

Mukesh Prashar Vs. State

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Court : Delhi

Decided On : Feb-21-2007

Reported in : 138(2007)DLT221

Judge : S. Ravindra Bhat, J.

Acts : Indian Penal Code (IPC) - Sections 392, 397 and 452

Appeal No. : Crl. Rev. P. 103/2007

Appellant : Mukesh Prashar

Respondent : State

Advocate for Def. : V.K. Malik, Adv.

Advocate for Pet/Ap. : Jitender Sethi and; A. Rohen Singh, Advs

Disposition : Petition allowed

Judgement :

S. Ravindra Bhat, J.

1. Issue notice. Mr. V.K. Malik accepts notice. With consent of counsel for the parties, the petition was heard for disposal.

2. The petitioner, accused of having committed offences under Sections 392 read with Section 452 IPC, has been charged by an impugned order dated 09.01.07, of the Additional Sessions Judge. The order of charge has been attacked in these proceedings only to the extent that it has indicted the petitioner and charged him for the offence under Section 397 IPC.

3. The allegations in the proceedings are that the complainant, Champa Devi, let in some people to her house. One of them introduced himself as a friend of her son. Later one of them allegedly threatened her, compelled her to keep quiet at the point of a revolver and with the co-accused robbed jewellery and other valuables from the house and decamped with them.

4. During the course of investigation, the petitioner and two other persons Javed Akhtar and Saleem were arrested. Saleem and Javed Akhtar could not be identified by the complainant during the TIP and were, therefore, released on bail. The petitioner was identified by the complainant.

5. It was contended by counsel for the petitioner that the charge of Section 397 IPC cannot be attracted in this case having regard to the language of the provision itself which specifically applies to 'one offender' who uses the deadly weapon or causes grievous hurt. It was contended that in this case, the allegation of use or threat held out with the deadly weapon, namely, the revolver, did not pertain to the petitioner and related to someone else. Counsel relied upon on portions of the FIR and charge-sheet for the purpose. He also read out the statement of co-accused Saleem who, it was submitted, unambiguously mentioned that the revolver was held by him.

6. Learned Counsel relied upon the judgment of the Supreme Court in Phool Kumar v. Delhi Administration : [1975]3SCR917 where the Court, confronted with the dichotomy of opinion in various High Courts as to the applicability or otherwise of Section 397 (where one among many used a weapon or held out threat with the weapon) held that a person can be convicted of the offence in that provision, only if he used the weapon or held out threat with it. The Court held as follows:

5. Section 392 of the Penal Code provides: Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and , if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

The sentence of imprisonment to be awarded under Section 392 cannot be less than 7 years if at the time of committing robbery the offender uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person: vide Section 397. A difficulty arose in several High Court as to the meaning of the word 'uses' in Section 397. The term 'offender' in that Section, as rightly held by several High Court, is confined to the offender who uses any deadly weapon. The use of a deadly weapon by one offender at the time of committing robbery cannot attract Section 397 for the imposition of the minimum punishment on another offender who had not used any deadly weapon. In that view of the matter use of the gun by one of the culprits whether he was accused Ram Kumar or some body else, (surely one was there who had fired three shots) could not be and has not been the basis of sentencing the appellant with the aid of Section 397. So far as he is concerned he is said to be armed with a knife which is also a deadly weapon. To be more precise from the evidence of P.W. 16 'Phool Kumar had a knife in his hand'. He was, therefore, carrying a deadly weapon open to the view of the victims sufficient to frighten or terrorize them. Any other overt act, such as, brandishing of the knife or cause of grievous hurt with it was not necessary to bring the offender within the ambit of Section 397 of the Penal Code.

7. Learned Counsel also relied upon the judgment of this Court in Anwar v. State 2004 (3) JCC 1402. In that case the Court had held as follows: A plain reading of Section 397 IPC makes it clear that a conviction under Section 397 IPC can be of that person only who, at the time of committing robbery or dacoity uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person. This penal provision cannot be slapped against an accused who simply commits an offence defined under Section 392 IPC. Since in the present case, the prosecution failed to establish on record that the appellant had used the weapon at the time of the commission of the robbery this Court is of

the considered view that the conviction of the appellant under Section 397 IPC cannot be sustained.

8. Mr. V.K. Malik, learned Counsel for the State relied upon the decision in *Ashfaq v. State (Govt. of NCT of Delhi)* : 2004 CriLJ936 which had been cited in the trial Court to state that the charge in this case was properly framed. It was also submitted that the Court can drop the charge having regard to the nature of offence at the stage of trial.

9. The facts in this case would show that as per the allegations leveled, only one person had used the deadly weapon to hold out a threat against the complainant, and decamped with the jewellery and other valuables. The evidence on record by way of FIR and statements is also to the effect that the weapon was not held by the petitioner but allegedly by the other co-accused. There is strong corroboration to this circumstance by way of TIP evidence where the petitioner was identified as the other accused.

10. The effect of the decision of the Supreme Court as well as this Court which has not adverted to it but which follows the same principle is that unless the offender himself is in possession of the deadly weapon, the charge under Section 397 cannot be attracted.

11. In view of the above, I am of the considered opinion that the impugned order in so far as it charged the petitioner for having committed the offence under Section 397 IPC cannot be sustained. The impugned order, to that extent is hereby set aside. The charge, to the extent it deals with Section 397 in the third paragraph, stands deleted in so far as it pertains to the petitioner. The petition is allowed in the above terms.