

**Vikram @ Ganja Vs. State**

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**Court :** Delhi

**Decided On :** Feb-17-2014

**Judge :** S. P. Garg

**Appellant :** Vikram @ Ganja

**Respondent :** State

**Judgement :**

\* IN THE HIGH COURT OF DELHI AT NEW DELHI RESERVED ON : January 29, 2014 DECIDED ON : February 17, 2014 + CRL.A. 623/2012 VIKRAM @ GANJA ..... Appellant Through : Mr.V.K.Shukla, Advocate. versus STATE ..... Respondent Through : Mr.Lovkesh Sawhney, APP for the State. CORAM: MR. JUSTICE S.P.GARG S.P.GARG, J.

1. This appeal has been preferred by Vikram @ Ganja to challenge the legality of a judgment dated 30.03.2012 in Sessions Case No.122/11 arising out of FIR No.158/07 registered at Police Station Civil Lines by which he and his associates were held perpetrators of the crime under Section 395/397 IPC. By an order dated 03.04.2012, he was awarded RI for seven years with fine ` 5,000/- under Section 395 read with Section 397 IPC and in default of payment of fine to further undergo SI for five months.

2. The prosecution case, in brief, as projected in the charge- sheet is that on 26.06.2007 at about 3.15 a.m., at outer ring road, near CNG Pump, Chandgiram

Akhara, Delhi, the appellant and his associates Sameer @ Sonu, Raj Kumar, Ashok Kumar and Amit @ Bouncer in furtherance of common intention committed decoity of 28 bags of plastic raw material loaded in a Tempo No.DL-1LH-4864 from the possession of its driver Jahangir Ali. It was further alleged that Vikram @ Ganja used a knife while committing decoity. Saleem @ Khan was found in possession of 28 bags filled with plastic raw material which he received or retained knowing or having reasons to believe to be robbed / stolen property. During the course of investigation, statements of witnesses conversant with the facts were recorded. After completion of investigation a charge-sheet was filed against all of them except Amit @ Bouncer who faced proceedings before Juvenile Justice Board. The accused persons were duly charged and brought to trial. The prosecution examined fourteen witnesses. In 313 statement, the accused persons pleaded false implication and denied their complicity in the crime. The trial resulted in their conviction under Section 395/397 IPC. It is pertinent to mention that Saleem and Ashok in CrI.A.Nos.481/2012 and 480/2012 respectively confessed their guilt and their appeals were disposed of by this Court vide order dated 25.07.2013.

3. Conviction of the appellant is based upon the sole testimony of PW-3 (Jahangir Ali) who lodged First Information Report, soon after the incident. In his statement (Ex.PW-3/A) recorded at the earliest point of time, the complainant gave detailed account of the occurrence and narrated as to how and under what circumstances, he was robbed of 28 bags of plastic raw material by the assailants. He claimed to identify them. In his deposition in the Court, he supported the version given to the police without variation and deposed that he used to drive Tempo No.DL1LC-4864 and on 25.06.2007 he loaded 28 bags of plastic raw material from 1665 Industrial Area, Narela, to unload at Okhla. When he reached at bye-pass, near Majnu Tilla, Red Light at about 09.00 p.m., one of the tyres got punctured; he replaced the stepney and proceeded further. When he reached near Chandgi Akhara, CNG petrol pump at outer road at 12 night, one of the tyres again punctured and he sided the tempo by the road. Having no means to go ahead, he went to sleep in the tempo. At around 03.00 a.m., an individual came and asked for a screw driver. When he (the complainant) told its non-availability, he went away. After about 15 minutes, he was caught hold of his legs and hairs by the assailants and a knife

was put on his neck. They robbed 28 bags containing raw plastic material in the tempo; put these in a RTV and fled towards ISBT. He made telephone call to police at 100. In Court statement, he identified the assailants facing trial before the Court and attributed specific role to Vikram who had put knife on his neck. The appellant did not cross-examine the witness despite availing an opportunity. The facts narrated by the complainant remained unchallenged and unrebutted in the cross-examination. No motive was assigned to the complainant to falsely implicate the appellant with whom he had no prior acquaintance or animosity. PW-4 (Neeraj Jain) claimed ownership of the 28 bags and took these on superdari, vide superdaganama (Ex.PW-4/A). PW-5 (Anil Kumar) produced RTV bearing No.DL-1VA-1402 used to carry away the robbed bags. On 01.07.2007, all the accused persons were apprehended in case FIR No.161/07 under Section 399/402/34 IPC registered at Police Station Civil Lines. Pursuant to disclosure statements recorded in the said proceedings, their involvement in the present case emerged. Saleem pursuant to his disclosure statement (Ex.PW-12/D) recovered four bags of plastic raw material which were seized by seizure memo (Ex.PW-12/G). During police remand, he got 24 bags recovered from house No.E-3/27 seized vide seizure memo (Ex.PW-7/A). PW-7 (SI Manish Kumar) proved the recovery of 24 bags on his instance and his testimony remained unshattered despite cross-examination. Crl.A.No.623/2012 PW-8 (Insp.Raj Kumar) also Page 4 of 7 deposed on similar lines and the accused did not opt to cross-examine to challenge his version. PW-11 (Lal Chand) deposed that tempo in question was in possession of Jahangir (the complainant) on the relevant date and time. The accused did not give plausible explanation to the incriminating circumstances appearing against him. They declined to join the Test Identification Proceedings without cogent reasons. The prosecution was able to establish beyond doubt that the appellant was one of the assailants who committed decoity and deprived the complainant of 28 bags of plastic raw material on the day of occurrence.

4. Section 397 fixes a minimum term of imprisonment. It is imperative for the Trial Court to return specific findings that the assailants were armed with deadly weapons and it were used by them before convicting them with the aid of Section 397. In the instant case, the evidence is lacking on this aspect and benefit of doubt is to be given to the appellant.

5. In Crl.A.515/2010 Gulab @ Bablu vs. The State (NCT of Delhi), this court held:

8. A perusal of the aforesaid provision makes it clear that if an offender at the time of committing robbery or dacoity, uses any deadly weapon or causes grievous hurt or attempts to cause death or grievous hurt to any person the imprisonment with which such offender shall be punished shall not be less than seven years. This provision prescribes minimum sentence which shall be handed down to such an offender. In this case neither the victim has sustained grievous hurt nor there is an evidence that attempt was made to cause death or grievous hurt to the victim nor is there any evidence to show that the knife used at the time of committing robbery was a deadly weapon. Simple injuries have been sustained by the victim on his thigh.

9. In Charan Singh vs. The State, 1988 Crl.L.J.

NOC28(Delhi), Single Judge has held as under :

At the time of committing dacoity one of the offenders caused injury by knife on the hand of the victim but the said knife was not recovered. In order to bring home a charge under Section 397, the prosecution must produce convincing evidence that the knife used by the accused was a deadly weapon. What would make 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 by the prosecution that the knife use by the accused was a deadly weapon. In the absence of such an evidence and particularly, the non-recovery of the weapon would certainly bring the case out of the ambit of Section 397. The accused could be convicted under Section 392.

10. In Samiuddin @ Chotu vs. State of NCT of Delhi,175 (2010) Delhi Law Times 27, a Bench of co-ordinate jurisdiction has held that when a knife used in the commission of crime is not recovered the offence would not fall within the ambit of Section 397 IPC. In Rakesh Kumar vs. The State of NCT of Delhi 2005 (1) JCC334 and Sunil @ Munna vs. The State (Govt. of NCT), 2010 (1) JCC388 it was observed that in the absence of recovery of the knife used by the appellant at the time of commission of robbery charge under Section 397 IPC cannot be

established.

11. In the present case, indubitably the knife used for commission of crime was not recovered. Accordingly, in my view, appellant could not have been sentenced under Section 397 IPC and Trial Court has erred on this point.

6. In the instant case, admittedly no injuries, whatsoever, were inflicted to the complainant by any weapon. The weapon used in the crime was not recovered from the appellant or at his instance. The complainant did not give description, size or dimension of the knife used in the crime. In his deposition he did not described the broad feature of the weapon used at the time of occurrence. Thus, the conviction of the appellant with the aid of Section 397 was not permissible and is set aside. For sentence under Section 395 IPC, the appellant is to be treated at par with the convict Ashok who was awarded rigorous imprisonment for four years vide order dated 25.07.2013. Accordingly, the sentence qua the present appellant is modified and reduced to rigorous imprisonment for four years. Other terms and conditions of the sentence order are left undisturbed.

7. The appeal stands disposed of in the above terms. Court record be sent back forthwith. (S.P.GARG) JUDGE February 17, 2014/sa Trial

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