

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

Reserved on: 24.02.2014

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Date of Decision: 03.03.2014

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CRL.A. 373 of 2010

KASHI RAM

..... Appellant

Through: Mr. Ajay Verma, Adv.

versus

STATE

..... Respondent

Through: Mr. Feroz Khan Ghazi, APP.

+

CRL.A. 727 of 2010

ABDUL KADIR @ ADIL

..... Appellant

Through: Mr. Bhupesh Narula, Adv.

versus

STATE

..... Respondent

Through: Mr. Amit Ahlawat, APP.

+

CRL.A. 778 of 2010

DHARMENDER @ AJAY

..... Appellant

Through: Ms. Rakhi Dubey, Adv.

Versus

STATE

..... Respondent

Through: Mr. Feroz Khan Ghazi, APP.

+ **CRL.A. 825 of 2010**

RAJNU Appellant

Through: Mr. Ajay Verma, Adv.

versus

STATE Respondent

Through: Mr. Amit Ahlawat, APP.

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

JUDGMENT

V.K.JAIN, J.

On 3.4.2008, the police control room was informed that 4-5 armed persons had entered the house of the informant in AE Block of Shalimar Bagh. The information, when transmitted to Police Station Shalimar Bagh, was recorded vide DD No.6A, copy of which was given to S.I. Sudhir Kumar for investigation. When the aforesaid police officer reached the spot along with other police officials, the complainant Dr. Umesh Yadav met him there and his statement was recorded by the Investigating Officer. The complainant Dr. Umesh Yadav stated that at about 3:45 a.m. on that day, he got up to ease himself and when he was coming back from the toilet he saw the shadow of a person on the window curtain. Sensing danger, he woke up his wife and children and asked them to run inside. In the meanwhile

about 5-6 persons entered his bedroom through the window. One of them who was aged about 20-25 years showed a country-made pistol to him and asked him to remain silent. The complainant asked them to take whatever they wanted. In the meanwhile the parents of the complainant also had woken up and there was a grappling. One of the boys who was aged about 20-22 years and was carrying a knife with him gave a mild blow on the back of the complainant but no serious injury was caused to him. Another boy gave a knife blow on the left thigh of his father who also did not sustain a major injury. Yet another boy aged about 20-22 years removed the chain which the mother of the complainant was wearing. One of the intruders also tried to snatch the chain of the complainant but only half of the chain came in his hand. The complainant, during the grappling, pushed the person who had put country-made pistol against him and bolted the door from inside. The complainant then took out his licensed pistol and fired two shots as a result of which the intruders ran away. On checking the room, the complainant found that his mobile phone Nokia 2626 IMEI No.354843014522143, having SIM of mobile No.9868503773 had been stolen. The complainant also noticed that the grill of the window had

been removed by the intruders. He claimed that he could identify the intruders if brought before him.

2. During the course of investigation, an information was received by the Investigating Officer of this case that four persons who had been arrested in a case registered vide FIR No.98/2008 had admitted to their involvement in the present case. The appellants were thereupon arrested and an application was made for their Test Identification Parade (for short 'TIP'). They, however, refused to join the TIP.

This is also the case of the prosecution that while in police custody, the appellant Kashi Ram pursuant to a disclosure statement made by him got recovered the stolen Nokia mobile phone from under a heap of mud in the bushes near Kela Godam Platform (Banana Godown Platform) whereas the appellant Abdul Kadir got recovered a stolen gold chain from his *jhuggi*. The gold chain was correctly identified by Smt. Shakuntala in a judicial TIP. All the appellants were chargesheeted under Sections 458/395/398/397/34 of IPC.

3. The appellants having pleaded not guilty as many as eighteen (18) witnesses were examined by the prosecution.

4. The complainant Dr. Umesh Yadav came in the witness box as PW1 and stated that in the night intervening 2-3 April, 2008, when he

was returning to bedroom after easing himself he saw the shadow of a person standing in the compound, which was falling on the window curtain. Moving the curtain for a split second he saw three (3) persons standing in the compound. He woke up his wife and asked her to go to the adjacent bedroom situated in the rear side, along with their children, where his parents used to sleep. Within a minute or two those persons (intruders) were able to remove the grill of the window, besides breaking the wire mesh door and 5-6 persons jumped inside through the window. One of them blocked his way and put a *katta* (country-made) on his forehead. The complainant identified the appellant Abdul Kadir who had put *katta* on his forehead. He further stated that one more person then took out a knife in order to stab him. He, however, grappled with them since he knew taekwondo. However, one of them gave slip to him and was able to move towards the passage leading to the rear bedroom. On the shout of the witness his parents came out of the rear bedroom. In the meanwhile one person stabbed him on his back. He then told them to spare them and told them that they would be given whatever they wanted. One of the accused persons then abused his mother, put a knife on her and snatched her chain. The witness further claimed that his chain was also snatched but he and his parents were

able to push themselves to the passage leading to the rear bedroom which had a door on the other side and bolted the said door thereby separating themselves from the intruders. The witness then brought out his licensed pistol and shot two fires. The intruders, however, fled away. He further stated that on checking the house he found that his Nokia mobile phone SIM of mobile No.9868503773 was missing. The witness identified all the four appellants who entered his house on that day. He identified the appellant Kashi Ram as the person who had stabbed him on the back and the appellant Dharmender as the person who had stabbed his father besides showing knife to his mother. The appellant Rajnu was identified as one of the persons who had intruded in his house on that day. He also claimed that on 1.5.2008, the appellants had brought the appellant Dharmender and on that day he had seen him and identified him. He also claimed to have identified Abdul Kadir when brought to his house on 7.5.2008. The witness during his deposition in the court brought the stolen mobile phone Ex.P1 and its IMEI number was cross-checked by the learned trial Judge.

5. Smt. Shakuntala, mother of the complainant came in the witness box as PW3 and stated that on hearing the noise of her son saying that some dacoits had entered the house and beating him she as well as her

husband ran towards his room and saw six (6) persons having surrounded his son. One of them had put revolver on the head of his son and another one inflicted injury on his back. The person who had put revolver snatched her chain. The third person amongst them inflicted knife injury on the abdomen of his husband and the fourth one gave fist blows to her son. The witness identified the appellant Kashi Ram as the person who had given knife injury to her son and accused Abdul Kadir as the person who had put revolver on the forehead of her son. The appellant Dharmender was identified as the person who had give knife blows to the husband of the witness. The fourth appellant was also identified by the witness. She also claimed that in the scuffle her son lost his gold chain which could not be recovered. She also deposed with respect to the theft of the mobile phone. She also corroborated the deposition of her son with respect to his firing two shots from his licensed revolver. She identified the chain Ex.P2 and claimed that she had also identified the same in TIP.

6. PW2 Shri Lakshmi Narayan is the father of the complainant. He stated that hearing the noise of his son Umesh he came to the passage, he saw six (6) persons having caught hold of his son and tried to help him. He, however, was hit by one of them with a knife. He identified

the appellant Dharmender as the person who had hit him with the knife. He also identified the appellants Abdul Kadir as the person who had put *katta* on the forehead of his son and had snatched the chain of his wife. The appellant Kashi Ram was identified as the person who had stabbed his son on the back.

7. PW6 Head Constable Vijay Pal *inter alia* stated that on 2.5.2008, the appellant Kashi Ram who was in their custody led them to Kela Godam Platform and got recovered a mobile phone from the bushes which was seized by them after sealing the same with the seal of VPS. He further stated that the appellant Abdul Kadir took them to his *jhuggi* in Village Barola on 7.5.2008, and got recovered a gold chain Ex.P2 from his *jhuggi*.

PW8 Constable Charan Singh has corroborated the deposition of PW6 with respect to recovery of a mobile phone from a heap of mud in the bushes near Kela Godam at the instance of the appellant Kashi Ram.

PW16 S.I. Sudhir Gulia is the Investigating Officer of this case who corroborated the deposition of PW6 and PW8 with respect to the appellant Kashi Ram taking them to platform at Kela Godam Railway Station on 2.5.2008 and getting a mobile phone recovered from there. He also deposed with respect to the appellant Abdul Kadir taking them

to their *jhuggi* on 7.5.2008 and producing a gold chain in the said house. He identified the mobile phone as well as the chain which he had recovered.

8. PW12 Dr. Sanjay Kumar proved the MLC of the complainant and his father Ex.PW12/A and PW12/B. The injuries were found to be simple.

PW15 Shri Prashant Kumar is the Judicial Officer before whom, the appellant Dharmender refused to join TIP on 28.4.2008 on the ground that his photographs were taken at the police station and he was shown to the witnesses. The appellant Rajnu also refused to join the TIP before the aforesaid witness on 29.4.2008 on the same ground. On 6.5.2008, the appellant Abdul Kadir refused to join TIP before him taking an identical plea. He also stated that a gold chain was identified by the witness Shakuntala Devi before him in a TIP.

9. In their statements under Section 313 Cr.P.C., the appellants denied the allegations against them and claimed to be innocent.

10. Vide impugned judgement dated 12.11.2009, the appellants were convicted under Sections 458/395/34 of IPC. Section 397 of IPC was also applied in the case of appellants Dharmender, Abdul Qadir and Kashi Ram. Vide Order on Sentence dated 13.11.2009, all the

appellants were sentenced to undergo RI for ten (10) years each and to pay fine of Rs.5,000/- each or to undergo SI for one (1) month each in default under Section 458/34 of IPC. The appellants Dharmender, Abdul Qadir and Kashi Ram were also sentenced to RI for a period of ten years and to pay fine of Rs.5,000/- or to undergo SI for one (1) month each in default under Section 395/34 read with Section 397 IPC. The appellant Rajnu was sentenced to undergo RI for seven (7) years and to pay fine of Rs.5,000/- or to undergo SI for one (1) month in default for offence under Section 395/34 of IPC. Aggrieved from their conviction and sentence, the appellants are before this Court by way of these appeals.

11. The impugned judgement has been assailed by the learned counsel for the appellants on the following grounds:

- a. The wife of the complainant was not examined though it is she who informed the police.
- b. No public witness was joined in the alleged recovery of mobile phone and gold chain.
- c. No role has been ascribed to the appellant Rajnu and no stolen property has been recovered from him.

d. No weapon or stolen property was recovered from the appellant Dharmender.

e. The appellant Dharmender was in police custody till 16.4.2008 in the case registered vide FIR No.97/2008 of Police Station Adarsh Nagar and intimation in this regard was received by Police Station Shalimar Bagh on 13.4.2008, but despite that he was arrested only on 24.4.2008.

f. The disclosure statement of the appellant Dharmender is stated to have been recorded on 14.4.2008 whereas Police Station Shalimar Bagh had been intimated on 13.4.2008 itself that he had made confession of his involvement in the case before this Court.

Kashi Ram

12. Though it is stated in the charge sheet that all the four accused had refused to join TIP there is no evidence of the appellant Kashi Ram having refused to join TIP. PW15 Shri Prashant Kumar, Metropolitan Magistrate also did not depose with respect to the appellant Kashi Ram refusing to join TIP before him. The prosecution, thus, has failed to prove that he had refused to join the TIP before a Magistrate. Since the learned counsel for the appellant Kashi Ram and Rajnu stated that both of them were more than 50 years old, production warrants of both of them were issued by the Court and when they appeared before the

Court, it transpired that Kashi Ram had grey hair and one of his eyes was of stone. He claimed that he was 60 years old. The case of the complainant in the FIR was that all the intruders were young boys aged about 20-25 years. Though PW1 to PW3 identified the appellant Kashi Ram as the person who had given knife blow to the complainant, considering the apparent age of the appellant Kashi Ram, his grey hair and his having a stone eye, it would not be safe to rely upon identification by the aforesaid witness for the first time during the trial, when there is no evidence of either the witnesses having identified him during investigation or the appellant Kashi Ram having refused to join TIP. Therefore, benefit of doubt needs to be given to the appellant Kashi Ram as far as his alleged participation in the dacoity is concerned.

Though the case of the prosecution is that while in police custody the appellant Kashi Ram made a disclosure statement stating therein that he could get the stolen mobile phone recovered, neither in the disclosure statement dated 20.4.2008, recorded in FIR No.97/2008 of Police Station Adarsh Nagar nor in his disclosure statement dated 2.5.2008, recorded by the Investigating Officer of this case it is stated that the mobile phone was lying in bushes near Kela Godam Platform. In these circumstances, the alleged recovery of the mobile phone from the

appellant Kashi Ram is also doubtful. He, therefore, needs to be acquitted.

Rajnu

13. No role to the appellant Rajnu has been assigned by any of the three eye-witnesses. No stolen property has been recovered from him. When the appellant Rajnu was produced before this Court on production warrant, he claimed that he was 55 years old. From appearance also he did not look to be less than 50 years old. The incident of dacoity in this case took place about six (6) years before the said appellant was produced in the Court, meaning thereby that he could not have been less than 45 years of age at that time. As noted earlier according to the complainant all the intruders were young boys aged 20-25 years. Considering the fact that there is no recovery from the appellant Rajnu, no specific role in the dacoity has been assigned to him and he could not have been mistaken as a young boy aged about 20-25 years, it would not be safe to convict him on the basis of identification by the witnesses. It would be appropriate to note here that this was not the case of any of the witnesses when they came in the witness box that any of the intruders was a middle aged man. The appellant Rajnu, therefore, is liable to be acquitted.

Abdul Kadir

14. All the three eye-witnesses have identified the appellant Abdul Kadir as the person who had put a country-made pistol against the complainant. All of them are consistent in this regard and there is no contradiction in their testimony on this aspect of the case. Admittedly, the appellant Abdul Kadir refused to join TIP before PW15 Shri Prashant Kumar, Metropolitan Magistrate on 6.5.2008. The refusal to join TIP was based on the ground that he had been shown to the witnesses and his photographs had been taken in the police station. However, there is absolutely no evidence of either the appellant Abdul Kadir or his photographs having been shown to any of the witnesses before 6.5.2008 when he refused to join the TIP. It has come in the deposition of the complainant that it was on 7.5.2008, that the appellant Abdul Kadir was brought to his house and he identified him at that time. Thus, there was absolutely no justification for the appellant Abdul Kadir refusing to join the TIP. On 6.5.2008, an adverse inference, therefore, needs to be drawn that had he participated in the TIP he would have been identified by the witnesses and that is the reason he refused to participate therein.

15. The identification of the appellant Abdul Kadir by as many as three (3) eye-witnesses who have been consistent as regards the role played by him in the dacoity, coupled with his refusal to join TIP is sufficient to establish his involvement in the dacoity as well as the use of country made pistol by him while committing the said dacoity.

As noted earlier Ex.PW11/C is the disclosure statement made by the appellant Abdul Kadir in FIR No.97/2008 of Police Station Adarsh Nagar while in police custody. In the said statement he *inter alia* stated that the gold chain was in his possession. PW11/C is yet another disclosure statement made by the aforesaid appellant while in custody and in the said statement also he maintained that the stolen gold chain was with him and he could get it recovered. Ex.PW6/C is the disclosure statement of the appellant Abdul Kadir recorded in the present case on 2.5.2008. In the said statement he again reiterated that he could get the chain recovered. It has also come in evidence that thereafter the appellant Abdul Kadir led the police officers to his *jhuggi* and produced the chain Ex.P2 from the said *jhuggi*. The chain was recovered on 7.5.2008. Though, no public witness was joined in the recovery of the chain from the *jhuggi* of the appellant Abdul Kadir. Considering that the recovery was effected pursuant to a disclosure statement made by

the said appellant which is admissible in evidence under Section 27 of the Evidence Act, since pursuant to the said statement the police discovered the fact that the stolen chain was in his possession, the provisions of Section 100 of the Code of Criminal Procedure did not apply and, therefore, it would not be obligatory of the Investigating Officer to join a public witness before recovering the stolen chain.

In **State of NCT of Delhi Vs. Sunil & Another** : 2000 VIII AD (SC) 613, a plea was taken that there was no independent witness of the recovery made by the police pursuant to the statement of the accused while in police custody. The following observations made by the Hon'ble Supreme Court in this regard are pertinent:

“Hence, it is a fallacious impression that when recovery is effected pursuant to any statement made by the accused the document prepared by the Investigating Officer contemporaneous with such recovery must necessarily be attested by independent witness. Of course, if any such statement leads to recovery of any article it is open to the Investigating Officer to take the signatures of any person present at that time, on the document prepared for such recovery. But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the Investigating Officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth.”

16. Three possibilities arise from the disclosure statement made by the appellant Abdul Kadir. The first being that he had himself kept the chain in the *jhuggi* where it was found; the second being that he had seen someone keeping the chain in the *jhuggi* and the third being that someone had told him that the chain had been kept in the *jhuggi* in which it was found. Since he did not tell the court as to how he came to know that the chain Ex.P2 was lying in the *jhuggi*, the presumption would be that he had come into possession of the chain before it was recovered by the police.

Since the appellant Abdul Kadir came in possession of the stolen chain soon after its theft and he has not offered any explanation for its possession, it can be safely presumed under Section 114 of the Evidence Act that either he had committed its theft or he had received or retained it knowing the same to be stolen property. In the facts & circumstances of the case the presumption ought to be that he had committed theft of this chain during the course of dacoity in the house of the complainant. The recovery of stolen chain, therefore, further corroborates the case of the prosecution against the appellant Abdul

Kadir and leaves no reasonable doubt about his involvement in the dacoity.

17. As noted earlier the chain Ex.P2 was identified by PW3 in judicial TIP conducted by PW15 Smt. Shakuntala. Even otherwise, she being the person who had been wearing the chain, she could have encountered no difficulty in identifying it before the Magistrate.

It was held by the Hon'ble Supreme Court in **Erabhadrapa alias Krishnappa v. State of Karnataka**, AIR 1983 SC 446, that where a lady witness identifies the stolen articles such as ornaments and sarees at the trial without prior Test Identification Parade, the testimony of such a witness was not inadmissible in evidence for want of prior Test Identification Parade, as ladies have uncanny sense of identifying their own belongings, particularly the articles of personal use. A particular article may be identified by any particular mark on it or by its frequent use or observation which causes a permanent impression on the mind of identifier that leads to recognition of the article.

Therefore, no fault can be found with the conviction of the appellant Abdul Kadir.

Dharmender

18. Though nothing has been recovered from the appellant Dharmender, it has come in the deposition of PW1, PW2 & PW3 that he had stabbed Shri Lakshmi Narayan, father of the complainant. All the witnesses are consistent in this regard and there is no discrepancy in their testimony on this aspect. Admittedly, the appellant Dharmender refused to join TIP before PW15 Shri Prashant Kumar, Metropolitan Magistrate. The refusal to join TIP was based on the ground that he had been shown to the witnesses and his photographs had been taken in the police station. However, there is absolutely no evidence by either the appellant Dharmender or his photographs having been shown to any of the witnesses before the TIP when he refused to join the TIP. Thus, there was absolutely no justification for the appellant Dharmender refusing to join the TIP. An adverse inference, therefore, needs to be drawn that had he participated in the TIP he would have been identified by the witnesses and that is the reason he refused to participate therein.

The identification of the appellant Dharmender by as many as three (3) eye-witnesses who have been consistent as regards the role played by him in the dacoity, coupled with his refusal to join TIP is sufficient to establish his involvement in the said dacoity.

19. As regards the contention that despite receiving intimation of his arrest on 13.4.2008, he was arrested only on 24.4.2008, I find that there has been absolutely no cross-examination of the Investigating Officer on this aspect. If the appellant wanted to derive any advantage on account of the delay in his arrest he ought to have given an opportunity to the Investigating Officer to explain the delay by asking him why, despite receiving intimation on 13.4.2008, he did not arrest him till 24.4.2008 despite the fact that he was in police custody till 16.4.2008. In the absence of cross-examination of the Investigating Officer in this regard, the Court cannot know what were the reasons for the said delay and consequent no benefit on account of the delay accrues to him. Even otherwise it is settled legal proposition that a defect in investigation does not by itself result in acquittal of the accused and the attempt of the court should be to evaluate the evidence produced by the prosecution, independently of the said defect and then decide whether the evidence which the prosecution has produced is creditworthy and reliable and whether it establishes the guilty attributed to the accused beyond reasonable doubt or not.

As held by the Hon'ble Supreme Court in Karnel Singh vs. State of M.P. JT 1995 (6) SC 437, it is not proper to acquit the person due to

defective investigation, if the case otherwise stands established, since doing so would be falling in to the hands of the erring Investigating Officer. As noted by the Supreme Court in Ram Bihari Yadav vs. State of Bihar and others, JT 1998 (3) SC 290, the story of the prosecution is to be examined *de hors* the contaminated conduct of the Investigating Officer lest the mischief which may also be deliberate one is perpetuated. The criminal justice should not be made casualty because of the wrong doing of a police officer.

The Apex Court in Dhanaj Singh @ Shera & Ors. v. State of Punjab (2004) 3 SCC 654, held, “in the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.”

The Apex Court in the case of Paras Yadav v. State of Bihar AIR 1999 SC 644, enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined *de hors* such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of

officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

Considering the consistent deposition of the eye-witnesses with respect to the role played by the appellant Dharmender and his refusal to join TIP without any justification, there can be no reasonable doubt that he was one of the persons who committed dacoity in the house of the complainant and that he was armed with a knife at that time which he used for causing injuries to PW2.

20. It was contended by the learned counsel for the appellant Dharmender that since no knife was recovered from the appellant Dharmender it cannot be known whether the knife alleged to have been used by him was a deadly weapon or not and, therefore, Section 397 of IPC could not have been applied for his conviction. I, however, find no merit in the contention. The following view taken by this Court in **Ikram Ansari v. State(NCT of Delhi)** in CrI.A.No.181/2013 and other connected appeals decided on 24.2.2014, is pertinent in this regard:

“In *Shri Phool Kumar vs. Delhi Administration*, AIR 1975 SC 905, 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 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 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 v. 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.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 Cr.L.J. 3988, where the High Court held that irrespective of its size, any knife is a deadly weapon.”

21. As regards failure of the Investigating Officer to record the statement of the wife of the complainant under Section 161 of Cr.P.C., that to my mind would be immaterial considering that she had not witnessed the incident of dacoity, she having taken shelter in the bedroom in the rear where her parents-in-law used to sleep.

22. Since the intruders committed house breaking by night, they having removed the grill in the window for entering the house and after they had made preparations for causing hurt or putting any person in fear of hurt or assault as is evident from their being armed with country made pistol and knives, the conviction of the appellants Abdul Kadir and Dharmender under Section 458/34 of IPC is justified. Since more than five (5) persons were involved in the robbery, which took place in the house of the complainant, they have been rightly convicted under

Section 395 of IPC read with Section 34 thereof. Since the appellant Abdul Kadir was armed with a country made pistol and the appellant Dharmender was armed with a knife, both of which are deadly weapons, Section 397 of IPC was rightly applied in their case.

23. For the reasons stated hereinabove, Crl. A. No.373/2010 filed by Kashi Ram and Crl. A. No.825/2010 filed by Rajnu are allowed and both of them are acquitted.

While maintaining the conviction of the appellants Abdul Kadir and Dharmender under Sections 458/34 and 395/34 read with Section 397 thereof, the substantive sentence awarded to them both under Section 458 of IPC as well as 395 read with Section 397 thereof is reduced to seven (7) years each. No ground for reducing the fine imposed upon the said appellants is made out.

The appeals stand disposed of accordingly.

LCR be sent back along with a copy of this order.

A copy of this order be sent to the concerned Jail Superintendent for information and necessary action.

MARCH 03, 2014
b'nesh

V.K. JAIN, J.