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Imran @ Akhlakh Vs. State

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Court : Delhi

Decided On : Apr-22-2015

Judge : Sunita Gupta

Appellant : Imran @ Akhlakh

Respondent : State

Advocate for Pet/Ap. : Mr. Riaz Mohd, Ms. Ritu Gauba, Mr. K.N. Mishra

Judgement :

$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision:

22. d April, 2015 + CRL.A. 1351/2013 IMRAN @ AKHLAKH Through : ..... Appellant Mr. Riaz Mohd., Advocate. versus STATE Through : + CRL.A. 553/2014 AASH MOHD. @ ASHU Through : ..... Respondent Ms. Ritu Gauba, APP for State. ..... Appellant Mr. K.N. Mishra, Advocate. versus STATE Through : ..... Respondent Ms. Ritu Gauba, APP for State. CORAM: HON'BLE MS. JUSTICE SUNITA GUPTA

JUDGMENT
: SUNITA GUPTA, J.

1. Complainant Ganga Ram Jat was running a garment business at X/234, Gali No.0, Ram Nagar, Gandhi Nagar, Delhi. On 8th November, 2009, he was present in his shop when at about 7:30 pm, two boys entered the shop armed with knife

and country made pistol and pulled down the shutter of the shop. He was robbed of approximately Rs.2,50,000/-, bank drafts worth Rs.6.5 lacs, his gold ring and mobile. Thereafter his hands were tied. On hearing the knock at the shutter, they opened the shutter and found Hanuman Prasad, employee of the complainant, who was threatened to kill and was asked to run upstairs. Therefore, both the boys ran away. He had seen these two boys along with one boy Akhlakh who used to do fabrication work at Lokesh Garments about half an hour ago. He informed the police on which DD No.31A was recorded. PW3-SI Chanderpal along with Constable Sukhbir reached the spot where he recorded statement of Ganga Ram Ex.PW2/A which culminated in registration of FIR Ex. PW1/A. Further investigation was entrusted to Sub Inspector Nalin Verma (PW10). Portrait of accused was got prepared. Call detail record of mobile phone No.9990489985 and 9990303816 of accused Imran @ Akhlakh was obtained and his location was found to be of Gandhi Nagar. Call details of mobile phone No.9718307229 and mobile phone 9990303816 was obtained which confirmed that both these numbers were in contact of each other at the time of incident and subsequent thereto and their location at the time of incident was found to be of Gandhi Nagar area.

2. On 13th November, 2009, on the basis of secret information, Accused Imran @ Akhlakh was apprehended from Pusar Chauraha Thana Doghat, Baghpat, Uttar Pradesh. He was arrested. He made a disclosure statement Ex.PW2/G and got recovered the robbed mobile phone, SIM card, cheques, bank drafts and photograph of Aash Mohd. from his factory at Prem Garden, Sahibabad which was taken into police possession. Motorcycle bearing No.DL1R7539used in the incident was also recovered from the factory.

3. Search for accused Aash Mohd. was made. Crl. A. 1351/2013 & 553/2014 evading arrest, NBWs were got issued against him followed by issuance of process u/s 82/83 Cr.P.C. and ultimately he was declared proclaimed offender on 9th November, 2010. On 15th November, 2011, accused Aash Mohd. was arrested by Head Constable Rambir of Police Station Gandhi Nagar. After seeking permission from the learned Metropolitan Magistrate, he was arrested in this case. He made a disclosure statement Ex.PW7/A. On 24th November, 2011, his Test Identification proceedings were conducted by Sh. J.P. Nahar, Metropolitan

Magistrate, Ex.PW9/C, however, accused refused to join the proceedings. On 28th November, 2011, complainant identified the accused in police station.

4. Efforts were made to arrest co-accused Israr but due to incomplete address, he could not be arrested.

5. After completing investigation, charge sheet was submitted against both the accused u/s 392/397/120B/411 IPC and 25/27/54/59 Arms Act.

6. Both the accused pleaded not guilty to the charge and claimed trial. In order to substantiate its case, prosecution in all examined 10 witnesses. All the incriminating evidence was put to the accused persons while recording their statement u/s 313 Cr.P.C. wherein they took the plea that Ganga Ram was running his factory and doing the job of encashment of cheques of the labourers, who were working nearby. It was further alleged that Imran @ Akhlakh used to go to Lokesh Garments where complainant was doing the business on the ground floor and he used to go to him for encashment of cheques, thus the complainant was known to him. There was some money dispute on the issue of encashment of cheques. As such, he got him falsely implicated in this case. Similar plea was taken by accused Aash Mohd. However, both the accused did not prefer to lead any defence evidence.

7. After considering the evidence adduced by the prosecution and the defence of the accused, vide impugned judgment dated 21st September, 2013, both the accused were convicted under Section 120B r/w Section 392 IPC. Accused Aash Mohd. was also held guilty under Section 392/34/397 IPC and 25/27 Arms Act. Accused Imran @ Akhlakh was held guilty of offence u/s 411 IPC. Vide order dated 24th September, 2013, they were sentenced as under:(i) Convict Imran @ Akhlakh was awarded five years rigorous imprisonment and fine of Rs.5000/- for the offence punishable u/s 120B IPC r/w Section 392 IPC. In default of payment of fine, he was to undergo simple imprisonment for six months. (ii) Convict Imran @ Akhlakh was further awarded two years rigorous imprisonment and fine of Rs.5000/- for the offence under Section 411 IPC. In default of payment of fine, he was to undergo simple imprisonment for six months. (iii) Convict Aash Mohd. @ Ashu was awarded five years rigorous imprisonment and fine of Rs.5000/- for the

offence punishable under Section 120B IPC r/w Section 392 IPC. In default of payment of fine, he was to undergo simple imprisonment for six months. (iv) Convict Aash Mohd. @ Ashu was awarded five years rigorous imprisonment and fine of Rs.5000/- for the offence punishable u/s 392/34 IPC. In default of payment of fine, he was to undergo simple imprisonment for six months. (v) Convict Aash Mohd. @ Ashu was further awarded seven years rigorous imprisonment for offence punishable u/s 397 IPC. (vi) Convict Aash Mohd @ Ashu was further awarded five years rigorous imprisonment and fine of Rs.5000/- for the offence punishable u/s 25 Arms Act. In default of payment of fine, he was to undergo simple imprisonment for six months. (vii) Convict Aash Mohd. @ Ashu was awarded seven years rigorous imprisonment and fine of Rs.5000/- for the offence punishable u/s 27 Arms Act. In default of payment of fine, he was to undergo simple imprisonment for six months.

8. Feeling aggrieved, separate appeals bearing Crl.A.Nos. 1351/2013 and 553/2014 have been filed by appellant Imran @ Akhlakh and Aash Mohd. @ Ashu respectively.

9. Assailing the findings of learned Trial Court, it was submitted by the learned counsel for Imran @ Akhlakh that the only role attributed to this accused in the initial statement made by the complainant is that he saw two accused persons talking to this accused in the gali 45 minutes prior to the incident. However, while appearing as a witness, he made substantial improvement by alleging that he was one of the robbers who participated in committing robbery. However, his testimony in this regard did not find corroboration from PW4 Hanuman Prasad who also deposed that he saw him outside the office of the complainant. It was submitted that nobody had heard appellant talking to the co-accused and it is not clear as to what talks took place between them. Further there is no independent witness to the incident. The call details do not support the case of prosecution. There is contradiction in the testimony of the witnesses. Moreover, as per the prosecution case, the appellant got recovered certain articles belonging to the complainant. It was submitted that the articles were planted on him as the same were of no use to the accused, as such, why would he keep these articles with him so that on a future date he may be arrested by police and sent to jail. Under the circumstances,

prosecution has failed to bring home the guilt of the accused beyond reasonable doubt, as such, impugned judgment be set aside and accused be acquitted.

10. Counsel for Aash Mohd. challenged the findings on the ground that the offence u/s 397 IPC is not made out. Weapon of offence has not been recovered. Testimony of the complainant is inconsistent. Sometimes, he alleges that the accused was in possession of knife while at other place, he alleges that he was armed with country made pistol. Only on the basis of photograph recovered from co-accused Imran, he was implicated in this case. Offence u/s 120B IPC is not made out, inasmuch as, the accused were not known to each other before. There is nothing to show that they entered into any conspiracy or there was any meeting of mind. That being so, the findings cannot be sustained and the impugned judgment be set aside.

11. Rebutting the submissions of learned counsels for the parties, it was submitted by the learned Additional Public Prosecutor for the State that the testimony of the complainant is cogent and consistent. It seems that there is typographical error in the statement of complainant regarding accused Israr who could not be arrested being one of the persons who robbed the complainant instead of Imran @ Akhlakh. Moreover, conspiracy between the accused persons stands proved from the fact that immediately after the incident, recovery of various articles was made at the instance of this accused. So far as accused Aash Mohd. is concerned, this accused has refused to join TIP proceedings, as such, adverse inference is liable to be drawn against him. He was duly identified by the complainant and proved the role played by him in committing robbery. Under the circumstances, the impugned judgment does not suffer from any infirmity which calls for interference. As such, the appeal be dismissed.

12. As regards the actual incident, the star witness of prosecution is PW2 complainant Ganga Ram Jat, who in his complaint Ex.PW2/A unfolded that he was running his business of garments at X/234, Gali No.0, Ram Nagar, Gandhi Nagar, Delhi. On 8th November, 2009, at about 7:30 pm, he was present in his office. Two boys out of whom one was aged about 26-27 years, having height of about quarter to six feet, armed with katta and wearing cream colour shirt and white

colour pant and another boy aged about 20-22 years having height of 5 feet, armed with knife and wearing black striped baniyan and dark colour pant entered his office and pulled down the shutter. They abused him. The boy who was armed with katta pointed out the same on his left ear while other put knife on his neck and made him to open the iron almirah and took out a sum of approximately Rs.2,50,000/- of different denominations, details of which was given and the boy who was armed with knife kept the same in his baniyan. Thereafter, they removed bank drafts worth Rs.6 lacs which were of Bombay, Surat and Delhi, on which he had put his slip of G.R. Prints and details of parties from whom the drafts were received, and kept the same in his baniyan. Thereafter, he was robbed of his gold rings weighing 5 gms. and his mobile phone make Nokia (No.9312208317) lying at his counter. His hands were tied with a plastic rope and one towel was inserted in his mouth. During this period, there was a knock at the shutter. They rushed towards the shutter and the boy who was armed with country made pistol, threatened his friend Hanuman Prasad who was outside the office asking him to go upstairs failing which he would be killed. Hanuman Prasad being scared went upstairs. About 45 minutes prior to the incident, when he had gone to urinal in the street, he had seen these boys talking to Akhlakh who was working as a fabricator in Lokesh Garments. He could indentify both the boys.

13. In his deposition made before the Court he has substantiated the allegations made in the initial complaint and further deposed that he managed to untie the rope used for tying his hands and informed police at 100 number from his adjoining shop. Police officials from Police Station and PCR Van reached there. SI Chander Pal untied his another hand. He gave his statement Ex.PW2/A to the police on which FIR was registered.

14. The witness was subjected to cross-examination by learned defence counsel, however, as regards the incident of robbery, the same was not challenged by any of the accused. As such, in regard to the incident, the testimony of the complainant in fact goes unrebutted, unchallenged and unshattered. Moreover, his testimony finds corroboration from PW4-Hanuman Prasad who was working in the shop of the complainant Ganga Ram in the year 2009. He deposed that on 8th November, 2009, at about 7:30 pm, he was present with his employer Ganga Ram in his office

and then went to collect the payment from the parties in the area of Gandhi Nagar. After about 20 minutes, he returned back and found the shutter of the office closed. He found accused Akhlakh outside the office and made inquiry from him about Ganga Ram who informed him that his employer had gone somewhere. He searched for Ganga Ram in nearby shops but could not find him then he returned back to the office. He lifted the shutter and the same was unlocked and then he found two persons in the office. Ganga Ram was apprehended by two persons from the back. One of them threatened him yahan se bhag ja nahin to goli mar denge by pointing out pistol on him. He went upstairs. After some time on hearing the noise of rolling down of the shutter, he came down. He lifted the shutter again and found that both the hands of Ganga Ram were tied. He untied his hands and police was informed.

15. Their testimony also finds corroboration from PW2 SI Chanderpal, who on receipt of a call vide DD No.31A regarding robbery at the shop of Ganga Ram, went along with Constable Sukhbir to the spot where he met Ganga Ram who made a complaint of robbery by using firearm etc. and his right hand was found tied with the sutli. He untied the rope and then made formal inquiry from him and recorded his statement Ex.PW2/A on which he made endorsement and got the FIR registered. The rope was also taken into possession. Site plan of the place of incident was prepared.

16. The question for consideration is regarding the involvement of the accused persons in the crime.

17. As regards accused Imran @ Akhlakh, undisputedly he was known to the complainant as well as PW-4-Hanuman Prasad much prior to the incident, inasmuch as, accused was having a workshop of jeans pants and used to go to Lokesh Garments for payment. Office of Lokesh Garments was situated on the first floor whereas office of the complainant was on the ground floor. According to the accused himself, he used to visit the office of the complainant as the complainant used to deal in business of encashment of cheques of the labourers and used to give cash against cheques. As per the version of the complainant, 45 minutes prior to the incident, he had seen this accused with other two co-accused,

who committed robbery, and talking to each other in the gali.

18. Learned counsel for the appellant urged that except for the fact that the complainant saw this accused talking to the other two coaccused in the street, there is no other incriminating piece of evidence against him so as to convict him. However, this submission, which on first sight seemed attractive, deserves rejection in view of the fact that according to SI Nalin Verma (PW10), complainant was again joined investigation on 9th November, 2009 and he collected details of mobile number of accused Imran. He was able to arrange the location of the accused through his mobile number and it was confirmed that accused was present at the spot at the time of incident. Mobile number of the accused and some other mobile numbers used in the crime were kept on surveillance. Thereafter on 13th November, 2009 at the instance of secret informer, accused Imran was apprehended and was brought to Police Station Gandhi Nagar where he was interrogated. He made a disclosure statement Ex.PW2/G. The accused was arrested. His police remand was taken. Thereafter this accused took the police party to his factory from where he got recovered cheque, demand drafts, one mobile chip/SIM Card, one post card size photograph of accused Aas Mohd, one mobile phone Samsung and another mobile phone Nokia with SIM Card which was taken into possession. Complainant identified the articles recovered from the factory of this accused as belonging to him.

19. Charge against this accused was of entering into criminal conspiracy with the other accused for committing robbery. While dealing with the law relating to criminal conspiracy in K.R. Purushothaman vs. State of Kerala, (2005)12 SCC631 it was observed as under:

To constitute a conspiracy, meeting of mind of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition and it is not necessary that all the conspirators must know each and every detail of conspiracy. Neither it is necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts. The agreement amongst the conspirators can be inferred by necessary implications. In most of the cases, the conspiracies are proved by the circumstantial evidence, as the conspiracy is

seldom an open affair. The existence of conspiracy and its objects are usually deducted from the circumstances of the case and the conduct of the accused involved in the conspiracy. While appreciating the evidence of the conspiracy, it is incumbent on the Court to keep in mind the well-known rule governing circumstantial evidence viz., each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible. The criminal conspiracy is an independent offence in Indian Penal Code. The unlawful agreement is sine quo non for constituting offence under Indian Penal Code and not an accomplishment. Conspiracy consists of the scheme or adjustment between two or more persons which may be express or implied or partly express and partly implied. Mere knowledge, even discussion, of the Plan would not per se constitute conspiracy. The offence of conspiracy shall continue till the termination of agreement.

20. In Shivnarayan Laxminarayan Joshi vs. State of Maharashtra, 1980 SCC (Cri.) 493, Honble Supreme Court has observed that it is manifest that a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the same. The offence can only be proved largely from the inferences drawn from acts or illegal omission committed by the conspirators in pursuance of a common design which has been amply proved by the prosecution as found as a fact by the High Court.

21. In case of conspiracy, direct evidence is hardly available and normally conspiracies are hatched in secrecy. Therefore, the offence is proved by circumstantial evidence. It is not necessary that everyone of the conspirators should take active part in the commission of every criminal act. That being so, even if no active part was played by this accused while committing robbery, that is not sufficient to exonerate him. It was this accused alone who was having dealings with the complainant and was aware about his financial condition. Complainant had no axe to grind against this accused which is reflected from the fact that in the initial statement made by him to the police, he did not level any allegations against him except for stating that he saw him talking to other two co-accused 45 minutes

prior to the incident. At that time, probably he was also not aware of the fact that he was one of the conspirators who conspired to commit robbery. It was only subsequently when during the course of investigation, as per the mobile details, his location was found near the place of incident and subsequent to his arrest various articles belonging to the complainant were recovered at his instance; that he was charge sheeted in this case. The recovery at his instance is admissible in evidence under Section 27 of the Indian Evidence Act. The same is challenged by the learned counsel for the appellant on the ground that there is no independent witness to the recovery. However, recovery was effected in the presence of PW8-Head Constable Satender Singh and PW10-SI Nalin Verma. No infirmity could be pointed out by the learned counsel for the appellant in the statement of these two witnesses during the course of arguments except for the fact that there was no independent witness of recovery. Just because these two witnesses are police officials, it cannot be said that their evidence is not of an independent character. Under Section 114 Illustration (e) of the Evidence Act, there is a presumption that all officials acts by Govt. Servants are regularly performed. Needless to say, both these police officials are Govt. Servants. If the accused wants to rebut this presumption, he could have done so by bringing on record relevant material either by producing his own evidence or eliciting answers from cross-examination of the witnesses from which a doubt could have entered the judicial mind regarding genuineness of the acts which the police officials claimed to have performed while discharging their official duties during the investigation of crime but he has failed to do so.

22. The incident took place on 8th November, 2009 and the recovery of articles belonging to the complainant was effected at the instance of the accused on 13th November, 2009, meaning thereby the recovery was soon after the incident and, therefore, under Illustration (a) of Section 114 of the Evidence Act, a presumption can be drawn that the appellant who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. In Sanjay @ Kaka vs. State, (2001) 3 SCC190and Gulab Chand vs. State of MP, (1995) 3 SCR27 the accused was convicted both for robbery and murder even when recovery was effected after more than a year of the incident of robbery and murder. If the accused wanted to

rebut this presumption, he could have done so by bringing on record relevant material by producing his own evidence or from cross-examination of the witnesses but he failed to do so. The fact that immediately prior to the incident, he was seen talking to the co-accused, then he tried to mislead Hanuman Prasad by stating that Ganga Ram has gone somewhere, recovery of incriminating articles at his instance from his factory belonging to the complainant and recovery of photograph of accused Aas Mohd. from him are the circumstances which proves that he entered into conspiracy with remaining two accused for committing robbery.

23. Learned counsel for the appellant also submitted that the testimony of the complainant is not reliable, inasmuch as, in the initial complaint he had merely stated that he saw this accused standing in the gali talking to other two co-accused whereas in the Court, he assigned him the role of participating in the commission of robbery at the point of knife. As such, there is material improvement in the testimony of the complainant and, therefore, the same is wholly unreliable. This submission again deserves rejection in view of the settled law that evidence of prosecution witness cannot be rejected in toto merely because of some minor discrepancies or improvements. As observed in Sukhdev Yadav and Ors. vs. State of Bihar, AIR 2001 SC3678 there would hardly be a witness whose evidence does not contain some amount of exaggeration or embellishment, sometimes there would be a deliberate attempt to offer the same and sometimes the witnesses in their over anxiety to do better from the witness-box details out an exaggerated account. The observations made by Honble Supreme Court in Appabhai and Anr. vs. State of Gujarat, AIR 1988 SC696also deserves mention where the Supreme Court has cautioned the courts not to give undue importance to minor discrepancies which do not shake the basic version of the prosecution case. It was observed that the court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness for the reason that witnesses now a days go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. However, the courts should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.

24. Again in Sucha Singh vs. State of Punjab, AIR 2003 SC3617 Honble Supreme Court had taken note of its various earlier judgments and held that even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno falsus in omnibus (false in one thing, false in everything) has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, truth is the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well.

25. This view was reiterated in Paulmeli and Anr. vs. State of Tamil Nadu through Inspector of Police, 2014 Cri.L.J.3240.

26. A perusal of testimony of this witness recorded on 24 th July, 2012 goes to show that although at one stage, he deposed that accused Imran @ Akhlakh was having knife in his hand which was used against him while committing robbery of his cash, jewellery and valuable articles and that on 13th November, 2009, he went to police station to make inquiry about progress of the case where he found Imran @ Akhlakh and he identified him as one of the robbers who used knife against him while committing robbery and he along with his associates was seen in the gali 45 minutes prior to the incident. However, his examination-in-chief was deferred till lunch and when he was recalled in post lunch session, he deposed that there was third accused who had actually used the knife while committing robbery and entered into his shop. Under the circumstances, it cannot be said that the testimony of this witness is so inconsistent that same cannot be relied upon. Moreover, PW4-Hanuman Prasad has also deposed that when he returned back to the office he found accused Akhlakh outside the office of the complainant and on inquiry about his employer Ganga Ram, he misguided him by stating that he had gone somewhere. Despite his search, he could not find him. Therefore, he

lifted the shutter and then found that Ganga Ram was apprehended by two persons from the back. He was threatened by one of them to be killed, otherwise he should go upstairs, as such, he went upstairs and thereafter he came back and got released his employer Ganga Ram. Despite cross-examination, nothing material could be elicited to discredit the testimony of either the complainant or Hanuman Prasad.

27. Under the circumstances, he was rightly convicted by the learned Trial Court for offence u/s 120 B IPC r/w Section 392 IPC and Section 411 IPC.

28. As regards accused Aas Mohd., this accused was not known to the complainant from before. Photograph of this accused was recovered at the instance of co-accused Imran @ Akhlakh. Thereafter efforts were made to arrest him but in vain. Therefore, after initiating proceeding against him he was declared proclaimed offender. He could be arrested only on 15th November, 2011. Thereafter an application for conducting his Test Identification Parade was moved by the Investigating Officer. Sh. J.P. Nahar (PW9), Metropolitan Magistrate visited Tihar Jail for conducting the Test Identification Parade of this accused, however, as per the proceedings Ex.PW9/C he refused to join proceedings despite giving warnings to him that his refusal to join the proceedings may lead to adverse inference against him during the course of trial. The accused had refused to join the proceedings on the ground that his employer has given his photograph at Police Station Gandhi Nagar and he feared that his photograph is shown to the witness. He was also told by two police officials that his photograph was shown to the witness, however, he could not give the name of the police officials. It is pertinent to note that no suggestion was given to the complainant that his photograph was shown to him in the police station. Under the circumstances, there was no justification on the part of this accused to refuse to join TIP proceedings. In Suraj Pal vs. State of Haryana, (1995) 2 SCC64 Honble Supreme Court observed that if the accused refuses Test Identification Parade without any justifiable cause, he does at his own peril and the Court will, in such circumstances, be justified in drawing an inference that had the appellant participated in Test Identification Parade he would have been identified by the witnesses and that precisely was the reason why he refused to join the TIP. Moreover, this accused was duly identified

by the complainant in the Court.

29. In Dana Yadav @ Dahu and Ors. vs. State of Bihar, (2002) 7 SCC295Honble Supreme Court observed that evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of accused by a witness in Court. This judgment was followed in Rijaul Khan vs. State, 2014 (1) JCC670where it was observed as under:

As a legal principle, the substantive evidence of a witness is the statement made by him in the Court. The identification for the first time in the Court, by its very nature, is of a weak character and, therefore, the Court normally looks for corroboration of such evidence by way of some other evidence which may, inter alia, include identification in a Test Identification Proceeding. Identification in a Test Identification Parade is not a substantive piece of evidence, though it can be used as a piece of corroborative evidence if the witness identifies the accused while deposing in the Court.

30. Learned counsel for the appellant relied upon Mohan Lal Ganga Ram Gehani vs. State of Maharashtra, 1982 Cri. LJ6302); Anil Lusana @ Anil Rathi vs. State (NCT of Delhi), 2010 (1) Crimes 445 (Del.); Mohd. Abdul Hafeez vs. State of Andhra Pradesh, AIR 1983 SC367 However, none of these judgments help the appellant, inasmuch as, in all these cases, Test Identification Parade of the accused was not held. Accused was not known to the victim prior to the occurrence, therefore, his identification in the Court for the first time by victim was not relied upon.

31. In the instant case, as stated above, despite the fact that the Test Identification proceedings were conducted by a Metropolitan Magistrate, without any justification accused refused to join the proceedings, therefore, adverse inference was liable to be drawn against him. Moreover, he was duly identified by the complainant in the Court. Moreover, in the initial complaint made by the complainant he has given the complete details of the robbers along with their approximate age, height, complexion and the clothes which they were wearing at the time of incident. The

complainant had sufficient opportunity to see the appellants and to note their distinctive features and, therefore, he could identify the accused in the Court as well. So far as this accused is concerned, the testimony of the complainant is consistent that while committing robbery, this accused was armed with a country made pistol and on the point of country made pistol, he was robbed of his belongings. Not only this, PW4 Hanuman was terrorised by him to go upstairs failing which he would be killed.

32. Another limb of argument that due to non-recovery of weapon of offence, no case u/s 397 IPC is made out again is without any substance.

33. In Ashfaq vs. State (Govt. of NCT of Delhi, (2004) 3 SCC116 it was urged that unless the deadly weapon has been actually used to inflict any injury in the commission of the offence, the essential ingredients to attract the said provision could not have been held to have been proved and substantiated. Repelling the contention it was observed by Honble Supreme Court as under:

We are of the view that the said claim on behalf of the appellants proceeds upon a too narrow construction of the provision and meaning of the words Uses found in Section 397 IPC. As a matter of fact, this Court had an occasion to deal with the question in the decision reported in AIR 1975 SC905(Phool Kumar V. Delhi Administration) and it was observed as follows :

Section 398 uses the expression "armed with any deadly weapon" and the minimum punishment provided therein is also 7 years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. this has created an anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed in committing it attracts the minimum punishment of 7 years under Section 398, if he is merely armed with any deadly weapon, while an offender so armed will not incur the liability to the minimum punishment under section 397 if he succeeded in committing the robbery. But then, what was the purport behind the use of the different words by the Legislature in the two sections, viz. "Uses" in Section 397 and "is armed" in Section 398. In our judgment the anomaly is resolved if the two terms are given the identical meaning. There seems to be a reasonable explanation for the use of the two

different expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to any fruitful use because it would have been of use only when the offender succeeded in committing the robbery."

Thus, what is essential to satisfy the word "Uses" for the purposes of Section 397 IPC is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of victim and not that it should be further shown to have been actually used for cutting, stabbing, shooting, as the case may be.

34. In Sanjay Shankar Swami @ Sanjay Kumar vs. State(NCT) of Delhi, 2013 V AD(Delhi) 413, substantially similar plea was taken that since no recovery of any weapon of offence has been made from the appellant, Section 397 IPC is not attracted. Repelling the contention, it was observed by a Single Judge of this court that from the testimony of PW-5 it was amply clear that one of the appellants showed him the katta while another showed him a knife. Thus there was use of weapons. Conviction u/s 397 IPC is not based on consequential recovery but on the user. If the Court is satisfied that a deadly weapon is used then Section 397 IPC is clearly attracted. Similar plea was taken in Kashi Ram and Ors. vs. State, 2014 V AD(Delhi) 171 that in the absence of recovery of weapon of offence it cannot be known whether the knife alleged to have been used was a deadly weapon or not and, therefore, Section 397 IPC could not have been applied for his conviction. The Court followed the view taken in earlier decision rendered in Ikram Ansari vs. State(NCT of Delhi) in Crl.A. No.181/13 and other connected appeals where it was observed as under:"In Shri Phool Kumar Vs. Delhi Administration, AIR 1975 SC905 the appellant before the Apex Court, namely, Phool Kumar was armed with a knife at the time of commission of the robbery. He was convicted with the aid of Section 397 of IPC. It was submitted on behalf of the appellant that sentencing him to undergo RI for seven years under Section 397 of the Penal

Code was illegal and he ought to have been convicted under Section 397 simplicitor. The precise evidence against the appellant was "Phool Kumar had a knife in his hand". Rejecting the contention, the Apex Court held that he was carrying a deadly weapon to the view of the victim which was sufficient to frighten or terrorize them and any other overt act, such as, brandishing of the knife or causing of grievous hurt with it was not necessary to bring the offender within the ambit of Section 397 of the Penal Code. The Apex Court in this regard also referred to Section 398 of IPC which prescribes a minimum sentence of seven years in case the offender at the time of attempting to commit robbery is armed with any deadly weapon and held as under:"6. Section 398 uses the expression "armed with any deadly weapon" and the minimum punishment provided therein is also 7 years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. This has created an anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed in committing it attracts the minimum punishment of 7 years under Section 398 if he is merely armed with any deadly weapon, while an offender so armed will not incur' the liability of the minimum punishment under Section 397 if he succeeded in committing the robbery. But then, what was the purport behind the use of the different words by the Legislature in the two sections, viz., "uses" in Section 397 and "is armed" in Section 398. In our judgment the anomaly is resolved if the two terms arc given the identical meaning. There seems to be a reasonable explanation for the use of the two different expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to a fruitful use because it would have been of use only when the offender succeeded in committing the robbery."

38. Carrying a deadly weapon in a manner that it is seen by the victim clearly is aimed at intimidating the victim to part with the property under a fear that if he does not part with the property, the weapon being carried by the offender can be used against him. There is nothing in the judgment to indicate that the size of the

knife which the appellant Phool Kumar carried with him at the time of commission of the offence was indicated by the witnesses or that the said knife was recovered by the police during the course of investigation. Despite that, the Apex Court upheld his conviction with the aid of Section 397 of IPC.

39. In Salim Vs. State (Delhi Administration), 1987(3) Crimes 794, decided on 09.11.1987, the charge against the appellant was that they committed robbery while armed with knives. It was contended on behalf of the appellant that no offence under Section 397 of IPC could be said to have been committed inasmuch as the knife had not been recovered. Reliance in this regard was also placed upon Murari Lal Vs. State:

23. 1983)DLT410, wherein no knife had been recovered and it was contended that unless the size of the blade was known, a knife could not ordinarily be classified as a deadly weapon within the meaning of Section 397 Indian Penal Code . The learned counsel for the appellant in that case placed reliance also upon an earlier decision of this Court in Balik Ram Vs. State 1983 Crl.L.J.

1438. Relying upon the observation of the Apex Court in Phool Kumar (supra) that "so far as he is concerned he is said to be armed with a knife which is also a deadly weapon. To be more precise from the evidence of PW-16 "Phool Kumar had a knife in his hand", the contention was rejected by this Court. It was held that since the aforesaid decision of the Apex Court had not been referred to in the earlier decisions in Balik Ram (supra) and Murari Lal (supra), the said decisions were not a binding precedent. While rejecting the appeal, this Court, inter alia, observed and held as under:"The Concise Oxford Dictionary defines the word 'weapon' as 'material thing designed or used or usable as an instrument for inflicting-bodily harm, e.g. gun, bomb, rifle, sword, spear, stick hammer, poker, horn, claw'. The word 'deadly', according to this Dictionary, means 'causing fatal injury'. Also, according to this Dictionary, 'knife' means 'blade with sharpened longitudinal edge fixed in handle either rigidly or with hinge used as cutting instrument or as weapon'. As per Webster's Third New International Dictionary a 'knife" is 'a simple instrument used for cutting consisting of a sharp-edged usually steel blade provided with a handle'. Longman Dictionary of Contemporary English

defines 'knife' as 'a blade fixed in a handle used for cutting as a tool or weapon'. These definitions in various dictionaries can be multiplied. We all understand what a knife means and to categorise it or to fix its size for it to be a deadly weapon may not be appropriate. A knife has also been' described as a pocket knife, pen knife, table knife, kitchen knife, etc. It cannot be denied that a knife can be used as a weapon of offence. It can cut, it can pierce, it can be deadly. To say that a knife to be a deadly weapon should be of a particular size would perhaps be not a correct statement."

Similar view was taken in State of Maharashtra vs. Vinayak, 1997 Crl.L.J.

3988, where the High Court held that irrespective of its size, any knife is a deadly weapon."

35. In view of the aforesaid decisions that merely because weapon of offence could not be recovered, it cannot be said the offence u/s 397 IPC is not made out. The recovery could not be effected in the instant case as it was accused Aash Mohd. who was armed with country made pistol and he could be arrested after a lapse of about two years as he was evading the process of law and had to be declared proclaimed offender. That being so, due to lapse of two years, there was hardly any possibility of recovery of weapon of offence. The complainant has deposed that this accused was armed with country made pistol which he put on his temple while his co-accused was armed with knife which was put on his neck and then he was forced to open the almirah and counter from which they forcibly took out about Rs.2.5 lacs, bank drafts of a sum of Rs.6.5 lacs, his gold ring and mobile phone. Not only the complainant but also PW4 Hanuman Prasad was threatened with country made pistol. Needless to say country made pistol is a deadly weapon. Thus, there was use of deadly weapon and, therefore, Section 397 IPC was clearly attracted.

36. Accordingly, the conviction of this appellant for offence u/s 120B IPC r/w Section 392 IPC, 392/34 IPC and 397 IPC does not call for interference. However, this accused was also convicted u/s 25 and 27 of the Arms Act on the ground that recovery of knife was effected which was used in the commission of crime. This finding, however, is not fortified by the record, inasmuch as, neither the katta nor

the knife has been recovered. Section 39 of the Arms Act provides that previous sanction of the District Magistrate is necessary for the prosecution against any person in respect of any offence under Section 3. Section 3 provides for licence for acquisition and possession of firearms and ammunition. Thus, unless there is a previous sanction of the District Magistrate/Competent Authority a person cannot be prosecuted in respect of any offence under Section 3. Section 25 provides for an offence relating to possession or carrying any prohibited arms or prohibited ammunition in contravention of Section 3. Thus, sanction was necessary and in the absence of sanction, the accused could not be prosecuted at all, even if he was in possession of any unlicensed arm. Under the circumstances, the findings of the learned Trial Court regarding conviction of the appellant Aash Mohd. u/s 25/27 of the Arms Act cannot be sustained and is accordingly set aside.

37. In view of the foregoing, conviction of the appellant Imran @ Akhlakh for offence u/s 120B IPC r/w Section 392 and 411 IPC does not call for any interference and is accordingly up held. As regards quantum of sentence, this appellant has been sentenced to undergo rigorous imprisonment for five years and Rs.5000/- for offence u/s 392 IPC in default to undergo SI for 6 months and rigorous imprisonment for two years and fine of Rs.5000/- in default 6 months SI for offence u/s 411. As per the nominal roll, this appellant has also been convicted in another FIR No.1001/2013 u/s 420 IPC registered with Police Station City Thanesar, Haryana. As such, so far as substantive sentence is concerned, no interference is called for. However, as regards quantum of fine, fine of Rs.5000/- imposed for offence u/s 411 IPC is reduced to Rs.1000/- in default to undergo SI for 15 days. With this modification, Crl. Appeal No.1351/2013 is dismissed.

38. Crl. Appeal No.553/2014 preferred by Aash Mohd. is partly allowed. His conviction for offence u/s 120B IPC r/w Section 392 IPC, 392/34 and 397 IPC is upheld. However, conviction u/s 25 and 27 Arms Act is set aside. As per nominal roll, he is facing trial in case FIR No.387/13 under Section 147/148/149/302/201/120B IPC., P.S.Shahpur, Muzaffar Nagar. That being so, no interference is called for in the quantum of sentence. Fine, if realised, be paid as compensation to PW2 Ganga Ram Jat. With these observations, both the appeals stand disposed of. Copy of the judgment along with Trial Court Record be sent

back. Appellants be informed through Superintendent Jail. (SUNITA GUPTA) JUDGE APRIL22 2015 rs

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