

Dharam @ Banti Vs. State

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Court : Delhi

Decided On : Jul-16-2013

Judge : S. P. Garg

Appellant : Dharam @ Banti

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI RESERVED ON : July 11, 2013 DECIDED ON : July 16, 2013 + CRL.A. 309/2012 DHARAM @ BANTI Through : Appellant Mr.Gautam Khazanchi, Advocate. versus STATE Respondent Through : Mr.M.N.Dudeja, APP for the State. CORAM: MR. JUSTICE S.P.GARG S.P.GARG, J.

1. Dharam @ Banti (the appellant) challenges a judgment dated 30.05.2009 of learned Additional Sessions Judge in Sessions Case No. 78/1/2008 arising out of FIR No. 194/2008 PS Bindapur by which he was held guilty for committing offence under Section 392/34 read with Section 397 IPC. By an order dated 03.07.2009 he was sentenced to undergo Rigorous Imprisonment for seven years under Section 397 IPC.

2. Allegations in the charge-sheet were that on 06.08.2008 at about 01.00 A.M. at 40 Foota Road, near Jagdamba Sweets Palace, Chanakya Palace, Dharma @ Banti and his associates Manish Khanna @ Punjabi and Sanju @ Sandeep @

Tapul committed robbery and deprived Sandeep Kumar of his motorcycle not DL 9SV 792. make XCD 125. Purse containing `150/- and a mobile phone make Nokia. It was further alleged that Dharma @ Banti was armed with a knife and injured Sandeep Kumar while committing robbery. During investigation, the appellant and his associates were arrested. Pursuant to their disclosure statements, the motorcycle and weapon of offence i.e. knife were recovered. Statements of the witnesses conversant with the facts were reduced into writing. After completion of investigation, a charge-sheet was submitted against the appellant and his associates for committing the aforesaid offence. The prosecution examined 7 witnesses. In their 313 statements, the assailants pleaded false implication. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held the appellant perpetrator of the crime for the offences mentioned previously. Being aggrieved, he has preferred the instant appeal.

3. During hearing, on instructions, appellants counsel stated at Bar that the appellant has opted not to challenge the conviction under Section 392 IPC. He argued that offence under Section 397 was not made out as the prosecution could not establish beyond doubt that deadly weapon was used by the appellant while committing robbery. Learned Additional Public Prosecutor urged that the victim has categorically stated that the appellant was armed with a deadly weapon i.e. knife and it was used while committing robbery.

4. Since the appellant has not opted to challenge the conviction under Section 392 IPC, the findings of the Trial Court on conviction under Section 392 IPC are affirmed.

5. Under Section 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 used the deadly weapon is liable for minimum sentence with the aid of Section 397. The provisions of Section 397 do not create new substantive offence but merely serve a complimentary to Section 392 and 395 IPC by regulating the punishment already prescribed. In the instant case, the victim Sandeep Kumar in his statement (Ex.PW-2/A) disclosed to the police that one of

the assailants showed him the knife while committing robbery. In his Court statement PW-2 (Sandeep Kumar) identified Dharma @ Banti to be the assailant who showed him the knife. However, he categorically stated that he was unable to identify the knife used by him in the incident. He did not give dimensions of the knife used in the incident. The knife used in the occurrence was not recovered from the appellants possession or at his instance. PW-4 (Constable Surender Kumar) is categorical to depose that the knife (Ex.P-6) was recovered from the right side pocket of the pant of accused Sanju @ Sandeep @ Tapul on 09.08.2008 at about 11.00 A.M. when they were present for the investigation of this case and were able to trace the culprits. Apparently, the knife used in the incident was not recovered from the possession of the present appellant. It is not explained as to when and under what circumstances, the appellant handed over the knife allegedly used by him in the incident to the co-accused Sanju @ Sandeep @ Tapul. The prosecution could not establish beyond doubt that the knife (Ex.P-6) was the same which was used in the incident and it was a deadly weapon. There is no evidence on record that while committing robbery Sandeep Kumar was injured. He was not taken for medical examination. On 06.08.2008 Sandeep Kumar was medically examined at DDU hospital and the MLC (Ex.PW-7/C) was exhibited without examining the doctor who prepared it. The knife recovered in the incident was not shown to the doctor to ascertain if injuries on the complainants body were possible with that weapon or it was a deadly weapon in nature. MLC rather reveals that no incised sharp wound was found on the complainants body. Apparently, the knife was not used in causing injury to the complainant. Moreover, the injuries were simple in nature and did not fall within the ambit of Section 397 IPC.

6. In CrI.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 Cri.L.J.

NOC 2.(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 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.

10. In Samiuddin @ Chotu vs. State of NCT of Delhi,175 (2010) Delhi Law Times 27, 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 33.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 under Section 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 under Section 397 IPC and Trial Court has erred on this point.

7. For the foregoing reasons, while upholding the conviction and sentence of the appellant under Section 392 IPC, his conviction and sentence under Section 397 is set aside.

8. No specific sentence was awarded to the appellant under Section 392 IPC. Co-accused Manish Khanna @ Punjabi and Sanju @ Sandeep @ Tapul were convicted under Section 392/34 IPC and were sentenced to undergo Rigorous Imprisonment for three years with fine of `5000/- and in default to undergo simple imprisonment for one month. The impugned order on sentence is modified and the appellant Dharam @ Banti is sentenced to undergo RI for three years with fine of `5000/- and in default of payment of fine to further undergo SI for one month. The period already spent by him in custody shall be set off under Section 428 IPC.

9. The appeal stands disposed of in the above terms. Trial Court record be sent back forthwith. (S.P.GARG) JUDGE July 16, 2013 sa

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