

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

% *Date of Decision: September 09, 2013*

+ **CRL.A.NO.326/2004**

DINESH RAI .....Appellant  
Represented by: Ms.Saahila Lamba,  
Advocate/Amicus Curiae

versus

STATE ..... Respondent  
Represented by: Mr.Pawan Sharma, Standing  
Counsel (Crl.)

**CORAM:**  
**HON'BLE MR. JUSTICE PRADEEP NANDRAJOG**

**PRADEEP NANDRAJOG, J. (Oral)**

1. Since the appeal has reached for hearing and none appears for the appellant I appoint Ms.Saahila Lamba, Advocate, who is empanelled by the Delhi High Court Legal Service Committee as the Amicus Curiae to argue the appeal on behalf of the appellant.
2. Fee of learned Amicus Curiae shall be paid by the Delhi High Court Legal Services Committee.
3. Appellant Dinesh Rai has been convicted vide impugned judgment and order dated March 08, 2004 for having committed offences punishable under Section 392/397 IPC read with Section 34 IPC and vide order on sentence dated March 09, 2004 has been sentenced to undergo imprisonment for 10 years noting the fact that since a knife was used in the commission of the offence the minimum sentence contemplated by Section 397 IPC is 7 years. Fine in sum of ₹5,000/- and in default to undergo imprisonment for 2 years has also been imposed.

4. Briefly stated, the case set up by the prosecution against the appellant was that on July 23, 2003, at about 09.00 P.M. one Jiawuddin, an auto rickshaw driver, was proceeding on the road and as he was passing by police Station Vasant Kunj, two boys one of which was the appellant signalled him to stop the auto. Jiawuddin stopped the auto rickshaw and said two boys boarded the same. After travelling some distance said two boys asked Jiawuddin to stop the auto rickshaw and robbed him of ₹345/- and to immobilize Jiawuddin took the key of his auto rickshaw i.e. robbed Jiawuddin of even the key of the auto rickshaw and while committing the offence the boy accompanying the appellant took out a knife from his shirt to overawe Jiawuddin so that the commission of the offence was facilitated. As the two attempted to flee Jiawuddin raised an alarm to which people in the vicinity responded and managed to apprehend the appellant from whose personal possession ₹345/- and key of the auto rickshaw was recovered. The other boy who could not be apprehended ran away with the knife.

5. I record at the outset that the knife statedly used by the other co-accused who was not sent for trial was not recovered.

6. At the trial, the star witness of the prosecution Jiawuddin was examined as PW-3. He supported the indictment and proved the recovery of the key Ex.P-2 and ₹345/- Ex.P-1 collectively i.e. the stolen property from the appellant. He proved the seizure memo Ex.PW-2/A and stood by his complaint Ex.PW-3/A on basis whereof the FIR was registered.

7. Influenced by the fact that a knife was used in the commission of the crime, vide judgment and order dated March 08, 2004 the appellant has been convicted for the offence punishable under Section 392/397 read with Section 34 IPC.

8. As I read between the lines, since the learned Trial Judge has not

discussed as to why was he of the opinion that Section 34 of the IPC was attracted, I find that what the learned Trial Judge had in mind was that there was another co-accused who had used a knife upon being exhorted by the appellant when the appellant and the other co-accused committed the robbery and thus the appellant would be liable for the act of the co-accused.

9. Having perused the testimony of Jiawuddin PW-3, with the help of Ms.Saahila Lamba, learned Amicus Curiae, I find that the same inspires confidence. Jiawuddin has supported the case set up by the prosecution in its entirety. Jiawuddin has been cross-examined at length but has withstood the ground. In that view of the matter, no fault can be found with the conclusion arrived by the Trial Judge that the appellant had robbed Jiawuddin on the fateful night of July 23, 2003 and he was accompanied by an accomplice who had used the knife to overawe Jiawuddin but had managed to flee.

10. Ms.Saahila Lamba, learned Amicus Curiae, would urge that the appellant could not have been convicted for the offence punishable under Section 397 IPC, much less read with Section 34 IPC for the said offence, for the reason it was the accomplice who had used the knife as per the case of the prosecution and as deposed to by Jiawuddin. Learned counsel urges that there are two reasons to so hold. Firstly that the knife not being recovered, one could not say whether a deadly weapon was used on account of the fact that the knife could well be a pen knife. Counsel urges that unless the knife assumes proportion requiring it be classified as deadly weapon, mere use of a knife while committing robbery would not convert the offending act to an offence punishable under Section 397 IPC. Secondly, learned counsel urges that the use of the word '*offender*' in Section 397 IPC makes it clear that if during robbery more than one

person has acted in the commission of the offence, he alone who used a deadly weapon would be liable to be convicted under Section 397 IPC.

11. From the evidence adduced by the prosecution it is clear that the knife used in the commission of the crime had not been recovered. Dimension, shape, size and type of the knife have also not been given by any of the witnesses nor have any of them deposed that the same was a deadly weapon.

12. Section 397, IPC reads as under:-

*“If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, 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.” **(Emphasis Supplied)***

13. A perusal of Section 397 IPC, makes it clear that if the offender at the time of committing robbery or dacoity uses a deadly weapon or causes grievous hurt or attempts to cause death or grievous hurt to any person, the offence contemplated by the Section would be made out.

14. In the instant case no grievous hurt or attempt to cause death or grievous hurt has been proved.

15. In the decision reported as 1988 CrL. L.J. NOC 28 (Delhi) a Single Judge of this Court observed as under:-

*“At the time of committing dacoity one of the offenders caused injury by knife on the hand of victim but the said knife was not recovered. In order to bring home a charge under S.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 facts to be proved by the prosecution that the knife used 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*

S.397. The accused could be convicted under S.392.”  
(Emphasis Supplied)

16. A similar view has been taken by several Single Judges of this Court in the decisions reported as 175 (2010) DLT 27 Samiuddin @ Chotu vs. State of NCT of Delhi, 2005 (1) JCC 334 Rakesh Kumar vs. State of NCT of Delhi, 2010 (1) JCC 388 Sunil @ Munna vs. The State (Govt. of NCT) 2012 (3) JCC 213 Gulab @ Bablu vs. The State (NCT of Delhi).

17. In the instant case, indisputably the knife used during robbery has not been recovered. Further, as per the law declared by the Supreme Court in the decisions reported as AIR 1975 SC 905 Phool Kumar Vs. Delhi Administration and 2007 (12) SCC 641 Dilawar Singh Vs. State of Delhi, the use of the word ‘offender’ in Section 397 IPC makes it clear that only such offender who uses a deadly weapon while committing robbery or dacoity shall be liable for the offence contemplated by Section 397 IPC.

18. Thus, the impugned decision dated March 08, 2004 convicting appellant for the offence punishable under Section 397 read with Section 34 IPC is set aside. But the same is maintained in so far the appellant has been convicted for the offence punishable under Section 392 IPC.

19. The nominal roll of the appellant produced in Court today would reveal that the appellant suffered incarceration for a period of 3 years, 1 month and 23 days and has earned remission for a period of 9 months and 22 days.

20. The appeal stands disposed of in terms of para 18 above with further direction that the sentence imposed upon the appellant would be period he has already undergone.

21. In view of the decision above, the bail bond and surety bond

furnished by the appellant when he was admitted to bail on September 11, 2006 are discharged.

22. TCR be returned.

**(PRADEEP NANDRAJOG)**  
**JUDGE**

**SEPTEMBER 09, 2013**  
*mamta*