

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Crl.A.No. 934/2005

TRILOK KAPOOR & ANR. Appellant
Through: Mr. Shakti Chand Sharma
Versus

THE STATE Respondent

Through: Mr. O.P. Saxena, APP

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be
reported in the Digest? Yes

: **V.K. JAIN, J. (oral)**

1. This is an appeal against the judgment dated 22nd October, 2005 and the order of sentence dated 26th October, 2005 whereby, the appellant has been convicted under Section 392 of IPC read with Section 397 thereof and has been sentenced to undergo R.I. for 7 years.

2. The case of the prosecution is that on 12th November, 2003 at about 12.30 PM, complainant Vijay Wahane, driver of car No. DL-9CC-4687 parked his car near the gate of the house of the car owner, 37, Paschim Marg, Vasant Vihar, New Delhi. Since he had to go to the school to bring the

children of his employer, the keys of the car were left by him in the ignition. Two boys came and stood near the car. One of them then opened the front door and sat on driver seat, whereas the other one sat on the rear seat. The car was started using the key, which had already been put in the ignition. The complainant ran towards the car, opened its front gate and dragged out the boy on the driving seat. The boy, who was sitting on the rear seat got down the vehicle and started beating the complainant. The person, who was sitting on the driver seat also joined him in beating the complainant. When the complainant raised alarm, the boy who was sitting on the rear seat managed to run away, whereas the boy, whom the complainant had dragged out of the driver's seat was apprehended. One tooth of the complainant was broken in the beating given to him. On enquiry, the name of the boy, who was apprehended on the spot was found to be Trilok.

3. Though two persons, the appellant Trilok and his co-accused Subhash were prosecuted in this case, Subhash was acquitted on the ground that the prosecution had failed to establish his identity.

4. The complainant Vijay Wahane came in the witness box s PW-1 and fully supported the case as set out in the FIR lodged by him. He stated that on the day of this incident, he had put keys in the ignition of the car and was waiting for the wife of his employer to come, outside house No. 37 Paschim Marg, Vasant Vihar, New Delhi. Both the accused, who were seen by him, were standing opposite the driver gate of the car. The appellant Trilok opened the front gate of the car and started the engine, whereas Subhash opened the rear door and sat behind him. As the car was started by Trilok, he ran towards him and pulled him outside the car. Subhash also came outside the car and they started beating him. In the process, he lost one tooth. Subhash managed to ran away from the spot, but Trilok was apprehended by him. In cross-examination, he admitted that car had not been moved, since hand break had been pulled by him while parking the car, though the appellant had put the car into gear.

5. PW-5 Dr. Rekha Tirkey has proved the MLC of the complainant Ex. PW5/A. As per the MLC upper right canine was broken and lower right canine was loose.

6. PW-7 Gaurav has stated that on the day of the incident, he saw the complainant dragging out the appellant Trilok from the driver seat of TATA Qualis vehicle. He also ran towards the vehicle and caught Trilok.

7. Though a number of other witnesses were produced by the prosecution, their testimony does not require any disclosure.

8. In his statement under Section 313 Cr.P.C. the appellant denied the allegations against him and stated that he was alone and passing from near the car when Vijay Wahane hit him and for this reason he was falsely implicated in this case.

9. There is no material on record to prove the plea taken by the appellant that he was hit by the complainant. During cross-examination of the complainant, it was suggested to him that Trilok hit him with his foot, when he was passing from near the car. A perusal of the MLC of the appellant Trilok Kapoor Ex. PW 5/B would show that he had received a lacerated wound behind left eye pinna. Such an injury could not have been caused from the foot of the complainant. When the appellant was taken for medical examination, he alleged that he had been assaulted.

Obviously when the appellant and his accomplice were beating the complainant, he may also have retaliated and the wound behind the left eye pinna was sustained by the appellant during that process. More importantly, the version given by the appellant does not explain the serious injuries, including loss of tooth suffered by the complainant and, therefore, even otherwise it does not inspire confidence. Therefore, the nature of the injury found on his person rules out his having been assaulted by the complainant or his foot. Even otherwise, the testimony of PW-7 Gaurav fully corroborates the testimony of the complainant. This witness saw the complainant dragging the appellant out of the car, which rules out the version given by the appellant in his statement under Section 313 of Cr.P.C.

10. There is no reason to disbelieve the complainant and PW-7 Gaurav Kumar. There is no enmity or ill-will between these witnesses on one hand and the appellant Trilok on the other hand. Therefore, there was no motive for either of them to implicate the appellant in a false case of robbery.

11. The testimony of the complainant proves that grievous injury was caused to him by those, who were involved in the

incident. According to the complainant, he was beaten by the appellant Trilok as well as by his co-accused Subhash, who has been acquitted by the trial court. The complainant did not tell the court as to who had given blow on his tooth. The testimony does not show, who was responsible for the loss of his upper tooth. The loss of upper tooth being the only grievous hurt suffered by the complainant, there is no evidence to prove which of the two persons involved in the incident had caused grievous hurt to the complainant. It cannot be said from the facts and circumstances of the case that both the persons involved in the incident shared a common intention to cause grievous hurt the complainant. The prosecution was required to prove either that both the accused persons shared a common intention to cause grievous hut to the complainant or it had to prove which out of the two culprits was responsible for causing grievous hurt to him. It can be safely said that when the appellant was dragged out of the car by the complainant and he started beating him and the other culprits, who was sitting on the rear seat also joined him in beating the complainant, both of them shared common intention to cause hurt to the complainant, but it cannot be said that both of them shared

a common intention to cause grievous hurt to the complainant. In fact, during cross-examination, the complainant stated that when he had caught hold of the appellant Trilok Kapoor, Subhash started bearing him so that Trilok could be released and the both of them could run away. This part of his deposition indicates that in fact beating was given to him mainly by the other culprit and not by the appellant. In these circumstances, I hold that the prosecution has failed to prove that the appellant had caused grievous hurt to the complainant, though it has been able to prove that he shared a common intention to cause hurt to the complainant.

12. The next question, which comes up for consideration is as to what evidence against the appellant Trilok is made out from his entering the car, starting it and causing hurt to the complainant. Section 397 of IPC is clearly not attracted as neither any deadly weapon was used by the appellant nor the prosecution has been able to prove that he had caused grievous hurt to the complainant.

13. Section 394 of IPC provides that if any person in committing or in attempting to commit robbery voluntarily causes hurt such person and any other person jointly

concerned in committing or attempting to commit robbery, shall be liable to punishment. Even if I accept the contention that since the car did not move and was only started, there was no robbery and it was only an attempt to commit robbery, the offence under Section 394 of IPC is nevertheless made out against the appellant. I, therefore, need not go into the question as to whether the act committed by the appellant amounted to robbery or only an attempt to commit robbery. In either case, he is liable to be convicted under Section 394 of IPC.

14. For the reasons given in the preceding paragraphs, the appellant is convicted under Section 394 of IPC and is sentenced to undergo R.I. for three years and to pay a fine of Rs.1000/- or to undergo S.I. for one month, in default.

With this modification, the appeal has been disposed of.

(V.K.JAIN)
JUDGE

DECEMBER 03, 2009

AG