

(2013) 08 DEL CK 0050
In the Delhi High Court
Case No : Criminal A. 1172 of 2011

Rajender Yadav

APPELLANT

Vs

The State (NCT of Delhi)

RESPONDENT

Date of Decision : 13-08-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428
Penal Code, 1860 (IPC) — Section 392, 395, 397

Citation : (2013) 7 AD 359

Hon'ble Judges : S.P. Garg, J

Bench : Single Bench

Advocate : Rakhi Dubey, for the Appellant; M.N. Dudeja, APP, for the Respondent

Final Decision : Disposed Off

Judgement

S.P. Garg, J.—Rajender Yadav (the appellant) impugns a judgment dated 15.04.2011 of learned Additional Sessions Judge in Sessions Case No. 66/2001 arising out of FIR No. 86/2010 PS Swaroop Nagar by which he was convicted u/s 392 IPC read with Section 397 IPC. By an order dated 19.04.2011 he was sentenced to undergo RI for seven years with fine Rs. 1,000/-. Allegations against the appellant were that on 07.07.2010 at 09.45 P.M. in Amrit Vihar Colony, 25 foota road, he and his associate (not arrested) robbed Ranjeet Pandey at the point of knife and deprived him of Rs. 1,100/-, mobile phone and I-card. The appellant was arrested at the spot after some chase. Daily Diary (DD) No. 60B (Ex. PW-1/A) was recorded at 10.08 P.M. at PS Swaroop Nagar on getting information that a thief had been caught at the spot. The investigation was marked to HC Dharambir who with Const. B.K. Parthey went to the spot. Rajender Yadav was produced by the complainant and from his possession Rs. 300 and a knife were recovered. The Investigating Officer lodged First Information Report after recording complainant's statement (Ex. PW-2/A). During the course of investigation, statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was

filed in the Court against the appellant. The prosecution examined seven witnesses. In his 313 statement, the appellant pleaded false implication. He took the defence that he was lying at the spot unconscious and was under the influence of liquor. After considering the rival contentions of the parties and appreciating the evidence on record, the Trial Court, by the impugned judgment, held the appellant guilty for the offence mentioned previously and sentenced him accordingly. Being aggrieved, he has preferred the appeal.

2. During the course of arguments, appellant's counsel urged that the prosecution could not establish that any deadly weapon was used by the appellant while committing robbery. In his 313 statement, no question was put to him about the use of knife. On appellant's instructions she stated at Bar that he has opted not to challenge his conviction u/s 392 IPC and accepts it voluntarily.

3. I have heard the learned counsel for the parties and have examined the record. Since the appellant has not opted to challenge findings of the Trial Court on conviction u/s 392 IPC and accepts it voluntarily, the conviction stands affirmed.

4. u/s 397 IPC, it is to be proved that "deadly" weapon was used at the time of committing robbery or dacoity or grievous hurt was caused to any person. The assailant who actually uses the "deadly" weapon is liable for minimum punishment with the aid of Section 397. The provisions of Section 397 do not create new substantive offence but merely serve as complementary to Section 392 and 395 by regulating the punishment already prescribed.

5. Section 397 fixes a minimum term of imprisonment. It is imperative for the Trial Court to return specific findings that the "assailants" were armed with "deadly" weapons and it were used by them before convicting them with the aid of Section 397. In the instant case, the evidence is lacking on this aspect and benefit of doubt is to be given to the appellant.

6. 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. 11. 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.

7. In the instant case, prosecution case itself is that only a vegetable knife was found in possession of the accused. The Investigating Officer did not prepare its sketch. The complainant PW-2 (Ranjeet Pandey) did not describe the specific dimensions of the knife recovered from the accused. PW-2 (Ranjeet Pandey), the victim did not specifically depose that Rajender Yadav was the assailant who had shown him the knife while committing robbery. Mere recovery of knife from the pocket of the accused is not enough to infer that it was the knife used to commit robbery. No injuries with the knife were inflicted on the victim's body. Even when the appellant was being chased by the complainant and his associate, he did not attempt to take out the knife to resist his apprehension. Appellant's associate could not be arrested during the investigation and his identity could not be established. Appellant's MLC on record reveals that he was given beating by the public. He had also consumed alcohol. Daily Diary (DD) No. 60B (Ex. PW-1/A) did not record if the assailant was caught with a knife. Taking into consideration all these discrepancies, recovery of knife from the possession of the accused is doubtful. Moreover, the knife allegedly recovered from the possession of the accused cannot be considered a "deadly" weapon to award RI for seven years which is a minimum sentence to be given with the aid of Section 397 IPC. There is no cogent evidence on record that the appellant had used the deadly weapon at the time of committing robbery. Conviction of the appellant with the aid of Section 397 IPC cannot be sustained and is set aside.

8. For committing the offence u/s 392 IPC, the appellant has been awarded RI for three years with fine Rs. 1,000/-. The sentence u/s 392 IPC is maintained.

However, in default of payment of fine, the appellant shall undergo SI for one month. He shall be entitled to get benefit u/s 428 Cr. P.C. The appeal stands disposed of in the above terms. Trial Court record be sent back forthwith. Copy of the order be sent to the Superintendent Jail.