

*IN THE COURT OF THE II ADDITIONAL DISTRICT AND
SESSIONS JUDGE, SALEM*

*PRESENT: Thiru.R.Sridharan, M.L.,
II Additional District Judge, Salem.*

Monday, the 23rd day of July 2018

CRIMINAL APPEAL NO.1/2018

*From which Court the appeal is : I Additional Sub Court, Salem
preferred*

No. of the case in that court : S.C.28/2016

Number of the Appeal : C.A.1/2018

*Name & description of the : G.Sureshkumar S/o Govindaraj
appellant*

*Name of the Complainant & : State: The Inspector of Police,
Cr.No Ammapet P.S., Cr.No.55/2015*

*The sentence and the law under : Trail court has convicted the
Which it was imposed in the accused under Sec. 341 and 392
Lower court r/w 397 IPC and sentenced him to
undergo Simple Imprisonment for
one month for the offence under
Sec. 341 IPC and to undergo
Rigorous Imprisonment for 5 years
under Sec.392 r/w 397 IPC. Set
off under 428 Cr.P.C. was also
allowed.*

*Whether confirmed/modified or : In the result, this appeal is allowed
Modified in part. The impugned judgment
and sentence passed by the trial
court dated 29.08.2016 in
S.C.28/2016 is modified conviction
under Sec.397 is set aside and the
sentence of the appellant under
Sec.392 IPC is reduced to the
period already undergone by him*

in this case. The appellant is ordered to be released if he is not detained in connection with any other case. Sent back the records along with the copy of the judgment to the trial court and also to the Superintendent of Police jail concerned.

Date of presentation : 10.07.2017
Date of filing : 05.01.2018
Date of Notice Issued by Court to appear : 10.01.2018
Date of appearance : 12.02.2018
Date of hearing : 04.07.2018
Date of Judgment : 23.07.2018

This appeal coming on for final hearing before me in the presence of Tvl.K.K.Kannan, & A.Ragu, Advocates for the appellant and of Thiru.G.E.Veerakumar, Learned Additional Public Prosecutor appearing for the respondent/state and upon perusing the records and the lower court judgment and decree and on hearing both side arguments, this Court delivered the following:

J U D G M E N T

The appellant has preferred this appeal assailing the judgment and conviction order dated 29.08.2016 passed in Session Case No.28/2016 whereby he has been convicted for committing the offence punishable under Section 341 and 392 r/w 397 IPC and sentenced to undergo Simple Imprisonment for one month for the offence under Sec.

341 IPC and to undergo Rigorous Imprisonment for 5 years under Sec.392 r/w 397 IPC, and set off under 428 Cr.P.C. was also allowed. Aggrieved by the conviction as also sentence awarded by the trial court, the appellant has preferred the present appeal.

2. The prosecution story, as emerges from the records is that on 18.01.2015 at about 6.30 p.m., when the defacto complainant Anguraj was proceeding in his motorcycle near Nachampatty Indiragandhi Girls Higher Secondary School opposite to Jambu hotel, the appellant herein unlawfully restrained him and demanded his gold neck chain and when Anguraj refused to remove the chain and give it to him, the appellant after taking the knife from his hip and put the complainant under threat and thereafter snatched the gold neck chain and when the complainant Anguraj shouted, the appellant herein intimidated him by showing knife and thereafter ran away from the place thereby committed the offence punishable under Sec.341, 392 r/w 397 and 506(ii) IPC. However the trial court has found that the charge under Sec.506(ii) IPC is not made out and therefore acquitted the appellant from the above offence. Since the appellant is challenging the conviction only to the conviction under Sec.397 IPC, it has to be considered by this court, whether on the basis of the statement made by P.W.1 Anguraj and P.W.2 Ramanan, the ingredients of Sec.397 IPC have been

proved by the prosecution so as to maintain his conviction for the aforesaid offence.

3. In the decision reported as Dilawar Sinvh vs. State of Delhi [(2007) 12 SCC 641], the ingredients of Section 397 IPC and the meaning of the word “offender” for the purpose of Section 397 IPC have been discussed by the Hon’ble Supreme Court as under :

“22. The essential ingredients of Section 397 IPC are as follows:

- 1. Accused committed robbery.*
- 2. While committing robbery or dacoity (i) accused used deadly weapon (ii) to cause grievous hurt to any person (iii) attempted to cause death or grievous hurt to any person.*
- 3. "Offender" refers to only culprit who actually used deadly weapon. When only one has used the deadly weapon, others cannot be awarded the minimum punishment. It only envisages the individual liability and not any constructive liability. Section 397 IPC is attracted only against the particular accused who uses the deadly weapon or does any of the acts mentioned in the provision. But other accused are not vicariously liable under that Section for acts of co-accused.*

23. As noted by this Court in Phool Kumar v. Delhi Administration MANU/SC/0210/1975 : [1975]3SCR917, the term "offender" under Section 397 IPC is confined to the offender who uses any deadly weapon. Use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397 IPC for the

imposition of minimum punishment on another offender who had not used any deadly weapon. There is distinction between 'uses' as used in Sections 397 IPC and 398 IPC. Section 397 IPC connotes something more than merely being armed with deadly weapon.

24. In the instant case admittedly no injury has been inflicted. The use of weapon by offender for creating terror in mind of victim is sufficient. It need not be further shown to have been actually used for cutting, stabbing or shooting, as the case may be. (See: Ashfaq v. State (Govt. of NCT of Delhi) MANU/SC/1042/2003 : 2004CriLJ936).

25. Therefore, the offence under Section 397 IPC has clearly not been established. In addition, the ingredients necessary for offence punishable under Sections 392 and 452 have not been established in view of the highly inconsistent version of the complainant PW 1.”

4. In the decision reported as Mohan Singh vs. State 1987(13) DRJ 176, it was held as under :

(12) On the second aspect even though there is some evidence to suggest that at the time of the committing of dacoity one of the offenders caused injury by knife on the left hand of Sham Lata Goel but unfortunately the said knife has not been recovered. In order to bring home a charge under Section 397 the prosecution is duty bound to produce convincing evidence that the knife used by the accused in this case was a deadly weapon, it is no doubt true that knives are weapons available in various sizes and may just

cause little hurt or may be a deadliest. There are deadly weapons parse as much as would ordinarily result in death by their use. M.L. Jain, J. in the case reopen as Balak Ram v. State MANU/DE/0387/1983 : 1983 Dlt 142 on this aspect observed that what would make a 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 and prosecution should prove that the knife used by the accused was a deadly weapon. 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 circumstances, be convicted under Section 392 Indian Penal Code.

5. Reverting to the facts of the present case, it is seen that P.W.1 Anguraj had not suffered even a scratch on his body. It is true that the knife said to have been used by the appellant for the commission of the offence is recovered and produced as M.O.2. Recovery of M.O.2 knife was also spoken by P.W.6 Sankar and P.W.9 Nagarajan, Investigation Officer in this case. However as held in the

above decisions, it is seen that the trial court has failed to give a finding knife used is “deadly weapon” as used under Sec. 397 IPC. When there is no specific finding with regard to the usage of knife and the nature of the same whether it is a deadly weapon or ordinary one, this court holds that the conviction under Sec. 397 IPC can not be maintained. At the same time, this court holds that the conviction of the appellant for committing the offence punishable under Sec.341 and 392 IPC is maintained.

6. As regard sentence this court finds that the appellant was arrested and remanded to judicial custody on 21.01.2015. Though he was ordered to be released on bail he was not released from jail and he continued to be in judicial custody till 29.08.2016. Therefore the appellant has remained in custody in this case for over 19 months.

7. Since the conviction of the appellant for committing the offence punishable under Sec.397 IPC has been set aside, the sentence of the appellant for committing the offence punishable under Sec. 392 IPC is reduced to the period already undergone by him in his case. To that extent, this court finds that the appeal has to be allowed and point is answered accordingly.

8. In the result, this appeal is allowed in part. The impugned judgment and sentence passed by the trial court dated

29.08.2016 in S.C.28/2016 is modified and conviction under Sec.397 IPC is set aside and the sentence of the appellant under Sec.392 IPC is reduced to the period already undergone by him in this case. The appellant is ordered to be released if he is not detained in connection with any other case. Sent back the records along with the copy of the judgment to the trial court and also to the Superintendent of Police jail concerned.

Dictated to Steno-typist, transcribed and typed by her, corrected and pronounced by me in the open court the 23rd day of July 2018.

*/sd/ R.Sridharan,
II Additional District Judge,
Salem.*