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

% *Reserved on : 10th December, 2021*
Pronounced on :28th January, 2022

\+ **CRL.A. 290/2021**

ASIF ..... Appellant
Represented by: Mr. Kunal Malhotra, Advocate with Mr. Ravinder Gaur, Advocate/ DHCLSC.

versus

STATE (N.C.T OF DELHI) ..... Respondent
Represented by: Mr. Amit Gupta, APP for the State through video conferencing with SI G.R. Meena, PS Ranjit Nagar.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By this appeal, the appellant challenges the judgment dated 5th July, 2019 convicting the appellant for offence punishable under Section 397 IPC and the order on sentence dated 17th July, 2019 directing him to undergo sentence of seven years imprisonment.

2. Learned counsel for the appellant assailing the conviction contends that the learned Trial Court failed to notice glaring contradictions in the testimonies of PW-1, PW-2 and PW-4 who gave altogether different versions in respect of the manner of commission of alleged robbery and the investigation carried out by the police qua the three witnesses. Admittedly, Mohd. Ibrahim (PW-1) is not an eye-witness as he himself admitted in his testimony that he was walking ahead of PW-2 and PW-4. He further stated that his statement was never recorded by the police during the investigation

either at the spot or thereafter. Testimony of PW-2 does not inspire confidence and his version is not corroborated by PW-1, PW-4 and PW-8. As per *rukka*, PW-2 alleged that both the SIM cards were taken out by the accused from his mobile phone and returned back to him, however, in his testimony before the Court, he is silent about the removal and handing over of the SIM cards. Further, PW-2 stated that he never visited the place of occurrence after the incident and all the written work was done at the Police Station. PW-8 stated that he went to the spot with PW-2 and prepared the site plan. PW-4 altogether contradicted the version of PW-2 as he deposed that the appellant took out the blade and took Sonu (PW-2) with him, whereas PW-2 stated that the appellant took out the blade, kicked him and PW-4 tried to stop him, when co-accused helped the appellant, the appellant hit PW-2 and ran away. The alleged weapon of offence i.e. the blade has not been recovered and in the absence thereof, it cannot be said that it was a deadly weapon. No injury has been caused to the victim. Even as per the prosecution, the weapon was used after the alleged snatching, hence the appellant cannot be convicted for the offence punishable under Section 397 IPC. Reliance in this regard is placed on the decisions of this Court in *Samiuddin @ Chotu vs. State of NCT of Delhi*, Crl. Appeal No.461/2016, decided on 9th November, 2010, *Bishan vs. State*, 1984 (6) DRJ 78, *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.

3. Countering the contentions of the learned counsel for the appellant, Mr. Amit Gupta, learned APP for the State submitted that the version of the complainant Sonu (PW-2) is duly corroborated by PW-1 and PW-4. Even if PW-1 stated that he was walking a few steps ahead, the same does not mean

that he did not witness the incident, when the complainant was waylaid by the appellant and his associate, who snatched the mobile phone and fled away from the scene. Call to the PCR was made by PW-1 from the spot and hence his presence at the spot, thereby witnessing the incident stands proved. Version of the complainant is also corroborated by PW-4. A mere detail testimony of one of the witnesses would not go to show that the complainant's version is not corroborated. Once the deadly weapon is shown, which in the present case was a blade, offence under Section 397 IPC is made out. Ingredients of the offence punishable under Section 397 IPC are satisfied once the weapon of offence is used and infliction of injury or that the weapon of offence should be recovered is not essential to prove the offence under Section 397 IPC. Since the blade causes serious incised wound injury, it falls within the category of deadly weapon. As per the nominal roll, the appellant is involved in four other cases of similar nature. Hence, there is no error in the impugned judgment of conviction and order on sentence, the appeal be dismissed.

4. FIR No.21/2015 was registered at Police Station Ranjit Nagar for offence punishable under Sections 392/397/34 IPC on the statement of the complainant Sonu who stated that on 9th January, 2015 at about 10:30 p.m. opposite Satyam Cinema, Ranjit Nagar, Delhi the appellant and co-accused Moideen @ Tinku committed robbery of his mobile phone made Karbon from his possession by showing him a deadly weapon, that is the blade.

5. In his deposition before the Court, the complainant stated that on 9th January, 2015 he along with Mohd. Ibrahim (PW-1) and Abdul Hamid (PW-4) were going to their house from their workplace, that is, Main Bazar, Patel Nagar Delhi. When they reached at Satyam Cinema and Mohd.

Ibrahim was 40-50 paces in front of them, one Asif, who worked with him earlier met them opposite Satyam Cinema. Asif asked for ₹50/-. When the complainant refused to give the money, Asif took out the mobile phone of the complainant make Karbon from his pocket of the pant. His friend Abdul Hamid tried to stop him when Asif took out a blade. Asif could not identify the complainant as his face was covered with muffler. However, the complainant duly identified him. In the meantime, one associate of Asif, who was present in the Court, hit him and both of them ran away. They chased the appellant and his associate but they disappeared. He went to the house of Asif but Asif was not present there. In the meantime, his friend Mohd. Ibrahim had already made a call to the police. Thus, three of them, that is, Sonu, Abdul Hamid and Mohd. Ibrahim went to the Police Station and lodged the FIR.

6. Statement of Sonu (Ex.PW-2/A) on which the FIR was registered immediately after the incident, had named Asif as the boy who had first stopped him and demanded ₹50/-. Mohd. Ibrahim also stated that all three of them were going to their home from the work place and he was walking fast. He was 40-50 paces ahead of Abdul Hamid and Sonu, who was stopped by one person near Satyam Cinema. He was called by Abdul Hamid by saying that '*Sonu ka mobile kisi ne chhin liya hai, tum ghar ja kar abbu ko bula lao'* and he went home and called the father of Abdul Hamid, who is his uncle and also made a call at 100 number. This witness in his cross-examination has clarified that when he turned back after hearing the voice of Abdul Hamid, the snatcher was running after snatching.

7. Though Mohd. Ibrahim in his examination-in-chief and cross-examination does not identify the appellant as the accused who had snatched

but corroborated the version of the complainant and Abdul Hamid to the extent that at around 10:30 p.m. after he closed the shop at Friday weekly market and they were going home, the incident took place and Mohd. Ibrahim made the PCR call.

8. Abdul Haimd, who appeared as PW-4, stated that though he did not remember the date and month in the year 2015, on the date of incident he along with Sonu and Mohd. Ibrahim was going from the duty and when they reached Satyam Cinema at around 11:00 p.m., accused Asif met them and snatched the mobile phone of Sonu. When they asked him to return the mobile phone, Asif took out the blade. Mohd. Ibrahim went to the house, called Sonu's father at the spot and also made a call to the police. Thus, this witness did not depose the fact that first Asif asked for ₹50/- from Sonu and when he refused, he took out the mobile phone. On being cross-examined by the learned APP for the State he accepted that Asif was demanding ₹50/- from Sonu and when he refused to give him ₹50/- then Asif took out mobile phone make Karbon from his pocket of pant. In the cross-examination he also accepted that Asif removed the two SIMs and handed over the same to Sonu and refused to return the mobile phone and that Asif gave kick blow to Sonu and thereafter fled from the spot. In his cross-examination he clarified that the blade taken out by the accused was a small blade and not a shaving blade but it was of different type. Thus, even if Mohd. Ibrahim does not claim to have witnessed the incident as he was 40-50 paces ahead and had only heard Abdul Hamid calling that Sonu’s mobile has been snatched, however, the version of Sonu is duly corroborated by Abdul Hamid in respect of the incident who has clearly stated about snatching of the mobile phone and when asked to return the mobile phone then appellant took out a

blade.

9. It is trite law that even if the weapon of offence is shown after snatching had taken place for running away along with snatched article, offence under Section 397 IPC is attracted. Section 390 Cr.P.C. provides that in a robbery, there is either theft or extortion. It is further provided that theft is 'robbery' if, in order to committing of the theft or in committing the theft, or in carrying away or attempting to carry away property obtained by theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. Thus, if the offender uses the deadly weapon at the time of committing robbery or dacoity which would include even the fear of instant death or instant hurt or wrongful restrain or an attempt to cause death or hurt or wrongful restraint even while carrying away or attempting to carry away the property obtained by theft, the act of the offender will fall within the four corners of Section 397 IPC. Thus the contention of learned counsel for the appellant that Section 397 IPC is not made out as the blade was allegedly shown after the mobile phone was robbed, deserves to be rejected. The decisions relied upon by the learned counsel for the appellant did not consider the necessary ingredients of an offence of robbery which in turn is a necessary ingredient of an offence punishable under Section 397 IPC.

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 MANU/DE/3330/2009 *Sanjay and Ors. vs. 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.

14. Appeal is disposed of.

15. Judgement be uploaded on the website of the Court and be conveyed to the Superintendent Jail for updation of the record and intimation to the appellant.

(MUKTA GUPTA)
JUDGE

JANUARY 28, 2022/vk