

(2014) 09 DEL CK 0341
In the Delhi High Court
Case No : Crl. A. 1454/2011

Ashraf

APPELLANT

Vs

State (Govt. of NCT) of Delhi

RESPONDENT

Date of Decision : 04-09-2014

Acts Referred:

Arms Act, 1959 — Section 25
Criminal Procedure Code, 1973 (CrPC) — Section 357(3)
Penal Code, 1860 (IPC) — Section 34, 392, 394, 397, 412

Citation : (2014) 09 DEL CK 0341

Hon'ble Judges : Sunita Gupta, J

Bench : Single Bench

Advocate : M.L. Yadav and Lokesh Chandra, Advocate for the Appellant; Ritu Gauba, APP and SI Afaque Ahmed, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Sunita Gupta, J.—The short point for consideration in the present appeal is whether offence u/s. 397 IPC is made out or not, in as much as learned counsel for the appellant has not challenged the conviction of the appellant for offence u/s. 392/394 IPC.

2. The prosecution case emanates from the fact that on 06.12.2008 at about 05.45 p.m at Gidwani Road, behind Moolchand Park, Adarsh Nagar, three boys armed with knives came and met the complainant Dhananjay. One of them inflicted knife injury on his right hand while two other boys snatched away Rs.10,000/- from his pocket and fled away. On 31.12.2008, accused Ashraf@Arif was arrested in case FIR No. 323/08 u/s. 25/54/59 Arms Act and made a disclosure statement pertaining to this case. He was arrested. He pointed out the place of occurrence but refused to take part in Test Identification Proceedings (TIP). During investigation, complainant identified the accused in Court. Co-accused could not be arrested. On completion of investigation, charge sheet u/s. 392/394/397/34 IPC was submitted in the Court. The accused pleaded not guilty

to the charge and claimed trial.

3. In order to substantiate its case, prosecution examined ten witnesses. The case of accused was one of denial simpliciter. He pleaded his innocence and alleged false implication in this case. He did not prefer to lead any evidence in defence.

4. Learned Additional Sessions Judge scrutinised the testimony of complainant Dhananjay who had substantiated the case of prosecution by deposing that on 06.12.2008, at about 5.45 a.m, he was going to Subji Mandi and when he reached near Moolchand Park, three boys, aged about 20-22 years came; one of them who was having knife hit him on his right hand while the other two boys snatched Rs.10,000/- from his pocket. He informed police at 100 number. PCR van came to the spot. He was taken to hospital, where his statement Ex. PW 1/A was recorded. He further deposed that he had gone to Tihar jail for identification of the assailant but assailant refused to take part in TIP. Subsequently on 16.01.2009, he identified the accused in Rohini Court. He also identified the accused during his deposition in Court by deposing that he was the same person who had caused injuries at his right hand with knife and his two assailants had robbed him of Rs.10,000/-. On the basis of testimony of complainant which could not be assailed in cross examination, coupled with the fact that accused has refused to take part in TIP and he was duly identified by the complainant in Court, learned Trial Court came to the conclusion that the prosecution had succeeded in establishing its case and as such convicted him for offence u/s. 392/394/34 IPC read with Section 397 IPC. He was sentenced to undergo rigorous imprisonment for seven years u/s. 392 IPC read with Section 397 IPC with fine of Rs.3,000/-, in default to undergo six months rigorous imprisonment. He was also sentenced to seven years rigorous imprisonment u/s. 394/34 IPC with fine of Rs.5000/-, in default to undergo six months rigorous imprisonment.

5. Feeling aggrieved, the present appeal has been preferred by the appellant. However as stated above, the appellant did not challenge his conviction for offence u/s. 392/34 IPC. The only submission of learned counsel for the appellant is that the weapon of offence has not been recovered in the instant case. The injuries were opined to be simple and the complainant was discharged from the hospital on the same day, as such offence u/s. 397 IPC is not made out. Reliance was placed on a judgment of a single Judge in Crl.A.238/06 and Crl.A.240/06, Asif Vs. State and Nadeem Vs. State. It was also submitted that the appellant has remained in jail for a period of almost three years, as such he be released on the period already undergone. It was further submitted that the accused has been acquitted in the case under Arms Act.

6. On the other hand, it was submitted by learned APP for the State that offence u/s. 397 IPC is made out as knife was used and injuries were inflicted on the wrist of the complainant on the right hand. Big blood vessels which if slitted may lead to huge quantity of blood loss and can cause death. Even vegetable or kitchen knife, if used in a particular manner on a particular portion may cause

death and it depends on the severity of the blow. Reliance was placed on *Balik Ram Vs. The State*, . It was further submitted that accused was arrested under Arms Act with a big knife which shows that accused was in the habit of carrying big knife and non-recovery of the weapon of offence is inconsequential. Rs.10,000/- was robbed from the complainant, who was a tomato seller and injury with knife and loss of blood in huge amount has also been caused, as such injured is liable to be compensated u/s. 357(3) Cr.P.C. It was further submitted that the antecedents of the appellant also do not deserve any leniency as he was arrested in a case under Arms Act. As per the status report, the appellant was involved in 5 cases, out of which he was convicted in 3 cases including this case. One FIR was quashed while in one case he was acquitted. It is further reported that he is a bad character of P.S. Jahangirpuri, Delhi.

7. Section 397 fixes the minimum term of imprisonment. It is imperative for the Trial Court to return specific findings that the "assailant? was armed with "deadly? weapon and it was used by him before convicting with the aid of Section 397.

8. In *Crl.A.515/2010 Gulab @ Bablu vs. The State (NCT of Delhi)*, this Court held:

"8. A perusal of the aforesaid provision makes it clear that if an offender at the time of committing robbery or dacoity, uses any deadly weapon or causes grievous hurt 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. This provision prescribes minimum sentence which shall be handed down to such an offender. In this case neither the victim has sustained grievous hurt nor there is an evidence that attempt was made to cause death or grievous hurt to the victim nor is there any evidence to show that the knife used at the time of committing robbery was a "deadly weapon". Simple injuries have been sustained by the victim on his thigh."

9. In *Charan Singh vs. The State*, 1988 Crl.L.J. NOC 28 (Delhi), Single Judge has held as under :-

"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 u/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 use 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 Section 397. The accused could be convicted u/s 392."

10. In *Samiuddin @ Chotu Vs. The State of Nct Delhi*, , a Bench of co-ordinate jurisdiction has held that when a knife used in the commission of crime is not recovered the offence would not fall within the ambit of Section 397 IPC. In

Rakesh Kumar vs. The State of NCT of Delhi 2005 (1) JCC 334 and Sunil @ Munna vs. The State (Govt. of NCT), 2010 (1) JCC 388, it was observed that in the absence of recovery of the knife used by the appellant at the time of commission of robbery charge u/s 397 IPC cannot be established.

In the present case, indubitably the knife used for commission of crime was not recovered. Accordingly, in my view, appellant could not have been sentenced u/s 397 IPC and Trial Court has erred on this point."

9. In Arif & Nadeem (supra) also robbery was alleged to have been committed by causing injuries on thighs by knife. Recovery of weapon of offence was disbelieved. Therefore, while maintaining the conviction u/s. 394 & 412 IPC, conviction u/s. 397 IPC was set aside.

10. Balik Ram(supra) relied upon by learned APP for the State, instead of helping the State favours the appellant. In that case, the weapon of offence, being knife was recovered. Despite that, the Court considered the question whether the knife so used was a "deadly weapon" within the meaning of Section 397 IPC and it was observed as under:-

"5....What is a deadly weapon is not defined in the Code. It must, I think, therefore, be a weapon which if used was likely to cause death. In Lakshmiammal Vs. Samiappa Goundar and Others, , weapons like knife, hammer, crowbar and spades were held undoubtedly to be deadly weapons, but in Mir Bayyan Khan vs. Emperor , it was said that a crowbar or spade may well be a deadly weapon if used as a weapon of offence, but not if used for destroying a bridge (that is, I think, for peaceful purposes). Knives are weapons available in various sizes and may just cause little hurt or may be the deadliest. They are not deadly weapons per se such as would ordinarily result in death by their use. What would make a knife deadly is its design or the manner of its use such as is calculated to or is likely to produce death. It is, therefore, a question of fact to be proved and prosecution should prove that the knife used by the accused was a deadly one....."

11. In the instant case, the weapon of offence has not been recovered, therefore, from the mere fact that simple hurt was caused on the person of the complainant, no inference can be drawn that the knife so used was a deadly weapon. The submission of learned APP that the injury was caused on the wrist of the complainant, which, if slitted may lead to loss of huge quantity of blood and can cause death may be true but there is no such evidence on record. Similarly the submission that the injuries resulted in loss of blood in huge quantity is not fortified by any evidence on record. Since the knife was not recovered, prosecution has failed to produce convincing evidence that the knife used by the accused was a deadly weapon. In the absence of such an evidence, conviction of the appellant with the aid of Section 397 IPC cannot be sustained and is set aside while upholding the conviction u/s. 392/394 IPC which has not been challenged.

12. Accordingly the sentence of the appellant is modified. As per the nominal roll, the appellant has remained in jail for a period of 2 years, 11 months and 14 days. He also earned remission for 2 months and 25 days. However, his overall conduct was reported to be unsatisfactory. As per status report, his antecedents are also not clean. As such, he is sentenced to undergo rigorous imprisonment for a period of 4 years and also directed to pay a sum of Rs.10,000/- as fine, in default to undergo simple imprisonment for 3 months. Fine, if realised, be paid as compensation to the complainant-Dhananjay.

13. The sentence of the appellant was suspended vide order dated 23.11.2011, as such he is directed to surrender immediately to serve the remaining part of his sentence.

14. The appeal stands disposed of in the above terms. Pending applications, if any, stands disposed of. Trial Court record be sent back. Copy of the judgment be sent to Superintendent Jail for information.