

**(2009) 04 DEL CK 0469**

**In the Delhi High Court**

**Case No :** Criminal A. No's. 947 and 1041 of 2006

Anil Kumar @ Kake

APPELLANT

Vs

State (NCT of Delhi) <BR> Harish Vs State

RESPONDENT

**Date of Decision :** 23-04-2009

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 120B, 34, 392, 394, 397

**Citation :** (2009) 04 DEL CK 0469

**Hon'ble Judges :** Sunil Gaur, J

**Bench :** Single Bench

**Advocate :** K.B. Andley and M.L. Yadav, in Criminal A. No. 947/2006, Mahesh Kumar Patel, Amicus Curiae in Criminal A. No. 1041/2006, D.S. Sidhu and D.P. Chopra, in Criminal A. No. 227/2007 and Criminal M. B. No. 1639/2007 and 984/2008 and Mahesh Kumar Patel, in Criminal A. No. 352/2007, for the Appellant; Amit Sharma, Additional Public Prosecutor, for the Respondent

**Final Decision :** Disposed Off

## Judgement

Sunil Gaur, J.—The above titled four appeals spring from an order of 20th October, 2006, passed by the trial court, whereby appellants-Yogesh, Jakir Ali and Anil Kumar @ Kake have been convicted and sentenced to undergo RI for seven years and fine of Rs. 2,000/- each, in default thereof to undergo RI for two months, for committing offence u/s 120B, r/w Section 394/397 of the IPC and to a further undergo RI for seven years and fine of Rs. 2,000/- each, in default thereof to undergo RI for two months, for the offence u/s 394/397, r/w Section 120B of the IPC. Appellant Harish has been convicted and sentenced to undergo RI for seven years and fine of Rupees two thousand, in default thereof to RI for two months for the offence u/s 120B, r/w Section 394 of the IPC and RI for seven year and fine of Rupees two thousand, in default thereof to undergo RI for two months, for the offence u/s 394, r/w Section 120B of the IPC.

2. The precise case of the prosecution is that on 5th October, 2002, upon receipt of DD No. 55-B, Sub-Inspector Saheb Singh (PW-16) along with Constable Jagat

Pal (PW-8) reached the spot where he came to know that the injured had already been removed to Trauma Center, where he recorded the statement of injured - Raj Kumar (PW-1). In his statement injured Raj Kumar (PW-1) narrated the purported incident, its gist is as under:

On 5th October, 2002, at about 9:30 p.m., injured Raj Kumar (PW-1), along with his father-in-law (PW-2), reached Laxmi Nagar Bus Stand for going to Old Railway Station and he was carrying an itachi, having a sum of Rupees five thousand in it and a bag, comprising house hold articles. While they were standing there, appellant/accused Anil and Zakir came and offered them to take a common auto as they also intended to go to the same destination, to which injured-Ram Kumar (PW-1) refused. In the meantime, a Maruti Van reached there, in which appellant/accused Yogesh was sitting on the rear seat while some other person was driving the van, and they offered them drop them by charging bus fare only. Ram Kumar (PW-1) along with his father-in-law and appellant/accused Anil and Zakir, entered the van and while the van reached I.T.O., the van was stopped and the appellant/ accused Anil took out a knife and attacked behind his ears and wrist. The van proceeded and other two appellants/accused also took out their knife and attacked him and when his father-in-law tried to intervene, he was also given knife blows. Ram Kumar (PW-1) tried to lift his Itachi but he was again given knife blows on the back of his head and was ultimately pushed out of the van and the goods which he was carrying, were snatched by the appellants/ accused. His father-in-law was also thrown out of the van after some distance.

3. On the basis of statement given by injured Ram Kumar (PW-1), FIR No. 418 of 2002, under Sections 394/397/34 of the IPC, was registered at Police Station I.P. Estate, Delhi and after completion of the necessary investigation, charge sheet in this case was filed in the court.

4. The trial court framed charges u/s 120B r/w Sections 392/394/397 of the IPC and under Sections 392/394 r/w Section 120B of the IPC against appellant/accused - Harish. Charge u/s 120B, r/w Section 392/394/397 of the IPC and u/s 392/394/397 r/w Section 120B of the IPC was framed against appellants/accusedYogesh, Jakir and Anil Kumar and trial of this case began as appellants/accused did not plead guilty to the charges framed against them under the aforesaid provisions of law.

5. During the trial, seventeen witnesses have deposed, out of whom, the material evidence is of injured Ram Kumar (PW-1), Kishan Dass (PW-2), father-in-law of PW-1 and a injured eye witness to the alleged incident, and Dr. Shusantu (PW-11) who proved the MLCs (EX. PW 11/A and EX. PW 11/B) of both the injured (PW-1 & PW-2). Sub Inspector Sahib Singh (PW-16) is the Investigating Officer of this case who had recorded statement of the injured (EX. PW1/A), prepared the rukka (EX. PW 16/A) and site plan (EX. PW16/B), formally arrested the four appellants/accused, recorded disclosure statement of appellant/accusedHarish, and carried out Test Identification Parade of appellants/accused

Anil, Zakir and Yogesh, while appellant/accused Harish refused to participate in TEST IDENTIFICATION PARADE proceedings.

6. All the four appellants/accused, when questioned by the trial court, denied the prosecution case and alleged that they were lifted from their respective houses and have been falsely implicated in this case. The four witnesses who have deposed in favour of appellants/accused are their relatives and they have supported the aforesaid stand of these four appellants/accused. Trial resulted in conviction of these appellants/accused as already reflected in opening paragraph of this judgment.

7. Since all these four appeals arise of common impugned judgment and order, therefore, with the consent of the parties, they have been heard together and are being disposed of by this common judgment.

8. Both the sides have been heard in these four appeals and the evidence on record, has been analysed.

9. On behalf of the appellants, Zakir Ali, Harish and Yogesh, learned Counsels for these three appellants have fairly conceded that the conviction of these three appellants for the offence u/s 394 of the IPC does not suffer from any infirmity. Upon perusal of the evidence on record, I find that learned Counsels for these three appellants are right in their submissions. However, on the point of sentence it has been urged on behalf of these three appellants that they are first offenders and are young persons and the sentence of RI for seven years, imposed upon them, for the commission of the offence u/s 394 of the IPC, is quite harsh and a lenient view on the point of sentence deserves to be taken.

10. As per the Nominal Roll of appellant - Zakir Ali, he has already undergone sentence of four years, eight months and twenty nine days and appellant Yogesh, has undergone sentence of four year and eight months and appellant Harish has undergone sentence of three years and one month and their conduct in jail has been found to be satisfactory.

11. The offence u/s 394 of the IPC, does not carry any minimum sentence. In the facts and circumstances of this case, the substantive sentence imposed upon appellants Zakir Ali s/o Manjoor Ali, Harish s/o Ganga Ram, and Yogesh s/o Rajesh Sharma, is reduced to the period already undergone by them for the offence u/s 394 of the IPC. However, the sentence of fine imposed upon them for this offence, is maintained.

12. In the case of Dilawar Singh v. State of Delhi 2007 (3) Crimes 388, Apex Court has held in clear terms that use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397 of IPC for the imposition of minimum punishment on another offender who has not used any deadly weapon.

13. Appellants - Zakir Ali and Yogesh have been also convicted by the trial court for the offence u/s 397 of the IPC, whereas, admittedly the assault made on the

witnesses by a knife, was by appellant/accused Anil alone and in such a situation, the conviction of appellants Zakir Ali and Yogesh for the offence u/s 397 of the IPC, with the aid of Section 120B of the IPC, is unwarranted and is infact unsustainable in law. Resultantly, the conviction of appellants Zakir Ali and Yogesh for the offence u/s 397 of the IPC with the aid of Section 120B of the IPC, is set aside.

14. Consequentially, appeals of appellants Zakir Ali, Yogesh and Harish, are partly allowed in the terms as aforesaid. These three appellants be apprised of this order through the concerned Jail Superintendent.

15. Now, I shall deal with the appeal of appellant - Anil @ Kakey. It is a matter of record that this appellant who was not identified in the Test Identification Parade, has been convicted by the trial court for the offences u/s 397/394 of the IPC on the basis of the identification of this appellant by the first informant Raj Kumar (PW-1) in the court. Trial court has relied upon a decision of the Apex Court in the case of Malkhansingh and Others Vs. State of Madhya Pradesh, to hold that identification by the court is the substantive evidence and Test Identification Parade can provide corroboration only to the identification of the accused by a witness in the court.

16. It is true that the identification of an accused by a witness in the court is a substantive evidence, but if it is negated in the a prior Test Identification Parade, then cogent reasons are required for relying upon the identification of an accused by a witness in the court. Trial court has brushed aside the submission of the defence regarding appellant Anil being entitled to benefit of doubt as this appellant was not identified in the Test Identification Parade by the star witness PW-1, by simply observing that there is no reason as to why complainant/injured PW-1 would falsely identify appellant/accused Anil. To say the least, an accused is required to explain, as to why he has been falsely implicated, only after the prosecution is able to establish the identity of the accused satisfactorily. Raj Kumar (PW-1) in his evidence has been cross examined by the defence regarding his inability to identify appellant/accused -Anil in the Test Identification Parade. This witness PW-1 has admitted that he could not identify appellant/accused Anil in Test Identification Parade and had volunteered that he could not do so because this appellant/accused had changed his hair style.

17. From the evidence of this solitary witness PW-1, it becomes clear that he had sufficient opportunity to observe the two culprits (appellant/accused Anil is said to be one of them) who were standing near this witness at Laxmi Nagar Bus Stop, but in the First Information Report, this witness has not given any description of those two culprits except that they were aged twenty five or twenty six years.

18. Without there being any descriptive features of the culprits in the FIR, identification of one of them, for the first time in the court, cannot be accepted on the face of it, especially in view of the fact that star witness PW-1 could not

identify appellant/accused Anil in the Test Identification Parade. In the absence of prior Test Identification Parade, implicit reliance cannot be placed upon the identification of an accused by a witness in the court, may not be a correct proposition but inability to identify a suspect as an accused in Test Identification Parade is altogether different than not holding Test Identification Parade or not participating in the Test Identification Parade. Inability to identify an accused in Test Identification Parade, is certainly a circumstance which goes in favour of the accused and it causes considerable dent in the testimony of the witness who identifies such an accused for the first time before the court and that too, in the absence of any descriptive features of the culprit in the FIR. In these peculiar facts, reliance placed by the trial court upon Malkhan Singh's case (supra), is misplaced.

19. Upon taking an overall view of the entire evidence on record, I find that appellant/accused Anil Kumar @ Kake son of Sushil, is certainly entitled to benefit of doubt and while extending benefit of doubt to this appellant, he is hereby acquitted of the charges framed against him. He is in custody. He be released forthwith, if not wanted in any other case.

20. To conclude, appeal of appellant-Anil Kumar @ Kake is allowed and the appeals of the remaining three appellants - Jakir Ali, Harish and Yogesh, are partly allowed and the substantive sentence imposed upon them is reduced to the period already undergone by them. They are in custody. Subject to deposit of fine by them, they be released if not wanted in any other case.

21. These four appeals and the pending applications, are accordingly disposed of.