* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 31st October, 2014

\+ CRL.A. 431/2013 & CRL.MB 654/2013

RAHUL ..... Appellant

Through: Ms. N.R. Nariman, Advocate

versus

STATE ..... Respondent

Through: Ms. Ritu Gauba, Additional Public Prosecutor for the State alongwith SI Vishal Police Station Adarsh Nagar

CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. On 10.12.2010, PW3-Mohd. Nuruddin was standing at Azad Pur Bus Terminal and was waiting for a bus to reach *Majnu Ka Tila.* At about 12.30 am, two boys came there from MCD Colony, Model Town side and attempted to remove the mobile phone and currency notes from him. One of the assailants who was having a knife hit on his right hand. He raised alarm '*bachao bachao, loot liya loot liya'*. PW2 Constable Subhash who was on patrolling duty, on hearing the alarm reached the spot. The boys were apprehended by complainant - Mohd. Nuruddin with the help of Constable Subhash and public persons. Their names were revealed as Rahul and Sonu.

The knife was recovered from the possession of Rahul. Some public persons informed the police as such DD No.4A was recorded which was assigned to PW5-ASI Rajpal, who reached the spot. Accused Rahul and Sonu were handed over to him along with the knife recovered from accused Rahul. ASI Rajpal recorded the statement of Nuruddin Ex.PW3/A and got the FIR registered. Accused were arrested. The proceedings regarding preparation of sketch of knife Ex.PW2/G, its seizure memo Ex.PW2/H were conducted. The complainant was sent to the hospital for his medical examination. After completing investigation, charge-sheet was submitted under Section 393/394 read with Section 34 and under Section 398 of IPC before the concerned Metropolitan Magistrate. Since offence under Section 398 IPC was exclusively triable by the Court of Sessions as such the case was committed to the Sessions Court. The charge for offence under Section 393/394 read with Section 34 IPC was framed against both the accused. Besides that, accused Rahul was also charged for offence under Section 398A IPC.

2. In order to substantiate its case, the prosecution in all examined five witnesses. All the incriminating evidence was put to the accused persons while recording their statements under Section 313 of Code of Criminal Procedure. Accused Sonu took the plea that he had an altercation with the complainant in the bus as he tried to pull him in the bus to save him from the

accident, but the complainant started abusing him and after some time when he de-boarded from the bus, he was apprehended and falsely implicated in this case. Accused Rahul took the plea that he was lifted from his house and thereafter falsely implicated in this case. None of the accused preferred to lead any evidence in defence.

3. Vide impugned judgment dated 14.07.2011, the learned Additional Sessions Judge convicted both the accused for offence under Section 393 and 394 read with Section 34 of Indian Penal Code. Accused Rahul was also held guilty for offence under Section 398 of IPC. Vide order dated 18.07.2011, both the accused were sentenced to undergo rigorous imprisonment for three years along with fine of Rs.5,000/-. In default of payment of fine, to undergo rigorous imprisonment for one month for offence under Section 393/34 IPC. They were also sentenced to undergo rigorous imprisonment for four years alongwith fine of Rs.5,000/- for offence under Section 394/34 IPC. In default of payment of fine to undergo rigorous imprisonment for one month. Accused Rahul was sentenced to rigorous imprisonment for seven years alongwith fine of Rs.5,000/- for offence punishable under Section 398A IPC and in default of payment of fine, to undergo rigorous imprisonment for one month. All the sentences

were ordered to run concurrently. The benefit under Section 428 Cr.P.C was given to them.

4. Feeling aggrieved, the present appeal has been preferred by one of the accused, namely, Rahul.

5. Assailing the findings of learned Trial Court, Ms. N.R. Nariman, learned counsel for the appellant – Rahul submitted that there are contradiction in the prosecution case as to whether it was a case of robbery or attempt to commit robbery inasmuch as PW2 – Constable Subhash has deposed that he was informed by the complainant that he has been robbed of his mobile phone and currency notes whereas the complainant has deposed that only an attempt to commit robbery was made. Moreover, according to the complainant he had reached at Azad Pur Bus Terminal by Outer Mudrika, but no bus ticket was handed over to the police as such the presence of the complainant at the spot is doubtful. Moreover, according to the complainant on hearing his alarm a police constable and some public persons reached the spot and with their help, the accused were apprehended. However, none of the public person was joined in the investigation. Moreover, according to him, the police was informed by one of the public persons, but even that independent person was not examined. The doctor could not say whether the injuries sustained by the patient could be caused

with knife or with an iron strip. However, this part of his testimony assumed importance because of the plea taken by the co-accused – Sonu in his statement under Section 313 Cr.PC wherein he had stated that he tried to pull the complainant inside the bus to save him from accident, but the complainant had an altercation with him in the bus and when he de-boarded the bus, he was apprehended and falsely implicated in this case. It was submitted that while the complainant was being pulled inside the bus by the co-accused Sonu at that time he might have sustained injuries. A discrepancy was also pointed out regarding arrest memo of the accused for showing that according to PW2–Constable Subhash after completing the proceedings, they left the spot finally at about 2.30/2.40 am. However, the arrest memo shows the time of arrest of accused as 3.20 am. The signatures of the complainant vary at different places at different times. The recovered knife was not sent to FSL. Serious attack was made on the conviction of the appellant for offence under Section 398A of IPC for submitting that as per the prosecution case itself it was only a vegetable cutting knife and, therefore, cannot be termed to be a deadly weapon. Reliance was placed on the notification dated 02.10.1980 for submitting that the recovered knife does not fall within the four corners of this notification. As such it was submitted that offence under Section 398A IPC is not made out. As regards

remaining offence under Section 393/394 IPC is concerned, the appellant has been in jail for more than four years as such he be released on the period already undergone.

6. Rebutting the submissions of learned counsel for the appellant, it was submitted by Ms. Ritu Gauba, Additional Public Prosecutor for the State that the case of the prosecution is "attempt" to commit robbery. The charge-sheet was also submitted for these offences and the charge was also framed to that effect. The complainant has also deposed regarding attempt to commit robbery. The mere fact that PW3 has deposed that the appellant has committed robbery of mobile phone and currency notes belonging to the complainant is not a material contradiction to cast any dent on the prosecution version inasmuch as he was not an eye witness to the incident of robbery and was informed about the same by the complainant. It was further submitted that non-handing over of the bus ticket by the complainant has no relevance. Similarly, non-joining of independent witness is not fatal to the case of the prosecution because there is no reason to disbelieve the complainant or Constable Subhash with whom the accused has not alleged any enmity. The public present there might have helped in nabbing the accused but they might not have joined the police proceedings, but for that reason, there is no reason to discard the testimony of the complainant or of

constable Subhash who apprehended both the accused on the spot. The testimony of complainant finds corroboration from the medical evidence as PW4 – Dr. Suhail who examined the complainant found injuries on his person to be fresh. Minor variations in the time of arrest of the accused is of no consequence inasmuch as the custody of accused was handed over by the complainant and constable Subhash to ASI Rajpal, who after completing the proceedings, prepared the arrest memo wherein the time of arrest was shown as 3.20 am. It was further submitted that minor variations in size of knife does not take it out of the ambit of notification issued by the government. The knife was a deadly weapon. It was a case of attempt to commit robbery on highway during night, as such, no fault can be found with the finding of learned Trial Court. It was further submitted that the appellant does not deserve any leniency inasmuch as he is a habitual offender and has been convicted in two other cases, while one case of similar nature is still pending trial.

7. The submission of learned counsel for the appellant regarding discrepancy appearing in the testimony of PW2 – Constable Subhash and PW3 – Nuruddin as to whether it was a case of robbery or attempt to commit robbery, the same is devoid of substance inasmuch as the best person to narrate about the incident was the complainant – Nuruddin himself. In his

initial statement made to the police which culminated in registration of FIR itself the complainant had stated that the appellant alongwith his co-accused Sonu attempted to commit robbery of his mobile and currency notes and, therefore, the FIR was registered under Section 393/398/34 IPC. The charge-sheet was also submitted under Section 393/394/398/34 IPC. The learned Additional Sessions Judge also framed charge for the said offence. During the course of his deposition, the complainant reiterated his stand regarding attempt to commit robbery by the appellant and his co-accused Sonu. Constable Subhash is not an eye witness to the actual incident and had reached the spot only on hearing the alarm of the complainant *"bachao bachao, loot liya loot liya"* and, therefore, even if he has deposed that he was informed by the complainant that he has been robbed of his mobile phone and money by the accused persons, same does not cast any dent on the prosecution version.

8. Mere non-handing over of the bus ticket by the complainant to the police official is insignificant inasmuch as presence of the complainant at the spot stands established beyond reasonable doubt. The manner in which he reached the Azad Pur Bus Terminal is insignificant.

9. Much stress was led by learned counsel for the appellant for submitting that although as per the case of the complainant, he had

apprehended the accused persons with the help of constable Subhash and some public persons and one of the public persons had informed the police, but no public person was included in the investigation of the case and for raising this submission, reliance was placed on *Pradeep Narayan Madgaonkar and others* v *State of Maharashtra,* (1995) 4 SCC 255; *Sans Pal Singh* v *State Delhi,* (1998) 2 SCC 371; and *Mohan Singh* v *State of Haryana,* (1995) 3 SCC 192. The judgments rendered in all these cases pertained to Section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 read with Section 27 of Arms Act and in all these cases, the case of the prosecution rested on the testimony of the police officials. Even in these cases, it was observed that the evidence of officials (police) witnesses cannot be discarded merely on the ground that they belonged to police force and are, either interested in the investigating or the prosecuting agency, but prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible corroboration of their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation requires greater care to appreciate their testimony. In the factual matrix of those cases, it was found that no attempt was made by the police officials to join independent witnesses and therefore it was observed that it was not safe to rely upon the evidence relating to the alleged search

and recovery and therefore appellants were granted benefit of doubt. However, the things are entirely different in the instant case as the case of the prosecution does not rest upon the testimony of police officials alone. In fact, the star witness of prosecution is the complainant Nuruddin who is totally an independent witness and the initial statement made by him which forms the basis of registration of FIR was reiterated by him when he came to depose in the Court alleging inter alia that on 01.12.2010 at about 12.30 am when he was standing at Azad Pur Bus Terminal, Ring Road and was waiting for a bus to reach *Majnu Ka Tila*, two boys came to him from MCD Colony, Model Town side. Out of them, one of the accused, namely, Rahul, whose name was revealed later on, gave him knife blow at his right hand which injured his two fingers and the other boy, namely, Sonu, whose name was also revealed later on tried to rob him of his mobile and currency notes which he was having in his pocket. He tried to save himself and raised alarm *"bachao bachao, loot liya loot liya"*. In the meanwhile, constable Subhash, on hearing his alarm came there. Both the accused ran away towards Model Town side. He, with the help of the said constable and some public persons apprehended both the accused persons after chasing 10-20 paces. The knife was recovered from the possession of accused Rahul. This witness was subject to cross examination by counsel for both the accused. Despite that,

nothing material could be elicited to discard his testimony. None of the accused were known to him before as such the complainant had absolutely no axe to grind to falsely implicate any of the accused in this case. It has also come in the statement of PW5 – ASI Rajpal that he had verified the antecedents of the complainant and he is a law abiding citizen having no previous involvement. Therefore, there was absolutely no reason as to why at dead hours of night he will call the police and falsely implicate the accused persons in such a serious case. The police machinery swung into action only subsequently when the accused persons were apprehended at the spot and one of the public person informed the police. On receipt of telephonic information that two robbers have been apprehended at Azad Pur Bus Terminal, PW1 HC – B.A. Rao recorded DD No.4A Ex.PW1/A and assigned the same to ASI Rajpal who reached the spot and carried out further investigation into the matter. Under the circumstances, the instant case is not a case which is based on testimony of the police officials and therefore none of the authorities relied upon by the learned counsel for the appellant would come to the rescue of the appellant. Although, it is true that some public persons were available with whose help the accused persons were nabbed and police was informed but if those persons were not joined in the investigation, the case of the prosecution cannot be said to have suffered

on that account more particularly when the testimony of the complainant is cogent, credible, trustworthy and inspires complete confidence. Furthermore, he is a person who sustained injuries in the incident and was taken to the hospital. He was examined by PW4 Dr. Suhail who prepared his MLC Ex.PW4/A. The submission of learned counsel for the appellant that possibility of complainant sustaining injuries by iron strip cannot be ruled out in view of the statement of accused Sonu has no substance as even co-accused Sonu in his statement under Section 313 Cr.P.C. has nowhere alleged that when he tried to pull the complainant inside the bus he sustained any injuries. The witness in fact has denied the suggestion that accused Sonu met him in the bus. The plea of the appellant that he was picked up from his house and falsely implicated again is devoid of any merit inasmuch as he was apprehended at the spot by the complainant and handed over to ASI Rajpal and was arrested from the spot itself. Under the circumstances, the prosecution had succeeded in establishing that the appellant alongwith co-accused Sonu attempted to rob the complainant of his mobile phone and currency notes. Therefore, so far as the conviction of the appellant for offence under Sections 393 and 394 IPC is concerned, there is absolutely no infirmity in the same and the findings in this regard are upheld.

10. The last limb of arguments of learned counsel for the appellant is regarding applicability of Section 398 IPC inasmuch as it was submitted that in order to attract the applicability of this section, the knife had to be a deadly weapon. In the instant case, as per the charge-sheet itself it was only a kitchen knife and the measurement of the same did not even fall within the notification dated 29.10.1980 and 02.10.1990 issued by Delhi Administration. Reliance was placed on a decision of this Court in *Sukhvinder Singh* v *State (Govt. Of NCT of Delhi)* Crl. A. No.1358/2012 where under similar circumstances, the conviction of the appellant under Section 397 IPC was set aside.

11. A perusal of the charge-sheet reveals that in column no.3 pertaining to property description, it is recorded *"one knife of vegetable"*. The sketch of knife Ex.PW2/G reflects that the total length of the knife is 17 cms, its blade is 7 cm and the handle is 10 cm while width of the blade is 1.5 cm. As per the notification dated 29.10.1980 and 02.10.1990 issued by Delhi Administration license is required to be obtained for manufacturing, sell or possession for sale button actuated knife, *gararidar* knife and other knives which opened or closed with any other mechanical device having sharp edged blade of 7.62 cm or more in length and 1.72 cm or more in breadth in

the Union Territory of Delhi. The measurement of the knife in question falls short of the description given in these notifications.

12. The sole question for determination, therefore, is whether the such a knife can be termed as 'deadly weapon' within the meaning of expression "used" in Section 398 of IPC.

13. Sections 397 and 398 IPC are not substantive sections but prescribe a minimum sentence for the offence of robbery or decoity or attempt to commit robbery or decoity once aggravating circumstances stated in the said sections are satisfied. Section 397 applies when offence of decoity/robbery has actually been committed. Section 398 IPC on the other hand, has no application when robbery or decoity has been completed, but applies to case of attempt to commit robbery or decoity.

14. The term "deadly weapon" has been defined in Black's Law Dictionary, 6th edition at page 398 to mean;

> "any fire arm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

Such weapons or instruments are made and designed for offensive or defensive purposes or for destruction of life or inflation of injury, one

which, from the manner used, is calculated or likely to produce death or serious bodily injury.

15. In ***Sukhvinder Singh*** (supra), this aspect of the matter was dealt with relying on various precedents and it was observed as under:-

> *"9. Term 'deadly weapon' has been discussed by this court in various cases. In case titled as **Balik Ram vs. State**, (1983 Crl.L.J. 1438 DEL) the FIR was registered by one Ganga Ram who was driving his scooter DHR 8204. He had reported that he was hired by two persons from Railway Station, Delhi Main, for Chanakya Puri, but when they reached near Chanakya Cinema, they asked him to stop for some time and then directed him to proceed towards Jesus and Marry College. There one of them caught hold of him from the back by his collar and another placed knife at his abdomen and made him descend from the scooter. One of them removed his wrist watch and the purse containing Rs.335/- and thereafter they ran away with the scooter. They were, however, apprehended with scooter and appellant on search was found in possession of spring actuated knife. On these facts, the court has observed as under:*
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> > *"5. ... .... 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. Though the knife that was recovered from the accused a few hours of the occurrence, was no doubt a deadly one on account of its size and design but it was not shown to the victim when he came to depose nor has he given any description of the knife so that it could be held that the knife alleged to have been placed by the accused on his abdomen was the one recovered or the one similar to that one. The accused can, therefore, legitimately claim that the weapon used by him has not been proved to be a deadly one. And if there is want of proper proof, the benefit should go to the accused and the prosecution cannot invoke section 397, IPC to fix him up in the minimum sentence of seven years. ... ....."*

*10. In another case reported in 1983 (1) Crimes 155 titled as Bishan vs. The State this court has followed the law laid down in Balik Ram's case (supra) and held as under:*

> *" Para 5 "..... ..... According to the recovery memo, the knives that were recovered from both the accused were knives meant for cutting vegetables, though the blade of one was 6" long and of the other was 3" long. Can such weapon be described as deadly weapons?"*
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> *Para 6 x x x x x x x x x*
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> *"..... ..... It is proved in this case from the recovery memo itself that the knives were designed for cutting vegetables and could not be considered to be deadly. Their manner of use was also not such as was likely to cause death. I am, therefore, unable to agree that the accused can be sentenced under Section 397 Indian Penal Code. In the interests of justice, I think the sentence of four years will meet the ends of justice for an offence under Section392 IPC."*

*11. In another case reported in 1987 (13) DJ 176 titled as Mohan Singh vs. State, this court while following the law laid down in Balik Ram's case (supra) reached to the conclusion:*

> *"Para 12. .... .... .... Applying the said principle on the facts of the present case I find that there is not an iota of evidence on record to suggest that the knife used by the accused way a deadly weapon. Even Sham Lata Goel has not given its description. We are probably in the dark to conclude if the knife was a but tender knife, a kitchen knife or a pen knife or the knife used could possible cause the death of the victim, in the absence of such an evidence and particularly the non-recovery of the weapon will certainly bring the case of the accused out of the ambit of Section 397 Indian Penal Code. The accused could, under the Crl.A.No.1358/2012 Page 7 of 11 circumstances, be convicted under Section 392 Indian Penal Code."*

*12. In another judgment reported in 1985 Cri.L.J. 1621 titled as Jagdish and etc. vs. The State while discussing the provisions of Section 397 IPC this court has held as under:*

> *"Para 8. Lastly, the question would arise us to whether the appellants are liable to enhance punishment under Section 397, I.P.C. Needless to say that the said section does not create any substantive offence and it simply prescribes a minimum sentence for the offence of robbery under the aggravating circumstances mentioned therein. While there can be no*

*shadow of doubt that both the appellants carried knives and they aimed the same at their victims, namely, Rajinder Parshad and Krishan Kumar, there is no satisfactory evidence to establish that those knives could be termed "deadly weapons" as envisaged under Section 397. Rajinder Parshad and Krishan Kumar have simply stated that both the appellants were carrying a knife each in their hands. However, according to Raj Kishore the knives carried by them were small. In the FIR the knives were described as vegetable cutting knives. The question would, therefore, arise whether in the absence of anything more the said knives can be said to be deadly weapons.*

*Para9. "A deadly weapon is a thing designed to cause death, for instance, a gun, a bomb, a rifle, a sword or even a knife. A thing not so designed may also be used as a weapon to cause bodily injury and even death. It will be a question of fact in each case whether the particular weapon which may even be a knife can be said to be a deadly weapon. In the instant case, there is evidence to the effect that the knives which the accused were having were small in size. They were ordinary vegetable cutting knives. This renders the possibility of those knives being deadly weapons highly doubtful and as such the appellants shall be entitled to benefit thereof. Consequently it would be unfair to impose the minimum sentence contemplated in Section 397 on the appellants merely because they used those knives in the commission of the crime. …. ….."*

*13. In a case reported in 1988 Crl.L.J.NOC 28 (Delhi) titled as Charan Singh vs. The State, the Single Judge of this court 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 under Section 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 under Section 392."*

*14. In a case reported in 2012 (3) JCC 2213 in Crl. A. 515/2010 titled as Gulab @ Bablu vs. The State (NCT of Delhi), this court while setting aside the conviction under Section 397 IPC has held as under:*

> *"7. 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."*
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> *15. In a very recent judgment of the year 2013 reported in 2013 vii AD (Delhi) 359 titled as Rajender Yadav vs. The State (NCT of Delhi), this court has held that where the prosecution case itself is that only vegetable knife was found in the possession of the accused, the knife cannot be considered a deadly weapon to award the sentence of seven years which is a minimum sentence to be given with the aid of Section 397 IPC."*

16. Following these judgments, it was held that the use of knife at the time of robbery does not *ipso facto* prove a case under Section 397 of IPC. The prosecution has to prove that the knife used falls within the four corners of deadly weapon. In that case, the knife was a kitchen knife. The injuries inflicted upon the injured was simple in nature and was caused on the right hand of the injured and as such it was observed that the vegetable knife cannot be termed as deadly weapon, therefore, conviction of appellant under Section 397 IPC was set aside.

17. In the instant case also, as per the prosecution case itself it was only a vegetable knife and as per the MLC the complainant had one superficial cut mark over right hand of ring finger and the measurement of the knife reflects that it was not capable of producing death or serious bodily injuries as such

it cannot be termed to be a deadly weapon so as to attract the applicability of Section 398 of IPC. That being so, the conviction of appellant under Section 398 of IPC cannot be sustained and is accordingly set aside.

18. The appeal is accordingly partly allowed maintaining the conviction of appellant under Section 393/394/34 IPC and setting aside conviction u/s 398 IPC.

19. As regards quantum of sentence, no leniency is warranted keeping in view his antecedents. As per the status report submitted by the State, the appellant has already been convicted in case FIR No.291/2010 under Section 393/394/398/34 IPC Police Station Adarsh Nagar, Delhi and FIR No.461/2009 under Section 25/54/59 of Arms Act. As such, order of conviction qua these offences is upheld.

Trial Court record be returned along with a copy of this judgment.

A copy of this judgment be also sent to Superintendent, Tihar Jail for information to the appellant and compliance.

(SUNITA GUPTA)
JUDGE

OCTOBER 31, 2014
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