Counsel is that the TIP of appellant has not been conducted by prosecution, and only Wahid Ali (PW-2/complainant) has directly identified the appellant. Therefore, it was contended that the identity of the accused persons had not been proved beyond reasonable doubt, and benefit of the same must accrue to appellant.

25. Counsel has also pointed to the legality of the dock identification, which creates doubt in the eyes of the law, and such doubt always supports the accused person if it is not proven beyond a reasonable doubt by the prosecution.

No recovery of property alleged to have been robbed



26. It is submitted that there has been no recovery of the property allegedly robbed from the appellant, as duly noted by the Trial Court. This includes the personal belongings of PW-2 (Wahid Ali), such as his purse containing his Aadhaar card slip, photocopy of his driving license, cash amounting to ₹1,100, and family photographs. The Trial Court observed that none of these items, which were specific and identifiable, were recovered from any of the accused. This strongly suggests false implication of the appellant, especially given that the accused were apprehended at the spot.

27. Furthermore, while the prosecution alleged recovery of ₹1,750 in cash from accused Javed, the statements of PW-2 and PW-3 indicated that the amounts robbed were ₹1,100 and ₹4,200, respectively. No unique identifiers or distinguishing marks on the recovered currency notes were provided to establish their connection to the victims. The discrepancy in the alleged recovery amounts, coupled with the absence of the remaining cash, renders the recovery unreliable. The Trial Court rightly concluded that the recovery lacked evidentiary value and could not substantiate the prosecution's case.

28. Reliance is placed on the judgment of the Hon'ble Supreme Court in *Sheo Nath v. State of Uttar Pradesh* (1969) 3 SCC 106, which held that partial recovery of stolen goods, without definitive proof linking the property to the crime, cannot sustain a conviction under Sections 392 or 397 IPC. Similarly, in *Bhure Khan v. State of Madhya Pradesh* (1982) 2 SCC 445, the Supreme Court emphasized that unless the property recovered is identified conclusively as *corpus delicti*, a conviction under Sections 392 or 397 IPC cannot stand.

29. In the present case, the prosecution also alleged recovery of mobile phones from the accused. However, no ownership documents, such as purchase bills or invoices, were produced to substantiate these claims. The Judicial TIP of the



mobile phones was not conducted to establish their connection to the victims. Testimonies of PW-2 (Wahid Ali) and PW-3 (Kamlesh Pandey) failed to corroborate ownership, further undermining the prosecution's case. It is pertinent to note that the mobile phones in question continued to remain functional for significant periods post the alleged incident, casting doubt on the claim of robbery and suggesting the possibility of false implication.

Absence of Evidence to Establish Threat or Attempt to Cause Death, Hurt, or Wrongful Restraint

30. Appellant submits that the prosecution has failed to establish any act of threat, attempt, or voluntary causation of death, hurt, or wrongful restraint attributed to the Appellant. It is pertinent to note that no MLC is on record to substantiate the allegation that any victim was hurt, beaten, or inflicted with a knife blow. This glaring omission undermines the prosecution's case and renders the allegations of instant threat or harm unsubstantiated.

Recovery of Weapon of Offence Not Proved Beyond Reasonable Doubt

31. Appellant further submits that the alleged recovery of the weapon of offence has not been proved beyond reasonable doubt, as required by law.

(i) The witnesses to the seizure, arrest, and recovery of the weapon have turned hostile, thereby casting doubt on the prosecution's narrative. Specifically, PW-2 and PW-3, who purportedly signed the seizure memo, have denied witnessing the seizure. PW-2 deposed during cross-examination that he did not see the police recovering any knife from the Appellant. Similarly, PW-3 categorically stated that the knife presented in court was not the one allegedly used in the offence.

(ii) No forensic evidence, such as a fingerprint analysis, has been adduced to establish that the knife was wielded by the Appellant. This raises serious





doubts about the authenticity of the weapon and its connection to the alleged offence.

(iii) PW-7, during cross-examination, admitted to suggestions that the knife (allegedly a khanjar) was not recovered from the Appellant but was planted later by the police.

(iv) The Trial Court rightly acquitted the Appellant of charges under Section 25 of the Arms Act, emphasizing that the seizure was not proved beyond reasonable doubt due to the inconsistencies in the testimonies of PW-2 and PW-3.

(v) The improbability of the recovery has been further highlighted. The knife, measuring approximately 29 cm in length, could not plausibly have been carried in the waistband of the Appellant's pants while riding a motorcycle without causing injury to himself. This observation aligns with the judgment of Supreme Court in *Mohd. Arif v. State* 2015 SCC OnLine Del 12546, wherein the Court held that the alleged recovery of a weapon becomes doubtful if the dimensions and circumstances make its concealment implausible.

(vi) In light of the contradictions and improbabilities, the prosecution has miserably failed to prove the recovery of the knife beyond reasonable doubt. Independent witnesses to the seizure, PW-2 and PW-3, denied the recovery and discredited the prosecution's version, further weakening the case.

32. Counsel of appellant contends that the discrepancies in the testimonies of prosecution witnesses, coupled with the lack of forensic corroboration, indicate that the seizure memo and related documents were fabricated to falsely implicate the Appellant. These forged documents lack credibility and fail to meet the





standard of proof required to sustain a conviction. Therefore, Appellant respectfully submits that the conviction based on unsubstantiated allegations and doubtful recovery cannot stand in the eyes of the law.

Material Discrepancies and Contradictions in the Testimonies of Police Witnesses (PW-6, PW-7, PW-8, PW-12)

33. Appellant submits that there are substantial discrepancies and contradictions in the testimonies of PW-6 (HC Mukesh), PW-7 (Ct. Budhi Prakash), PW-8 (HC Dharamvir), and PW-12 (SI Suraj), who are police witnesses. These inconsistencies render their statements unreliable, particularly regarding the alleged recoveries from the accused and the circumstances of their arrest

a. Inconsistencies in Recoveries:

- PW-6 deposed that two mobile phones and ₹1,700/- were recovered from accused Javed, two mobile phones were recovered from accused Gaurav, and one dagger was recovered from the appellant (Ravi).
- In contrast, PW-7 stated that ₹1,750/- and nothing else were recovered from accused Javed, and only one mobile phone was recovered from Gaurav, contradicting PW-6's version.
- PW-8's testimony further contradicted both, stating that one mobile phone each was recovered from accused Javed, Gaurav, and the appellant.
- PW-12's deposition added yet another version, stating that two mobile phones were recovered from Javed, one from the appellant, and one from Gaurav.





The glaring inconsistencies among the depositions of police witnesses regarding recoveries raise serious doubts about the credibility of their testimonies.

b. Contradictions in Arrest Details:

- The testimonies of PW-6, PW-7, PW-8, and PW-12 differ regarding the date and place of the appellant's arrest. PW-6 and PW-7 mentioned 28th October 2016 at Lagoona Banquet, Hauz Rani, while the arrest memo records the date as 29th October 2016 and the location as Gurudwara Sheikh Sarai, Phase-II.
- Independent witnesses PW-2 and PW-3, whose signatures appear on the arrest memo, have not corroborated the prosecution's version. PW-2 deposed that the appellant escaped from the spot and was not apprehended in his presence, while PW-3 stated that he was not allowed to read the documents prepared by the police.

c. Unreliable Testimonies:

- PW-7's testimony is further undermined by his contradictory statements. On one hand, he claimed to have been part of the police team that apprehended the appellant, yet he admitted he could not identify any of the accused. The trial court rightly observed in paragraph 35 of the impugned judgment that PW-7's deposition does not inspire confidence.

d. Failure to Corroborate Presence Through CDRs:

- The prosecution produced CDRs of the victims but failed to procure the CDRs of the accused, despite mobile phones allegedly being recovered from them. This omission raises doubts about the veracity of the prosecution's case.





- Notably, the CDR of victim Wahid Ali (PW-2) indicates that his phone was functional and changing locations even after the alleged recovery. Similarly, mobile phones belonging to PW-3, Kamlesh Pandey, continued to be operational until well after the incident, which casts further doubt on the prosecution's narrative.

34. These material discrepancies and contradictions in the prosecution's evidence severely undermine the credibility of their case and indicate the possibility of false implication.

Submissions of State

35. APP for the state contends that the conviction of the appellant has squarely dealt in a fair and just manner by the impugned judgement. The impugned judgement has made following observations:

- a. Certain infirmities and inconsistencies have been observed in the testimony of PW2, the testimony must be considered in its entirety. The evidence cannot be wholly discarded if it retains a "ring of truth" upon holistic evaluation. Even though the recovery has not been established beyond reasonable doubt, the account provided by PW2 concerning the incident and the specific roles of the accused has remained consistent, coherent, and unrebutted throughout the proceedings. Consequently, the contention of the defense counsel to reject the testimony of PW2 in its entirety lacks merit.
- b. Defence's arguments do not hold much weight in light of the evidence on record and the facts and circumstances of the case. It is well-settled that the testimony of an eyewitness carries significant evidentiary value and cannot be discredited merely due to minor discrepancies or variations, particularly when such



variations do not affect the core of the prosecution's case. While appreciating the evidence, the court must determine whether the witness's testimony, when read as a whole, bears a “ring of truth.”

- c. In the present case, although no independent public witness supported the prosecution, this does not detract from the credibility of the victim, PW2 Wahid Ali. His testimony is trustworthy, unbiased, and devoid of any indication of malice or motive to falsely implicate the accused while exonerating the real culprits. Hence, the defense's contention lacks force and deserves rejection. Reliance is placed on the decision in *Sadab @ Shamshad v. State*, 209 (2014) DLT, which underscores that minor contradictions, embellishments, or inconsistencies on trivial matters, not affecting the core of the case, do not render the evidence unreliable. This principle finds further support in *State of U.P. v. Naresh*, (2011) 4 SCC 324, and *Ganga Bhawani v. Venkatesh Reddy & Ors.*, 2013 IX AD (SC) 493.
- d. The case at hand is based on direct evidence, not circumstantial evidence. The ocular testimony of PW2, Wahid Ali, regarding the robbery incident, has remained credible, consistent, and unimpeached even under cross-examination. His deposition is persuasive and carries sufficient weight to sustain the conviction of the accused. Therefore, the argument that the conviction cannot be based on the sole testimony of PW2 without independent corroboration lacks merit and stands rejected.
- e. Regarding the charge under Section 25 of the Arms Act against the accused Ravi, it is submitted that the recovery of the knife/dagger



allegedly seized from Ravi's possession has not been established beyond reasonable doubt. Both PW2 Wahid Ali and PW3 Kamlesh Pandey, cited as witnesses to the seizure memo (Ex. PW2/F), unequivocally stated that no recovery was made in their presence. Additionally, no independent public witnesses were associated with the recovery proceedings. Consequently, the seizure memo cannot be relied upon to prove the recovery beyond reasonable doubt, and the charge under Section 25 of the Arms Act remains unsubstantiated.

36. With regard to recovery of weapon under Section 397, APP for state contends that the question was whether the recovery of weapon (knife in the present case) would have any affect on conviction has been answered by placing reliance on the Division Bench Judgement of this Court in *Murlidhar v. State* 2018:DHC:3675, wherein the Court held that recovery of a weapon is not essential for conviction under Section 397 IPC if evidence establishes that the weapon was used to threaten or terrorize victims during the commission of the offense. The Court further emphasised this point by placing reliance on *Seetal v. State (NCT of Delhi)* 2014 SCC OnLine Del 4038, where the Court affirmed that recovery of the weapon is irrelevant under Section 397 IPC, provided there is credible evidence that the weapon was used to instil fear and compel victims to part with their belongings.

Analysis

37. A perusal of the impugned judgment would show that the conviction *qua* appellant is effectively based on the deposition of PW-2, Wahid Ali, who has been cited as the star witness for the prosecution. The Trial Court relied upon his testimony and noted that there was not a single contradiction or discrepancy *qua* the allegation of robbery.



38. However, in its analysis, the Trial Court does state in paragraph 28 of the impugned judgement, that it agreed with the contention of the defence to the extent that there was contradiction in the testimony of PW-2 with respect to the recovery of the case property i.e. mobile phones recovered from the accused persons and the knife/dagger shown to have been recovered from the appellant. PW-2 admitted that he had not seen seizure of the knife and that the appellant was not arrested in presence of the complainant which was contrary to the testimonies of police witnesses PW-6, PW-7, PW-8, and PW-12 (IO), who stated that PW-2 accompanied them at the time of arrest of *inter alia* the appellant. It was also noted by the Trial Court that PW-2 admitted during cross-examination that search of the appellant had not taken place in his presence nor their personal search was conducted in his presence and they were brought to the police station in his presence immediately after the incident. This contradicted the case of the prosecution as deposed by police witnesses relying upon their arrest and seizure memos. Despite this, the Trial Court based its conclusion of conviction on the evidence of PW-2 on the “ocular” evidence of PW-2.

39. This Court, however, has reservations about the conclusion arrived at in relation to the conviction of the appellant. This, *inter alia* for the following reasons:

- (i) PW-3 Kamlesh Pandey, who was one of the victims and PW-5, Rakesh Prasad, the auto driver, failed to identify the appellant and no TIP was ever conducted. So did Constable Buddhi Prakash PW-7. Testimony of PW-3 records that “*none of the robbers are present today in the Court*”. PW-4, the other victim of the robbery, also did not identify the robbers stating that “*as they were in darkness and they were in muffled face*”.



- (ii) Since TIP was not conducted by the prosecution, and as per the testimony of PW-2, they were brought to the police station after arrest, identification in the dock by PW-2 will not hold ground in itself. Counsel for appellant has, therefore, correctly relied upon the decision of the Supreme Court in ***Mohanlal Gangaram Gehani v. State of Maharashtra*** (1982) 1 SCC 700, the Court held that identification of an accused by a witness for the first time in court, without the corroborative process of a prior test identification parade, is considered valueless and cannot be relied upon as evidence. Relevant paragraph is extracted hereunder:

25. The only other evidence against the appellant is that of PWs 3 and 4. So far as PW 3 is concerned his evidence also suffers from the same infirmity as that of Shetty. PW 3 (Shaikh) admits at p. 22 of the paper-book that he had not seen the accused or any of the three accused before the date of the incident and that he had seen all the three for the first time at the time of the incident. He further admits that the names of the accused were given to him by the police. In these circumstances, therefore, if the appellant was not known to him before the incident and was identified for the first time in the court, in the absence of a test identification parade the evidence of PW 3 was valueless and could not be relied upon as held by this Court in V.C. Shukla v. State (Delhi Admn.) [(1980) 2 SCC 665 : 1980 SCC (Cri) 561 : (1980) 3 SCR 500] where this Court made the following observations:(SCC p. 677, para 24)

“Moreover, the identification of Tripathi by the witness for the first time in the court without being tested by a prior test identification parade was valueless.”

(emphasis added)



(iii) In this regard, the reliance is placed on the decision of the Supreme Court in *P.Sasikumar v. State* 2024 SCC OnLine SC 1652, is also important to be referenced. The Supreme Court underscores the critical role of TIP in criminal investigations, holding that the absence of a TIP in the present case rendered the dock identification of the accused doubtful, thereby preventing the prosecution from proving guilt beyond reasonable doubt. Relevant paragraphs are extracted as under:

“24. After considering the peculiar facts of the present case, we are of the opinion that not conducting a TIP in this case was a fatal flaw in the police investigation and in the absence of TIP in the present case the dock identification of the present appellant will always remain doubtful. Doubt always belongs to the accused. The prosecution has not been able to prove the identity of the present appellant i.e. A-2 beyond a reasonable doubt.”

25. The relevance of a TIP, is well-settled. It depends on the facts of a case. In a given case, TIP may not be necessary. The non conduct of a TIP may not prejudice the case of the prosecution or affect the identification of the accused. It would all depend upon the facts of the case. It is possible that the evidence of prosecution witness who has identified the accused in a court is of a sterling nature, as held by this Court in Rajesh v. State of Haryana [Rajesh v. State of Haryana, (2021) 1 SCC 118 : (2021) 1 SCC (Cri) 327] and therefore TIP may not be necessary. It is the task of the investigating team to see the relevance of a TIP in a given case. Not conducting TIP in a given case may prove fatal for the prosecution as we are afraid it will be in the present case.”

(emphasis added)





- (iv) There has been no recovery of property allegedly robbed from the victim which includes the personal belongings of PW-2. This, counsel for appellant has rightly pointed out, dents the case of the prosecution since the accused were apprehended at that spot. The cash, which was recovered, was from accused Javed of Rs.1,750/-. In this regard, counsel for the appellant relies on *Sheo Nath* (*supra*) and *Bhure Khan* (*supra*) is relevant.
- (v) There is no MLC on record to state where the victim was hurt, beaten, or inflicted with the knife blow.
- (vi) Most importantly, the recovery of the weapon is clouded and serious doubt. PW-2 and PW-3, who signed the seizure memo, denied witnessing the seizure during their testimonies. PW-3 categorically stated that the knife presented in the Court was not used in the offence. Prosecution did not have any forensic evidence with them such as fingerprint analysis to establish that the knife was wielded by appellant.
- (vii) Most importantly, appellant was acquitted of charges under Section 25 of the Arms Act by the Trial Court emphasising that the seizure memo Ex.PW-2/F was not proved beyond reasonable doubt due to the inconsistencies in testimonies of PW-2 and PW-3.
- (viii) Reliance by the appellant's counsel on *Mohd. Arif v. State* (*supra*) is relevant regarding the dimensions of the knife allegedly recovered. Appellant has stated that the knife recovered could not have possibly carried in the appellant's pants while driving a motorcycle. In this regard, the relevant paragraphs of *Mohd. Arif* (*supra*) are as under:



“7. A conviction under Section 397 of the IPC can be sustained only if it is established by the prosecution beyond all reasonable doubt that the offender had used the ‘deadly weapon’ at the time of committing robbery or dacoity. This Court is of the view that the alleged recovery of the deadly weapon has become doubtful in view of the size of the knife and the testimony of PW-4 which has been discussed supra.

8. This Court is accordingly inclined to modify the conviction of appellant Mohd. Arif from Section 397 of the IPC to one under Section 392 of the IPC. The ingredients of Section 392 of the IPC stand satisfied as admittedly a robbery had been committed on the complainant by the accused person; they had been apprehended at the spot and from Mohd. Arif apart from the aforementioned knife, the Samsung mobile of the complainant was also recovered and the fact that this mobile was purchased by the complainant was further established from the proof of purchase of the mobile which has been proved as Ex.PW-3/H1. From accused Mohd. Azim, a sum of Rs. 480/- was recovered. From the third accused Mohd. Noor, no recovery was effected but the fact that he was a co-accomplice and was a part of this crime stands established by the fact that all of them were admittedly together at the time when this offence of robbery was committed upon the victim; they had also been apprehended at the spot just minutes after the incident.”

(emphasis added)

- (ix) Also, reliance may be placed on the decision by a Coordinate Bench of this Court in **Asif v. State** 2022 SCC OnLine Del 270, where the Court altered the conviction under Section 397 IPC to that under



Section 392 IPC on the basis that the details of the weapon are important to be ascertained to determine whether it is a “deadly weapon” or not. In this regard, the following paragraphs of the decision are extracted hereunder:

“10. In respect of the second contention of the appellant that since the blade has not been recovered, it cannot be held that the same was a deadly weapon, it is well settled that whether the weapon of offence is deadly or not, is a question of fact which would depend on the nature of weapon used in the offence. A pistol, revolver, sword, axe or even a knife are deadly weapons. However, in the case of knife, the length of the knife, its sharpness and the pointed edge has to be seen to ascertain whether the knife is a deadly weapon or not. In the present case, the evidence of the prosecution is that the appellant took out a blade and kicked the complainant. In cross-examination it is further stated that the blade was not a shaving blade, hence the kind of blade used is not proved even by the ocular evidence of the witnesses. Though it is not essential that the weapon of offence should be recovered to prove the nature of the weapon used and that a deadly weapon was used at the time of commission of the offence, however, the prosecution is required to prove the nature of the weapon of offence used specially in the case of knife or blade. Since from the evidence of the prosecution witnesses the size and sharpness of the blade is not proved, hence the prosecution has failed to prove that the appellant used a deadly weapon.

11. In the decision reported as 2009 SCC OnLine Del 4153 Sanjay v. The State of NCT Delhi this Court held as under:—



“12. The Investigating Officer has not prepared any sketch of the surgical blade alleged to have been recovered from the possession of the appellant Sanjay. The seizure memo of the blade does not show what its size or shape was. Though the police officials have described the instrument recovered from the possession of the appellant as a surgical blade, none of the witness has given any description of the blade which has been referred by them as a surgical blade. The trial court has also not made any observation as regards the size, shape or design of the blade produced during trial. Unless size and shape etc. of the blade recovered from the appellant is given or a sketch is prepared from which these particulars may be ascertained, or a photograph of the weapon is produced, it is not possible for this Court to ascertain whether the blade recovered from the possession of the appellant was actually a surgical blade or not and whether it was a deadly weapon or not. There is no evidence or opinion on record to show that the blade recovered from the appellant was such, as would ordinarily result in death by its use. What would make a blade deadly is its size, design and shape etc. and a weapon cannot be said to be a deadly weapon merely because the witnesses described it as a surgical blade. This is more so when neither any sketch or photograph is produced nor any particulars of the instrument are given during evidence and the trial court also does not make a note as regards the size, shape and design etc. of the blade produced before it.”

12. In the absence of the use of a deadly weapon being proved by the prosecution, the conviction of the appellant for offence punishable under Section 397 IPC cannot be sustained and is required to be modified to an offence punishable under Section



392 IPC. A perusal of the nominal roll of the appellant would reveal that the appellant has undergone approximately 3 years and 9 months of sentence including remissions and the appellant is involved in four other FIRs including three FIRs relating to similar offences.

13. Consequently, the conviction of the appellant is altered to for an offence punishable under Section 392 IPC and the sentence of the appellant is modified to rigorous imprisonment for a period of five years.”

(emphasis added)

- (x) Aside from this, there are serious contradictions in the testimonies of the police witnesses, as highlighted by the counsel for appellant in paragraph 33(b) above. In particular, this Court noticed the contradictions in the arrest details where PW-6, PW-7, PW-8 and PW-12 testified differently relating to the date and place of arrest of the appellant. While PW-6 and PW-7 mention the arrest is on 28th October 2016, at Laguna Banquet Hall, Hauz Rani, the arrest memo records it as 29th October 2016, at Gurudwara, Sheikh Sarai Phase-II.

- (xi) No CDRs to prove the location of all the accused was ever produced.

40. Submissions on behalf of the State stated that the testimonies must be considered in this entirety and PW's testimony in itself relating to the incident would be enough to prosecute and convict the appellant, does not appeal to this Court.

Conclusion

41. Conviction must be based on proof beyond reasonable doubt, a fundamental principle of criminal jurisprudence that ensures no person is





convicted unless the prosecution proves the accused's guilt with certainty, leaving no room for reasonable doubt. This safeguard protects against wrongful convictions and ensures fairness in the criminal justice system. Courts consistently emphasize that the prosecution bears the burden of proof, and any uncertainty in the evidence benefits the accused, thus upholding their rights and maintaining the integrity of the judicial process.

42. Even if the prosecution's case is taken at the highest and PW-2's testimony is indeed believed as the gospel truth, conviction under Section 397 IPC would possibly not subsist and, therefore, at best would be sustained under Section 392 IPC for which the appellant has been sentence to only fifteen months of custody plus fine of Rs.10,000/-, against which he has already undergone two years so far.

43. However, considering that there are serious doubts not only the arrest but also the recovery and the identification of the appellant, it would be difficult to sustain the conviction itself. In any event, the appellant has already gone two years of custody and as per the Nominal Roll, has no previous involvements and his jail conduct has been completely satisfactory.

44. This Court therefore directs that appellant be released from custody forthwith, if not required in any other case.

45. Copy of this order be sent to the Jail Superintendent for information and compliance.

46. All pending applications are disposed of accordingly.

47. Judgment be uploaded on the website of this Court.

(ANISH DAYAL)
JUDGE

DECEMBER 2, 2024/MK/tk

Signature Not Verified

Digitally Signed
By: MANISH KUMAR
Signing Date: 03.12.2024
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