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**(2013) 07 DEL CK 0032**  
**In the Delhi High Court**  
**Case No : Criminal A. 313 of 2011**

Avid Ali

APPELLANT

Vs

State Govt. of NCT of Delhi

RESPONDENT

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**Date of Decision :** 02-07-2013

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 394, 397, 398

**Citation :** (2013) 6 ILR Delhi 4160

**Hon'ble Judges :** Mukta Gupta, J

**Bench :** Single Bench

**Advocate :** Yash Tandon and Appellant in custody, for the Appellant; Manoj Ohri, APP and Yashbir Singh, SI PS New Usmanpur, for the Respondent

**Final Decision :** Disposed Off

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## Judgement

Mukta Gupta, J.—By the present appeal, the Appellant challenges the judgment dated 4th October, 2010 convicting the Appellant for offences punishable u/s 394 /397 IPC and the order on sentence dated 5th October, 2010 awarding rigorous imprisonment for a period of 6 years and a fine of Rs. 5000/- for offence punishable u/s 394 IPC and rigorous imprisonment for a period of 7 years for offence u/s 397 IPC. Learned counsel for the Appellant contends that the alleged incident took place in residential area on 21st December, 2006 at about 7.50 PM when public witnesses would have been around, however no public witness was associated. Even as per the case of the prosecution, in view of the statement of PW 1 and PW 2, nothing has been robbed from the complainant and thus the sentence for imprisonment as imposed is disproportionately higher. Further, as per the MLC the injury was also simple in nature. The Appellant has by now undergone 6 years 8 months imprisonment with remissions out of the 7 years awarded and thus in the alternative the sentence in default of payment of fine i.e. simple imprisonment of six months be set aside.

2. Learned APP for the State on the other hand contends that from the testimonies of PW 1 and PW 2, the offence committed by the Appellant is proved

beyond reasonable doubt. The Appellant injured PW 1 with a hasia (knife). The testimony of PW 1 and PW 2 is further corroborated by the testimony of PW 3 Dr. Banarsi who has exhibited the MLC Ex. PW 3/A. PW 1 and PW 2 despite detailed cross-examination were recalled vide order dated 11th August, 2010 passed by the learned Trial Court and a suggestion of previous enmity was put to them. However, PW 1 and PW 2 denied the same. In view of the testimony of eye-witnesses, particularly the injured eye-witnesses, the prosecution has proved its case beyond reasonable doubt and thus no case for acquittal is made out.

3. Heard learned counsel for the parties. Briefly the case of the prosecution as per the statement of PW 1 Sunil Kumar, the complainant is that on 21st December, 2006 between 6.00 to 7.00 PM he was returning to his house after purchasing a book along with his friend Janardhan Singh PW 2. When they were passing through DDA park, Shastri Park he received a mobile phone call and to attend the same he sat down on a bench, while his friend was standing. In the meantime two persons came and demanded cigarette, match stick, tobacco etc. One of the two persons came from behind, who was pointed out as Abid, the present Appellant. It is further stated that the Appellant took out a knife type object and placed it on his neck and asked him to hand-over his belongings to him. The other boy, who accompanied the Appellant, remained standing at a distance. PW 1 caught hold of the hand of the Appellant followed by PW 2 catching hold of him. In the meantime the other boy accompanying the Appellant fled away. PW 1 and PW 2 brought the Appellant in the area of Shastri Park and called the Police. PW 1 sustained an injury on his right hand with the knife when he tried to catch it. The Appellant was handed over to the Police and the statements were duly recorded. Since PW 1 and PW 2 did not identify the accused Nasir in the Court, he was acquitted by the learned Court. However, a perusal of the evidence shows that the material evidence of showing the knife and demanding the belongings relates to the present Appellant, as the role attributed to Nasir was that he was standing at a distance. Both the witnesses have been cross-examined by the learned APP and the learned counsel for the Appellant. During cross-examination, no material improvements or contradictions have been shown. The Appellant was apprehended at the spot. The testimony of PW 1 and PW 2 is further corroborated by the testimony of PW 3 Dr. Banarsi who prepared the MLC of PW 1, Ex. PW 3/A. As per the MLC, PW 1 received an incised wound on the right index finger.

4. A perusal of the evidence of PW 1 and PW 2 shows that no robbery was committed and it was case of attempt to robbery only. Section 394 provides that if any person in committing or in attempting to commit robbery voluntarily causes hurt, such a person and any other person jointly concerned in committing or attempting to commit such robbery shall be punished with imprisonment for life or with rigorous imprisonment for a term which may extend to 10 years and shall also be liable to fine. In the present case it has been proved beyond reasonable doubt on record that the Appellant attempted to commit robbery by voluntarily causing hurt to PW 1. Thus, the learned Trial Court committed no

error in convicting the Appellant for offence u/s 394 IPC. Further Section 397 IPC provides that if at the time of committing robbery or dacoity the offender uses any deadly weapon or causes grievous hurt to any person or attempt to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than 7 years. In the present case robbery has not been committed, only an attempt to robbery was made which was foiled. Thus, Section 398 IPC would be attracted in the facts of the case, as the same provides that if at the time of attempting to commit robbery or dacoity the offender is armed with any deadly weapon, the punishment would be imprisonment not less than 7 years. The Appellant was charged for offence u/s 397 IPC and convicted thereof. However, from the facts of the case offence u/s 398 IPC is made out and the same being a minor offence of Section 397 IPC, no prejudice will be caused to the Appellant if the conviction is altered from Section 397 IPC to Section 398 IPC. The minimum sentence prescribed u/s 398 IPC is also 7 years imprisonment. In the facts and circumstances of the case, the conviction of the Appellant is altered to one u/s 394 /398 IPC. Learned counsel for the Appellant has contended that in default of payment of fine, sentence of imprisonment for six months be waived. Section 394 IPC provides for punishment with imprisonment for life or with rigorous imprisonment for a term which may extend to 10 years and also to pay a fine. Thus, payment of fine is mandatory u/s 394 IPC. In the present case the fine imposed is Rs. 5000/-. However, for non-payment of fine, the default sentence provided is simple imprisonment for six months which in my opinion is on the higher side. It is therefore directed that in case fine of Rs. 5000/- is not paid by the Appellant, he would undergo Simple imprisonment for a period of three months. The appeal is disposed of with the modifications in the judgment of conviction and order on sentence accordingly. Appellant be informed through the Superintendent Tihar Jail.