
(2021) 02 DEL CK 0080

Delhi High Court

Case No: Criminal Appeal No. 492 Of 2020

Kamran

APPELLANT

Vs

State (Gnct Of Delhi)

RESPONDENT

Date of Decision: Feb. 9, 2021

Acts Referred:

- Indian Penal Code, 1860 - Section 34, 392, 397, 411
- Code Of Criminal Procedure, 1973 - Section 313, 428, 437A

Hon'ble Judges: Anu Malhotra, J

Bench: Single Bench

Advocate: Sulaiman Mohd. Khan, Meenakshi Dahiya

Final Decision: Allowed

Judgement

Anu Malhotra, J

1. The appellant, vide the present appeal assails the impugned judgment dated 27.02.2020 and the impugned order on sentence dated 02.03.2020 of the

learned District & Sessions Judge (North-East), KKD Courts, Delhi whereby the appellant having been convicted qua the offences punishable under

Sections 392/397/34 of the Indian Penal Code, 1860 was sentenced to undergo Rigorous Imprisonment for a period of 3 years and to pay a fine of

Rs.5,000/- and in default of the payment of the said fine, to further undergo Simple Imprisonment for a period of 2 (two) months qua the offence

punishable under Section 392/34 of the Indian Penal Code, 1860 and was also sentenced to undergo Rigorous Imprisonment for a period of 7 (seven)

years and to pay a fine of Rs.5,000/- and in default of payment of the said fine, to further undergo Simple Imprisonment for a period of 2 (two) months

qua the offence punishable under Section 397 of the Indian Penal Code, 1860 with both the sentences having been directed to run concurrently with

the benefit of Section 428 of the Cr.P.C., 1973 having been given to the appellant as well as to the co-convict Mohd. Shahzad who was convicted and

sentenced to undergo Rigorous Imprisonment for a period of 3 (three) years and to pay a fine of Rs.5,000/- and in default of payment of the said fine,

to further undergo Simple Imprisonment for a period of 2 (two) months qua the offence punishable under Section 392/34 of the Indian Penal Code,

1860 with only the appellant herein namely Kamran having been convicted qua the offence punishable under Section 397 of the Indian Penal Code,

1860.

2. Along with the appeal, was CRL.M.A.13800/2020 filed on behalf of the appellant seeking condonation of 140 days delay in institution of the appeal

which vide order dated 07.10.2020 was allowed and the said delay was condoned.

3. CRL.M.(BAIL)8134/2020 filed on behalf of the appellant seeking suspension of sentence during pendency of the appeal was declined vide order

dated 23.11.2020.

4. The Trial Court Record was requisitioned and has been received and perused.

5. Written submissions on behalf of the appellant have been submitted by the learned counsel for the appellant deputed by the Delhi High Court Legal

Services Committee and oral submissions on behalf of the appellant and on behalf of the State have been addressed.

6. The charges framed against the appellant and the co-accused since convicted Mohd.Shahzad vide order dated 01.08.2018 of the learned Trial Court

were to the effect that on 28.04.2018 at about 2.00 am at the Main 66 Foota Road near Kardampuri Puliya, Delhi within the jurisdiction of PS

Bhajanpura, both the appellant and the co-convict in furtherance of their common intention robbed a mobile phone Xolo of black colour and cash

amounting to Rs.4,000/- from the complainant Golu and had committed an offence punishable under Sections 392/34 of the Indian Penal Code, 1860

and that the appellant herein Kamran whilst committing the said robbery had used an ustara and had thus committed an offence punishable under

Section 397 of the Indian Penal Code, 1860.

7. The State produced 11 witnesses in support of the prosecution version i.e. PW-1 Dr.Shalabh Dass, PW-2 Shakir, PW-3 Golu, PW-4 ASI Yashvir

Singh, PW-5 W.Ct.Anju, PW-6 Ct.Neeraj, PW-7 Ct.Pritam, PW-8 Ct.Rahul, PW-9 ASI Ravinder, PW-10 ASI Attar Singh and PW-11 W.Ct. Payal

and the appellant herein produced two defence witness i.e. DW-1 Sh.Aamir Khan and DW-2 Mohd. Farhan.

8. The complainant, Golu examined as PW-3 in his testimony before the learned Trial Court deposed that on 28.04.2018 at about 2.00 am, he was

going to Jowhripur from Seelampur in a TSR being driven by PW-2 Shakir and in the said TSR, one co-passenger was also sitting and that PW-3 had

boarded the TSR from Seelampur and when they reached near the Kardampuri Puliya, then both the accused persons i.e. the appellant herein and the

co-convict came there and got the TSR stopped and sat into the TSR from both sides and grappled with the complainant. Inter alia PW-3 Golu stated

that the accused Kamran i.e. the appellant herein put an ustara on his neck and the co-accused Shahzad removed his mobile phone and Rs.4,000/-

which he was carrying in his pocket and the co-passenger ran away from the spot. The co-accused Shahzad as per the testimony of PW-3 was

apprehended by the public when he tried to keep away from the spot but that Kamran i.e. the appellant herein managed to escape from the spot, the

accused Shahzad was drunk, public persons had beaten him, he fell down, sustained an injury on his head and someone called the police and the police

reached the spot and that the co-accused Shahzad led the police party to the house of the accused Kamaran i.e. the appellant herein but he was not

found there. Inter alia Golu identified his signatures on Ex.PW3/A, his statement made to the police which forms the basis of the FIR, identified the

spot of the occurrence to the police as a consequence of which the site plan Ex.PW3/B was prepared.

9. The said witness stated inter alia that on the following day, the accused Kamran i.e. the appellant herein was apprehended by the police from the

nearby place of Kardampuri Pulia at around 2.00 pm and that he PW-3 had identified his signatures on the arrest memo of Kamran Ex.PW3/F as

well as on his personal search memo Ex.PW3/G. It was also stated by this witness that a disclosure statement of accused Kamran was recorded

Ex.PW3/H which he signed, which was recorded on interrogation of Kamran and that one ustara was recovered from the pocket of the pant of the

accused Kamran, the sketch of which was Ex.PW3/1 which ustara (razor) was seized by the police vide a memo Ex.PW3/J. The mobile phone of the

complainant was also testified by the complainant to have been recovered from the possession of the accused Kamran which was also seized by the

police, which mobile phone, PW-3 Golu stated was in the name of his brother Subhash and which was of the make Xolo bearing IMEI

No.911535102870244 and 91153510319524, however, PW-3 stated that he was not able to identify the ustara.

10. On being cross examined on behalf of the accused persons, PW-3 denied that he had testified falsely and denied any false implication of the

appellant herein and denied that there was nothing recovered from the accused persons.

11. On behalf of the appellant, it was submitted during the course of submissions made as well as through the written submissions submitted that

though the time of the arrest memo of Kamran i.e. the appellant herein was shown to be 28.04.2018 at 7.00 pm on Ex.PW3/F, PW-3 in his statement

has stated that Kamran was arrested at 2.00 pm and that PW-3 was also unable to identify the ustara used in the commission of the crime which itself

brought forth the lack of veracity in the testimony of PW-3, the complainant which thus showed that the appellant was not arrested from the spot nor

was any recovery effected from him. Inter alia on behalf of the appellant it was submitted that the testimony of PW-2, the auto driver produced as an

eye witness by the State was also infirm and did not bring forth the culpability of the appellant herein qua the alleged commission of the offence

punishable under Section 397 of the Indian Penal Code, 1860, though in his examination in chief, he stated that the accused Kamran i.e. the appellant

herein had showed the ustara to the passenger and had managed to escape from the spot. In his cross examination dated 14.01.2019, he stated that he

had not seen as to which of the accused persons had given beatings to the passenger, that both the accused were grappling with the passenger and

that he had not seen as to who had shown the ustara to him.

12. It was also submitted on behalf of the appellant that the testimony of Shakir, the auto driver also indicated that no injury was caused to any

passenger and that he had also stated that his signatures were taken by the police on some blank papers and due to the darkness he was unable to

identify the accused persons as stated by him even in his cross examination. Though, this witness in his examination in chief had categorically stated

that on 28.04.2018 at about 1.45 am, the two passengers seated in his auto at Seelampur were going towards Gokulpuri and when they reached near

the Vijay Park, Seelampur, the accused persons who were present in Court during his testimony i.e. the appellant herein and the co-convict Mohd.

Shahzad had given a signal to him for stopping the TSR and he stopped the TSR and they started beating the two passengers and showed the ustara to

the passengers and one of the passengers ran away from the TSR, another passenger remained seated in the TSR and the accused person snatched

his mobile and money and raised an alarm and the public gathered there and the accused Shahzad was overpowered by the public persons but his

associate Kamran i.e. the appellant herein managed to escape from the spot and the accused Shahzad disclosed his name as well as the name of his

associate Kamran. Inter alia it was stated by this witness in his examination in chief that Kamran had shown the ustara to the passenger and had

managed to escape from the spot and that someone gave a call to the number 100 and in the meantime, the co-accused Shahzad had picked up a brick

piece and hit the same on his head to create a drama and thereafter the police had reached the spot and his statement was recorded by the police.

The witness PW2 in his cross examination dated 14.01.2019 inter alia stated that both the accused were grappling with the passenger but he had not seen as to who had showed the ustara to him.

13. Inter alia it was submitted on behalf of the appellant that the testimony of PW-6 Constable Neeraj who was on emergency duty in PS Bhajanpura

and who had accompanied the Investigating Officer ASI Ravinder to the spot on receipt of DD No.7B, who stated that he met Golu, the complainant

at the spot at 66 foota road, Kardampuri Puliya at about 2.30 am informed that the accused Shahzad, the co-convict was beaten by the public and was

produced before them and that the complainant narrated the facts, whereupon the statement of the complainant was recorded and the FIR was got

registered and Shahzad was got medically examined and arrested and his disclosure statement was recorded and on the same day, he along with ASI

Ravinder and the complainant went in search of the accused Kamran and when they reached Kardampuri Puliya on the identification of the

complainant Golu, the appellant herein Kamran was apprehended and arrested and an ustara and a mobile phone of the make Xolo was recovered

from his possession which was seized. Inter alia Constable Neeraj identified both the appellant herein i.e. Kamran and the co-accused i.e. Shahzad,

since convicted Shahzad.

14. On being cross examined, on behalf of the appellant herein, PW6 stated that some of the signatures on proceedings conducted were appended at

the spot and some at the police station by him. He however, denied that the appellant was arrested from his house and had been falsely implicated and

denied that there was no recovery of any ustara or of the mobile phone effected from the appellant or that in connivance with the complainant he had

testified falsely.

15. It was submitted on behalf of the appellant that the factum that there was no time of arrest mentioned by Constable Neeraj of the appellant itself

brought forth the falsity of the prosecution version.

16. Inter alia on behalf of the appellant it was submitted that the testimony of the Investigating Officer, ASI Ravinder also suffered from several

discrepancies and it was submitted on behalf of the appellant that ASI Ravinder had stated that on 28.04.2018 at around 5.00 pm, he along with the

complainant Golu and Constable Neeraj had gone in search of the accused i.e. the appellant herein Kamran and he was found at the Kardampuri

Puliya and was apprehended at the pointing out of Golu, the complainant when the mobile phone of the make Xolo belonging to the complainant and

the ustara were recovered from the right pocket of his pant and that the appellant had disclosed that he had used the ustara in the robbery. It was also

submitted on behalf of the appellant that in his cross-examination, ASI Ravinder had stated that they had reached the Kardampuri Puliya at 6.30 pm.

17. It has thus been submitted on behalf of the appellant that the testimonies of the prosecution witnesses were wholly infirm and vague in relation to

the arrest of the appellant herein Kamran as well as in relation to the aspect of recovery of any ustara from the appellant herein and in view of the

testimony of the complainant Golu and the testimony of Shakir, the auto driver examined as PW-3 & PW-2 respectively, it had not been established

that it was the appellant who had put the ustara on to the neck of the appellant.

18. Whilst urging that the appellant was entitled to an acquittal in toto in view of the discrepancies in the prosecution witnesses and thus consequential

falsity of the prosecution version, it was submitted in the alternative on behalf of the appellant that in any event the commission of the offence

punishable under Section 397 of the Indian Penal Code, 1860 was not established even remotely.

19. The other witnesses examined by the State were PW-1 Dr. Shalabh Dass, Medical Officer of Jag Parvesh Chand Hospital, Shastri Park, Delhi

who had examined the co-accused since convicted Shahzad who had been brought with the alleged history of beatings by the public, the co-accused

i.e. the appellant herein Kamran had also been referred to the Orthopedic Department.

20. PW-4 examined was ASI Yashvir Singh who testified to having got the FIR registered who significantly during cross-examination on behalf of the

appellant herein stated that no separate arrival or departure entry of Ct.Neeraj was made when Ct.Neeraj had been sent with the ruqqa to the police

station and had returned with the copy of the FIR, though, he stated that the ruqqa was produced before him at 3.20 am by Ct.Neeraj on 28.04.2018.

21. PW-5 W/Ct.Anju stated that she was working as a DD writer at PS Bhajanpura and on 28.04.2018 at about 2.20 am she had received an

information from the Control Room about theft at the Puliya Kardampuri and had recorded the said information vide DD No,7B and had informed ASI

Ravinder to take necessary action.

22. PW-7 Ct.Pritam had testified to the effect that he took the accused Shahzad to the Jag Parvesh Chand Hospital for medical examination on

28.04.2018.

23. PW-8 Ct.Rahul testified to having taken Kamran i.e. the appellant herein on 28.04.2018 at 8.00 pm for medical examination to the Jag Parvesh

Chand Hospital.

24. The evidence in defence led by the appellant/accused whom DW-1 Aamir Khan who stated that in the third or fourth month of the year on a

Saturday at about 1/1.30 pm, he was passing from Gali No.2, Kardampuri, Delhi and noticed a huge gathering in front of the house of the accused

Kamran i.e. the appellant herein and noticed that two police officials were taking Kamran forcefully somewhere and though the family members

asked the police why they were taking him, they did not inform them. However, this witness on being cross examined stated that he did not make any

complaint to any forum of the apprehension of the accused Kamran in the manner in which he was apprehended but denied that Kamran was actually

arrested from the Kardampuri Puliya at Yamuna Vihar by ASI Ravinder and denied that he was concocting a story to save Kamran.

25. DW-2 Mohd.Farhan testified to the effect that on 28.04.2018, two police persons came to his house in the afternoon and knocked at his door and

when he opened the door, those police persons asked him as to where was Kamran and since Kamran is his brother he told them that he was sleeping

and they directed him to send down Kamran and as Kamran was sleeping on the third floor of their house he brought his brother Kamran from the

third floor into the gali and those police personnel started taking him on their bike forcibly and on inquiries made by Mohd. Farhan, they told him that

they were taking him to PS Bhajanpura and he DW-2 went to PS Bhajanpura and waited for the release of his brother till night but they did not

release him and directed him to go to the Court for his release.

26. On being cross examined on behalf of the State, this witness stated that he did not remember the exact time but the police officials came between

12 noon to 1 pm. DW-2 however stated that he, his father and brother did not make any complaint to the higher police authorities or in the Court with

respect to the forcible lifting of his brother Kamran by the police official of PS Bhajanpura. This witness however categorically denied that his brother

Kamran was apprehended by the police on 28.04.2018 at about 7 pm at the Kardampuri Puliya 66 foota road.

27. The appellant Kamran in his statement under Section 313 of the Cr.P.C., 1973 denied all the incriminating evidence led against him and stated that

there was no recovery effected from him and that he had been falsely implicated after being lifted from his house.

28. On a consideration of the submissions that have been made on behalf of either side and the evidence adduced by the prosecution, it is apparent

that the contention raised on behalf of the appellant Kamran that taking into account the factum that Kamran has been convicted individually for the

commission of an offence punishable under Section 397 of the Indian Penal Code, 1860, the testimonies of the prosecution witnesses in relation to the

appellant herein having put the ustara on to the neck of the complainant are wholly infirm and discrepant.

29. This is so in as much as, the testimony of witness Shakir, the auto driver who in his examination his chief says that Kamran showed the ustara to

the passenger and managed to escape from the spot and who in his cross examination stated that due to darkness, he was unable to identify the

accused persons and that both the accused were grappling with the passenger and thus, he had not seen as to who had showed the ustara to him and

that police had obtained his signatures on blank papers, coupled with the statement of the complainant Golu who in his examination in chief stated that

Kamran had put an ustara on his neck who however was unable to identify the ustara allegedly recovered from Kamran i.e. the appellant herein and

who stated that an ustara was recovered from the pocket of the pant of Kamran on the next day after the date of incident, makes the testimony of the

complainant Golu who states that the appellant herein was apprehended on the following day of the incident at 2.00 pm from the Kardampuri Puliya,

whereas as per the testimony of the Investigating Officer, Kamran was allegedly apprehended at 6.30 pm and as per the arrest memo of Kamran, he

was arrested at 7.00 pm on 28.04.2018 at the Kardampur Puliya, coupled with the factum that even though the appellant herein was not apprehended

at the spot it was stated that the appellant was in possession of the ustara when it was allegedly recovered from the right pocket of his pant as stated

by ASI Ravinder qua which Constable Neeraj, though he stated that an ustara was recovered from Kamran, does not state how and where the ustara

was recovered from the appellant, makes the prosecution version in relation to the culpability of Kamran i.e. the appellant herein qua the alleged

commission of the offence punishable under Section 397 of the Indian Penal Code, 1860 wholly remote and not free from doubt.

30. The conviction of Kamran i.e. the appellant herein qua the alleged commission of the offence punishable under Section 397 of the Indian Penal

Code, 1860 and the sentence imposed in relation thereto is set aside with the appellant acquitted in relation thereto.

31. Even, in relation to the alleged commission of an offence punishable under Section 392/34 of the Indian Penal Code, 1860, it is significant that the

complainant in his testimony on oath had stated that it was the accused Shahzad who had removed the mobile phone and cash amounting to Rs.4,000/-

which he was carrying in his pocket. He stated further that the co-passenger i.e. apparently Kamran had managed to escape from the spot. No cross-

examination of this witness was conducted by the State in relation to his statement that it was the accused Shahzad who removed his mobile phone

and Rs.4,000/- which he was carrying in his pocket. It has not been stated by the complainant that the mobile phone and Rs.4,000/- which had been

taken out by Shahzad, the co-accused since convicted was handed over to the appellant Kamran, as a consequence of which the said mobile phone of

the make Xolo was allegedly recovered from the appellant herein Kamran on 28.04.2018 at 7.00 pm as per the prosecution version and at 2.00 pm as

per the complainant.

32. Furthermore, it is significant to observe that there is nothing on the record to suggest what happened to the sum of Rs.4,000/- which had been

robbed from the complainant and if it had been taken away by the accused since convicted i.e. the appellant herein as to what happened to the said

amount, has not been brought forth through the prosecution version. That the ustara was recovered from the appellant even allegedly after several

hours of the incident from his pocket, is not probable, for a person who committed an offence with the ustara would continue to retain it in his pocket

to be recovered is not believable. Significantly, the complainant has been unable to identify the ustara despite a sketch of the knife having been

prepared.

33. Apart from this aspect, it is essential to observe that whereas Shakir stated that the co-accused Shahzad had been overpowered by public persons

and whilst someone gave a call to number 100, Shahzad picked up a brick piece and hit the same on his head to create a drama, Golu, the complainant

stated that Shahzad was drunk and was apprehended by members of the public and had fallen down and thus sustained an injury on his head which is

at complete variance from the statement of Shakir that Shahzad had picked up a brick piece and hit the same on his head to create a drama.

Significantly, Shakir has also stated in his cross-examination that he had stated to the police that the accused Shahzad had picked up a brick piece and

hit it on his head and had also stated that the police had obtained his signatures on blank papers and as the accused person had entered the back

portion of the TSR, he had not seen which accused had given beatings to the passenger, though, both were grappling with the passenger.

34. Taking the totality of the circumstances into account, it is held that the prosecution version is wholly infirm even in relation to the alleged

commission of the offence punishable under Section 392/34 of the Indian Penal Code, 1860 against the accused Kamran i.e. the appellant herein who

is thus acquitted in relation thereto also qua FIR No.222/2018, PS Bhajanpura under Sections 392/34/397 of the Indian Penal Code, 1860 and is

directed to set at liberty in relation to the said FIR. In view of the observations in paragraph 31 hereinabove of the doubtful recovery in the instant

case effected allegedly from the appellant Kamran, even the offence punishable under Section 411 of the Indian Penal Code, 1860, cannot be

attracted in the instant case.

35. The appeal is thus allowed.

36. In terms of Section 437A of the Cr.P.C., 1973 however, Kamran i.e. the appellant herein shall submit a bail bond in the sum of Rs.15,000/- with

one surety of the like amount to the satisfaction of the Superintendent Jail, Delhi concerned and shall appear before the Appellate Court as and when

required in the event of any appeal filed against this judgment.

37. Copy of this judgment be sent to the Superintendent Jail, Delhi concerned.