

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

+ CRL. APPEAL No. 887/2008

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Decided on: 29th January, 2010

SALIM KHAN

..... Appellant

Through: Ms. Rakhi Dubey, Adv.

Versus

STATE NCT OF DELHI

..... Respondent

Through: Mr. M.P. Singh, Adv.

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

1. Whether the Reporters of local papers
may be allowed to see the judgment?

2. To be referred to Reporter or not?

3. Whether the judgment should be reported
in the Digest?

A.K. PATHAK, J. (ORAL)

1. Appellant has been convicted by the learned Additional Sessions Judge, Delhi under Sections 392/394/397 of the Indian Penal Code (IPC) and sentenced to undergo simple imprisonment for two years and pay fine of Rs. 500/- ; in default to further undergo simple imprisonment for fifteen days for

offence punishable under Section 392 IPC; sentenced to undergo simple imprisonment for four years and pay fine of Rs. 1,000/-; in default to further undergo simple imprisonment for thirty days for the offence under Section 394 IPC; sentenced to undergo simple imprisonment for seven years and pay fine of Rs. 1500/-; in default to further undergo simple imprisonment for sixty days for the offence under Section 397 IPC.

2. Brief facts of the case are that the appellant, on 17th March, 2007, at about 8:30 pm, in front of house No. 433 A, Pocket II, Mayur Vihar, Phase I, Delhi, switched on the ignition of Maruti Van bearing No. DL-6CE-5273, belonging to complainant Vikram Kapoor, in order to commit theft of the said vehicle. Complainant Vikram Kapoor, who was present in his house, on hearing the sound of the engine, came out and after opening the door of the Van confronted the appellant, as to what he was doing there, at which appellant gave a blow on his right

wrist with some sharp object. On complainant raising alarm neighbours came there and apprehended the appellant.

3. FIR No. 89/2007 under Sections 392/394/397 IPC was registered at the Police Station Mayur Vihar on the statement of complainant.

4. On receipt of information regarding the incident, SI Anant Kumar (hereinafter referred to as IO) along with Const. Brahm Singh reached the spot and took the appellant in custody. Master key of the vehicle was recovered from the possession of the appellant and sealed in a *pulanda*. Maruti Van was also seized and site plan was prepared. After completion of investigation, appellant was sent up to face trial, for having committed offences under Sections 392/394/397 IPC, by filing a charge sheet in the court of learned Metropolitan Magistrate, who took cognizance of the offence and after completing the

formalities under Section 207 Cr.P.C., committed the case to Sessions Court for trial.

5. Charges under Sections 392/394/397 IPC were framed against the appellant on 21st June, 2007 by the learned Additional Sessions Judge to which appellant pleaded not guilty and claimed trial.

6. Prosecution examined seven witnesses to prove its story. Complainant Vikram Kapoor was examined as PW3. Eye witness Virender Sharma was examined as PW1. Sub Inspector Anant Kumar was examined as PW7. These are the material witnesses. Other witnesses are formal in nature being Police officials.

7. After prosecution closed its evidence, statement of appellant under Section 313 Cr.P.C. was recorded wherein entire incriminating material which had come on record was put to him. Appellant denied the same as being incorrect. He claimed himself to be innocent and denied his complicity in the

said crime. He stated that he was a mechanic by profession and had repaired the Van but he was not paid the repair charges. On 17th March, 2007, he had gone to complainant's house for collecting the money. Complainant told that the gear box was not working properly, therefore, he would not pay anything. This lead to a scuffle between them as a result of which complainant received injury. Later on appellant was falsely implicated in this case. However, no evidence was lead by the appellant in his defence.

8. PW1 Virender Sharma, who was the alleged eye witness to the occurrence, did not support the prosecution case. He admitted that he was neighbour of complainant but at the same time, he categorically stated that nothing had happened in his presence. He was cross examined at length by the learned APP for the State but nothing could be elicited from him which could go in favour of the prosecution and against the appellant. PW3

Virender Kumar is the star witness of the prosecution. He has

supported the prosecution story. His testimony was found trustworthy and reliable by the learned Additional Sessions Judge, consequently appellant was convicted under Sections 392/394/397 IPC.

9. I have heard learned counsel for appellant, learned counsel for the State and perused the trial court record carefully and I find testimony of PW3 trustworthy and reliable. His statement, in cross-examination, had remained unshaken on material points. From the statement of PW3 it is clear that on 17th March, 2007 at about 8:30 pm when he came out of his house, on hearing the sound of engine of his Maruti Van, he found appellant sitting in the driver's seat. When complainant confronted the appellant as to what was he doing there, appellant attacked him causing injury in wrist of his right hand. Appellant was apprehended at the spot by the public persons. In my view, only because PW1 Virender Sharma had not supported

the prosecution case, would not be sufficient to discard the

testimony of victim i.e. PW3. Accordingly, I am of the opinion that learned Additional Sessions Judge rightly convicted the appellant for the offences under Section 392/394 IPC.

10. Next question which arises for consideration is as to whether the offending act of the appellant attracts the ingredients of offence under Section 397. It has to be seen whether appellant had caused injury by a deadly weapon. PW3 Vikram Kapoor deposed that appellant had attacked him by some object causing injury on his right hand. He further deposed that Police seized two-three items from the possession of appellant including some pointed/sharp knife type object, vide a seizure memo PW3/B. However, as per PW7, no such sharp object was recovered from the appellant. According to him, one 'L' shaped master key was recovered and taken in possession vide seizure memo PW3/B. No sketch of 'L' shaped master key was prepared nor had any of the witness deposed that the injury on the person of PW3 was possible by the recovered master key

of the car. In any case, there is nothing to show that the appellant was armed with knife by which he caused injury on the person of PW3. In view of this, appellant is entitled to benefit of doubt for the offence under Section 397 IPC.

11. In ***Charan Singh vs. State*** reported in ***1998 Crl. L.J. NOC 28 (Delhi)*** it was held that in order to bring home a charge under Section 397, the prosecution must produce convincing evidence that the knife used by the accused was 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 which is required to be proved by the prosecution that the knife used by the appellant was a deadly weapon and in absence of such evidence and particularly non-recovery of the weapon, would certainly bring the case out of the ambit of Section 397. Similar view has been expressed in ***Rakesh Kumar vs. State*** reported in ***2005(1) JCC 334.***

12. As already stated earlier, no sharp object was recovered from the appellant nor is there any evidence to indicate that the injury was possible by the master key, therefore, it cannot be said that injury was caused by use of deadly weapon, therefore, attracting the provision of Section 397 IPC.

13. Accordingly, appellant is acquitted for the offence under Section 397 IPC. Sentence of seven years as awarded by the learned trial court, under Section 397, is also set aside.

14. Sentence of petitioner under Section 394 IPC is also reduced from four years to three years. Sentence under Section 392 IPC as awarded by the trial court is maintained as it is. However, all the sentences shall run concurrently and benefit of Section 428 Cr.P.C. is also given.

15. Appeal disposed of in the above terms.

16. Copy of this order be sent to Superintendent Jail for compliance.

January 29, 2010
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A.K. PATHAK, J