

(2013) 11 DEL CK 0224
In the Delhi High Court
Case No : Criminal A. 776 of 2001

Mukesh Kumar

APPELLANT

Vs

State Govt. of N.C.T. of Delhi

RESPONDENT

Date of Decision : 22-11-2013

Acts Referred:

Penal Code, 1860 (IPC) — Section 34, 392, 394, 395, 397

Citation : (2013) 6 ILR Delhi 4712 : (2014) 1 JCC 41

Hon'ble Judges : S.P. Garg, J

Bench : Single Bench

Advocate : Sandeep Kumar, for the Appellant; M.N. Dudeja, APP, for the Respondent

Final Decision : Disposed Off

Judgement

S.P. Garg, J.

Crl. M.A. 17633/2013

For the reasons mentioned in the application, the non-bailable warrants issued against the appellant vide order dated 13.11.2013 stands cancelled. The application stands disposed of.

CRL. A. 776/2001

1. With the consent of parties, the appeal is taken up for hearing today. The date already fixed in the matter i.e. 17.12.2013 stands cancelled. Mukesh Kumar (the appellant) questions the legality and correctness of a judgment dated 12.09.2001 in Sessions Case No. 81/98 arising out of FIR No. 906/1997 registered at Police Station Kalkaji by which he was held guilty for committing offence u/s 397/34 IPC and sentenced to undergo Rigorous Imprisonment for seven years with fine Rs. 500/-. Allegations against him were that on 08.12.1997 at about 02.00 P.M. at Ma Anandmai Marg, opposite Giri Nagar Masjid, he and his companions Bhushan and Mahesh (not arrested) robbed Bhupender Kumar

(PW-1) of Rs. 1 lac withdrawn by him from Canara Bank, Okhla Industrial Area after inflicting injuries with knife. The injured was taken to hospital and was medically examined. The Investigating Officer lodged First Information Report after recording Bhupender Kumar's statement (Ex. PW-1/A). During investigation statements of witnesses conversant with the facts were recorded. Mukesh Kumar was arrested in FIR No. 29/1998 registered at Police Station Okhla Industrial Area and pursuant to his disclosure statement, he was taken into custody in this case. In the Test Identification Proceedings, he was identified by the complainant. After completion of investigation, a charge-sheet was filed and Mukesh Kumar was duly charged and brought to trial. His associates could not be apprehended and arrested. The prosecution examined 12 witnesses. In his 313 statement, the appellant denied complicity in the crime. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court by the impugned judgment held him guilty u/s 397/34 IPC.

2. During arguments, learned counsel for the appellant, on instructions, stated at Bar that the appellant has not opted to challenge the findings of the Trial Court on conviction u/s 394 IPC. He, however, prayed to take lenient view as the appellant had already undergone custody in this case for more than five years. Learned Additional Public Prosecutor has no objection to consider the mitigating circumstances.

3. Since the appellant has given up challenge to the findings of the Trial Court on conviction u/s 394 IPC where during robbery PW-1 (Bhupender Kumar) was deprived of a bag containing Rs. 1 lac, he after inflicting injuries and there is overwhelming evidence in the statement of the complainant whereby he identified him in the TIP proceedings as well as in the court, the conviction u/s 394 IPC is affirmed. The prosecution was unable to establish beyond doubt if at the time of committing robbery, the appellant was in possession of any deadly arm/weapon or it was used by him. PW-1 (Bhupender Kumar) in examination-in-chief was unable to disclose as to which of the three assailants was armed with knife and who inflicted injury to him. He was not specific if the appellant-Mukesh had caused injuries to him with knife. The crime weapon was not recovered from the possession of the accused or at his instance. The Supreme Court in *Ashfaq Vs. State (Govt. of NCT of Delhi)*, held:

Section 397, does not create any new substantive offence as such but merely serves as complementary to Section 392 and 395 by regulating the punishment already provided for dacoity by fixing a minimum term of imprisonment when the dacoity committed was found attendant upon certain aggravating circumstances viz. use of deadly weapon, or causing of grievous hurt or attempting to cause death or grievous hurt. For that reason, no doubt the provision postulates only the individual act of the accused to be relevant to attract section 397 IPC and thereby inevitably negates the use of principle of constructive or vicarious liability engrafted in Section 34 IPC. Each one of the accused in this case were said to have been wielding a deadly weapon of their own, and thereby squarely fulfilled

the ingredients of Section 397 IPC do not have any reference to section 34 IPC.

In view of it, the individual role of the accused has to be considered in relation to the use or carrying of a weapon at the time of robbery for attracting the provisions of Section 397 IPC. In the instant case, the prosecution could not establish that the appellant was also carrying a deadly weapon with him at the time of alleged robbery. Hence conviction with the aid of Section 397 IPC cannot be legally sustained. By an order dated 12.09.2001 Mukesh Kumar was awarded Rigorous Imprisonment for seven years with fine Rs. 500/- u/s 397 IPC. The substantive sentence is altered to Section 394/34 IPC. Appellant's nominal roll reveals that he had already undergone four years, five months and sixteen days incarceration as on 30.09.2004 besides earning remission for 11 months and six days. His overall conduct in jail was satisfactory and he had no previous criminal antecedents. The other associates could not be apprehended or arrested during investigation. The appellant was not found in possession of robbed money. Considering these mitigating circumstances, the period already spent by him in custody is taken as his substantive sentence. The fine is stated to have already been deposited. The appellant need not surrender in the trial court. Conviction u/s 397 IPC is altered to Section 394/34 IPC and the appellant is released for the period already undergone by him in this case.

The appeal stands disposed of in the above terms. A copy of the order be sent to Jail Superintendent, Tihar Jail for intimation. Trial Court record along with a copy of this order be sent back forthwith.