* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 25.02.2014

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\+ **CRL.A. 686/2013**

YASEEN

..... Appellant

Through: Mr. S.C. Sagar, Adv.

versus

STATE

..... Respondent

Through: Mr. Feroz Khan Ghazi,APP for State

\+ **CRL.A. 855/2013**

SIKENDER

..... Appellant

Through: Ms. Inderjeet Sidhu and Ms. Shiba Batra, Advs.

versus

STATE NCT OF DELHI

..... Respondent

Through: Mr. Feroz Khan Ghazi,APPfor State

\+ **CRL.A. 1359/2013**

MAMUN @ ABDUL RASHID

..... Appellant

Through: Ms. Aishwarya Rao, Adv.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Feroz Khan Ghazi,APP for State

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

JUDGMENT

V.K.JAIN, J. (ORAL)

On 23.01.2010, the complainant – Amarjit Singh, a resident of house no.F-107, East of Kailash, New Delhi came to the police station Amar Colony and submitted a complaint with respect to the robbery which had taken place in his house in the night intervening 22/23.01.2010. He stated that during the aforesaid night, he was sleeping in his bedroom on the second floor, whereas his son – Kunal Gulati, along with his wife Ms. Beenu Gulati and his son Ramit Gulati was sleeping in their rooms on the first floor. At about 5 am, four boys entered into the room, threatening him and asked for the cash. One of those boys put a knife on his neck and asked him to open the *almirah.* The complainant opened the *almirah* and the robbers removed about Rs.83,000/- in cash which had been kept in the *almirah*. Thereafter, they forced the complainant to accompany them to the room of his son at the first floor. Hearing the noise, his son came out of the room, but was taken inside and about Rs.1.82 lac in cash, one digital camera,a wrist watch of his son and two mobile phones belonging to the son of the complainant and one to the complainant. It was also alleged in the complaint that the robbers were aged about 20-22 years, were slim and had dark complexion.

(2) During the course of investigation, it transpired that one sim having number 9560705721 was being used in one of the stolen mobiles phones. The aforesaid sim was found to be in the name of one Smt. Julekha**,** who was arrested on 28.01.2010 and was interrogated. During the interrogation, she disclosed the involvement of the appellant –

Sikender and took the police officers to his place. Sikender was arrested on being pointed out by Smt. Julekha and one Rolex watch was recovered from his possession, which he was wearing on his wrist. On the basis of the information provided by Sikander, the appellant Yaseen and interrogated him. Yaseen, at that time, was in the custody of the Crime Branch. After disclosure statement of Yaseen has been recorded, the appellant Mamun was arrested from Santosh Colony, Faridabad on being pointed out by Yaseen and he was arrested after recovering a watch having blue strap from the pocket of his pant. The prosecution, thus, has explained to the Court how it had reached the appellants Sikander, Mamun and Yaseen.

(3) The case of the prosecution is that during the course of investigation, the appellant – Sikender was identified by the son of the complainant whereas the appellants – Mamun and Yaseen refused to join TIP. The fourth person namely Julekha who appears to have absconded during trial and the present appellants – Sikender, Yaseen and Mamun were charge-sheeted. Since they pleaded not guilty to the charges framed against them, the prosecution examined as many as 19 witnesses. The appellant Sikender examined himself as defence witness - DW1.

(4) The complainant, who came in the witness box as PW6, *inter alia,* stated that in the night intervening 22/23.01.2010, at about 5 am, four persons entered his bedroom and one of them put a knife on his throat and asked about jewellery etc. He identified the appellant – Sikender as the person who had put a knife on his throat. He further stated that Rs.33,000/-, kept in the *almirah* were taken by the accused

persons who thereafter took him to the other room and took out Rs.50,000/- which had been kept in the said *almirah*. The robbers, according to the complainant, had also taken out cash form a bag kept in the *almirah* along with some documents. Thereafter, the complainant was taken to the room of his son and as soon as he opened the door, on hearing the voice, the accused dragged him outside, and put knife on his throat. The complainant identified the appellant Mamun as the person who had put the knife on his son. He further stated that one of the accused had also put a knife on his son and the appellant Yaseen could be that person. He claimed that more than Rs.1.3 lac stolen from the room of his son besides the watch of his son, one camera and three mobile phones.

(5) The son of the complainant came in the witness box as PW2 and corroborated the deposition of his father. He stated that, when he heard some noise and opened the door in the night of 22/23.01.2010 or 23/24.01.2010, he saw four boys having surrendered his father and a knife having been put on him. When he came out, he was guarded by the robbers. The witness correctly identified all the three appellants as the person who committed robbery from his house on the aforesaid date. He identified the appellant – Yaseen as the person who had knocked at the door of his room, asking his wife not to make noise and threatened to kill her in case she did not come out. He deposed with respect to the theft of cash amounting to Rs.1.2 lac besides one camera, two gold rings of his wife, one watch make Rolex which belonged to his son. He identified the appellant – Mamun as the person who had pointed out the knife on him and touched at his stomach causing small wound, besides

threatening to kill him. He claimed that the appellant – Sikender was slapping his father and had hit him on the back when he was sitting on the bed.

(6) The daughter-in-law of the complainant came in the witness box as PW17. She corroborated the deposition of her husband and her father-in-law in respect of the robbery from their house in the night intervening 22/23.01.2010 and identified all the appellants as the persons who had committed the said robbery. She specifically stated that all of them had knives with them and they had put knives at the abdomen of her husband, father-in-law and son. She also deposed with respect to theft of Rs.1.20 lac belonging to her husband and about Rs.50,000/- / Rs.60,000/- belonged to her. Besides the theft of one camera, some articles of jewellery, wrist watch of her husband make Rolex and one wrist watch of her son.

(7) PW9 Shri Ravinder Singh, who was posted as Metropolitan Magistrate during the relevant time stated that on 15.02.2010, the application of the Investigating Officer for holding of TIP of the appellant – Sikender and Mamun was marked to him by the Area Magistrate and accordingly he reached the Central Jail no.4 on 18.02.2010 for holding his TIP.

He stated that on that date, the appellant Mamun was produced before him in Central Jail No.4 where he refused to join TIP on the ground that he had been shown to the witnesses during police remand. He further stated that on the same day, he visited Jail No.3 for

conducting the TIP of the appellant Sikender and the said accused was correctly identified by the witness Kanwar vide Ex.PW9/B.

(8) PW18 Shri Devender Kumar Jangala was posted as a Metropolitan Magistrate on 2.3.2010 when on an application of the Investigating Officer for TIP of the appellant Yaseen, it was marked to him. The appellant Yaseen was produced before him in muffled face but he refused to join TIP vide his statement Ex.PW18/A.

(9) The witness further stated that on the same date, the application of the Investigating Officer for TIP of the case property was also marked to him and the witness Kanwar also appeared before him on the said date. After the witness had been sent out of his chamber three transparent jars containing the jewellery, two sealed with the seal R.N.Y. and one sealed with the seal of W.H., were produced before him. The witness could see one wrist watch in each of the containers, the jars being transparent. Another jar sealed with the seal of R.N.Y. was produced before him and it contained one yellow colour wallet and the said wallet contained four packets of jewellery. After mixing the case property with the other articles brought by the Investigating Officer for the purpose, the Metropolitan Magistrate called the witness Kanwar inside and the witness picked up a gold ring thereby correctly identifying the said ring which was taken out of the wallet that had been kept in a jar. Thus, no property other than the gold ring was identified before the said witness.

(10) PW-19 SI Ram Niwas, inter alia, stated that when the investigation of the case was entrusted to him after registration of the

FIR, he enquired about IMEI number of the robbed mobile phones which belonged to Kanwar and Beenu. The IMEI number of the mobile phone of Beenu was found activated and the SIM card in it was issued in the name of Julekha. They went to the place of Julekha at House No.610, Madanpur Khadar, New Delhi where she was apprehended and interrogated. He further stated that he arrested the accused Julekha and interrogated her. She took them to the house of the appellant Sikender who was then interrogated and he made the disclosure statement PW15/T. He further stated that a Nokia 1600 mobile phone was recovered from the pocket of Sikender, which was seized vide Ex.PW15/N. He also produced an imported wrist watch which was seized vide Ex.PW15/E. According to the witness on 29.1.2010, he received information regarding arrest of the appellant Yaseen by the Crime Branch and on receipt of the said information Yaseen was interrogated. Yaseen made disclosure statement Ex.PW15/1 and on his pointing out, the appellant Mamun was arrested. He further stated that one wrist watch having blue strap was produced by the appellant Mamun from his pocket which was seized vide Ex.PW15/L. He also stated that the appellants Mamun and Yaseen led them to a house in Santosh Colony, Faridabad on 31.1.2010 and Yaseen produced a mobile phone Nokia 7500 which along with other articles produced by him was seized vide memo Ex.PW19/H. The witness identified Ex.PW15/1 as his watch which was recovered from the appellant Mamun and Ex.P-2/3 as the watch which was recovered from the appellant Sikender.

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

Sikender:

(12) The appellant Sikender has been identified by the complainant, his son as well as his daughter-in-law as one of the persons involved in the commission of robbery from their place. During the course of investigation, he was correctly identified by PW2 Kanwar Guleri during a TIP conducted by PW9 Ravinder Singh, who was the concerned Metropolitan Magistrate at that time. A perusal of the TIP proceedings would show that the aforesaid appellant had got arranged a number of under-trial prisoners of his choice to participate in the TIP proceedings and he was correctly picked up in the company those under-trial prisoners.

(13) It has come in the deposition of PW15 ASI Subhash Chand that when the appellant Sikender was arrested on being pointed out by the co-accused Julekha, he was wearing a wrist watch which he removed from his hand and handed over to the Investigating Officer. The watch was seized vide memo Ex.PW15/E after which it had been sealed 'RNY'. The deposition of PW15 in this regard has been corroborated by PW19 SI Ram Niwas who stated that an imported watch was produced by the appellant Sikender which was seized vide memo Ex.PW15/E after which it had been kept in a pulanda and sealed with the seal of 'RNY'.

(14) The watch produced by the appellant Sikender is Ex.P-2/3 and was duly identified by PW19 S.I. Ram Niwas. The said watch was also identified by PW15 ASI Subhash Chand. Thus, the aforesaid evidence would show that a watch make-Rolex, which during the course of trial,

was exhibited as P-2/3 was found in possession of the appellant Sikender at the time he was arrested on 28.1.2010.

(15) PW2 Kanwar Guleri is the son of the complainant. As noted earlier, he stated that his watch make-Rolex as well as the watch of his son was stolen by the robbers in the night of 22/23.1.2010. He identified his watch Ex.P-2/3, when he was examined in the Court. The aforesaid watch of PW2 was also identified by PW17, who is the wife of PW2. Thus, the prosecution has been able to prove from the deposition of the aforesaid witnesses that the watch make-Rolex Ex.P-2/3 which belongs to them was stolen in the robbery in the night intervening 22/23.1.2010. Thus, the evidence produced by the prosecution proves that the appellant Sikender was found in possession of the stolen watch Ex.P-2/3 (make-Rolex) just about 5-6 days after it was stolen.

(16) The appellant Sikender has not given any explanation for his being found in possession of the watch Ex.P-2/3 and this is not his case that the aforesaid watch which otherwise is a very costly watch, belongs to him. Considering that the appellant Sikender does not claim ownership of the watch Ex.P-2/3, there is no reason to disbelieve the deposition of PW2, PW6 and PW17 with respect to its ownership and its having been stolen in the night of 22/23.1.2010. Since the appellant Sikender has not come out with any explanation for his being found in possession of such a costly watch soon after its theft it can be safely presumed under Section 114 of Evidence Act that either he had stolen the said watch or he had received or retained it knowing or having reasons to believe the same to be stolen. Considering that the appellant

Sikender has been identified by PW2, PW6 and PW17 during trial, the presumption in this case should be that he participated in the robbery and committed theft of the said watch at that time. Therefore, no fault can be found with the conviction of the appellant Sikender.

(17) It has come in the deposition of PW17 Ms. Beenu Singh that all the robbers were armed with weapons. According to the complainant, the appellant Sikender was carrying a knife which he had put on his neck. There is no reason to disbelieve the deposition of the complainant. Even in the FIR he had alleged that one of the assailants had put a kitchen knife on his neck while asking him to open the almirah. It is, thus, evident that the appellant Sikender used a knife in commission of the aforesaid robbery.

(18) It is contended by learned counsel for the appellants that since no knife has been recovered; the charge under Section 397 of IPC does not stand substantiated. The contention is unless the knife is produced before the Court, it cannot be known whether it was of such type that it could be classified as a deadly weapon or not. I, however, find no merit in the contention. It is further submitted that in any case, since the knife alleged to have been used by the appellant Sikender is a kitchen knife, it does not amount to a deadly weapon. I, however, do not find any merit in either of the said submissions.

The expression "deadly weapon" has not been defined in IPC, and its ordinary meaning would be an object, which if used as a weapon, can result in death of a human being. It would be difficult be difficult to

dispute that even a kitchen knife, irrespective of its size , can result in death, if used with force at a vital part of the body.

19. The following view taken by this Court in *Crl.A.No.181/2013 titled `Ikram Ansari v. State (NCT of Delhi)'* and connected matters decided on 24.2.2014 is relevant in this regard:-

> "37. 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:-
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>> "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,* deiced 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.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."

Therefore, the appellant Sikender was rightly convicted under Section 392/397 of IPC.

Mamun:

(20) Coming to appellant Mamun, there is evidence of recovery of a watch from him since it has come in the deposition of PW15 ASI Subhash Chand and PW19 S.I. Ram Niwas that a watch was recovered from his possession at the time of his arrest and was seized vide seizure memo Ex.PW15/L. A perusal of the seizure memo would show that the colour of the watch as well as of its strap was blue. The aforesaid watch was identified by PW2 Shri Kanwar, PW6 Sh. Amarjeet Singh and PW17 Ms. Beenu Singh as the watch belonging to the grandson of the complainant. It has also come in the deposition of PW2 and PW17 that the watch of their son was also stolen during the robbery which took place in their house in the night intervening 22/23.1.2010. However, there was no allegation of theft of the aforesaid watch of the grandson of the complainant, in the FIR. Therefore, I am excluding from consideration the alleged recovery of the stolen watch from the appellant Mamun. However, the fact remains that he has been identified by all the three witnesses as one of the persons involved in the commission of the robbery.

(21) The robbers stayed in the house of the complainant for quite some time and, therefore, the witnesses had ample opportunity to see them and later identified them, during trial. Though PW17 could not tell who

had caught her husband, father-in-law and son, she specifically stated that she could never forget the faces of the offenders who had taken away her sleep. She denied the suggestion that there was no light in the house and, therefore she could not have seen the offenders. She specifically stated that all their lights were switched on. This can hardly be disputed that a person who has been subjected to an incident of this nature is unlikely to forget the faces of the offenders for years to come. The incident such as armed robbery do not occur every day in the life of a person and, therefore, a person who witnesses an incident in which armed robbers enter the house in the night, and commit theft of cash and various articles, by intimidating the inmates is unlikely to forget the faces of the robbers for a long time to come. The incident of armed robbery would continue to haunt the victim for a long time and would time and again bring the faces of the offenders before their eyes. Therefore, I do not find any merit in the contention that the witnesses were not in a position to identify the appellants and they identified them during the trial, at the instance of the investigating officer.

(22) The plea taken by the appellant Mamun for refusing to join TIP was that he had been shown to the witnesses during police remand. However, there is no evidence of the said appellant having been shown any of the eye witnesses during the period he was in police custody. Neither any of the eye witnesses nor does the investigating officer stated so in their deposition in the Court. It is, therefore, evident that the appellant Mamun refused to join TIP without any justification. Therefore, it can be safely inferred that had the appellant Mamun participated in the TIP would have been identified by the witnesses and that precisely was the reason he refused to join the said proceedings.

The identification of the appellant Mamun by the witnesses coupled with his refusal to join TIP, in my view, is sufficient to prove that he had participated in the commission of robbery which took place in the house of the complainant in the night intervening 22-23rd January, 2010.

(23) It has come in the deposition of PW-17 that all the robbers who entered their house were armed with weapons. When PW-2 came in the witness box, he identified Mamun as a person who had put the knife in his stomach. When the complainant came in the witness box he stated that Mamun had put knife on the neck of his son. There is some contradiction in the deposition of PW-2 and PW-6 as to at which part of the body to PW-2, knife was put by the appellant Mamun, but, the said discrepancy, to my mind, would be inconsequential, the core part of the testimony of both of them being that the appellant Mamun had a knife which he had used for intimidating PW-2 by placing it against his body. Therefore, the appellant Mamun used a knife which is a deadly weapon, during the commission of the robbery by placing the same against the body of PW-2 Kanwar Guleri.

(24) The learned counsel for the appellant Mamun submits that since no knife had been recovered by the investigating officer, the appellant could not have been convicted with the aid of Section 397 of IPC. I, however, do not agree with the learned counsel. The use of a deadly weapon during the commission of robbery attracts the applicability of Section 397 of IPC. The knife, as discussed earlier, is a deadly weapon irrespective of its size and the use of the knife in this case is also evident from the appellant Mamun placing it against the body of PW-2. If the

Court insists on the recovery of the weapon before a person can be convicted with the aid of Section 397 of IPC, it would be quite easy for every person using a weapon to destroy it immediately after commission of the offence and thereafter claim that in the absence of recovery of the weapon, he cannot be convicted for having used it during the commission of the offence. Therefore, the conviction of the appellant Mamun under Section 392 of IPC read with Section 397 thereof cannot be faulted with.

Yaseen

(25) As noted earlier, the appellant Yaseen has been identified by PW-2 and PW-17 as one of the persons who had attended their house in the night intervening 22-23rd January, 2010. PW-6 however was not sure with respect to his identity and stated that he could be one of the persons involved in the robbery. However, there is no good reason to disbelieve PW-2 and PW-17 as regards the identity of the appellant Yaseen. He also refused to join TIP during the course of investigation before PW-18 Shri Devender Kumar Jangala, Metropolitan Magistrate. The justification given by the aforesaid appellant for refusing to join TIP on 02.03.2010 was that he had been shown to witnesses in the police station. However, there is no evidence of the said appellant having been shown to any of the witnesses nor there is any material on record from which it may be inferred that he could have been shown to the witnesses in the police custody. In fact, there is no evidence of any of the witnesses having visited the police station at any time before the said appellant refusing to join TIP on 02.03.2010. Therefore, there was no justified reason for the appellant Yaseen to refuse to join TIP proposed

to be held by PW-18 Shri Devender Kumar Jangala, Metropolitan Magistrate. In these circumstances, it can be inferred that had he joined the TIP, he could have been identified by the appellant and that was the reason he declined to participate in the said proceedings. The identification of the appellant Yaseen coupled his refusal to join TIP without there being any justification for such refusal would be sufficient to establish his identity even if the alleged recovery of the watch of the son of the complainant is excluded from consideration on the ground that in the FIR there was allegation of theft of only one watch, his identification in the Court coupled with refusal to join TIP is sufficient to prove the guilt attributed to him, he having participated in the commission of the robbery.

(26) It has come in the deposition of the complainant that the appellant Yaseen could be the person who had put the knife on his grandson. However, when the son of the complainant came in the witness box as PW-2 he stated that the fourth boy who was not present in the Court was holding a knife over his son, meaning thereby that the appellant was not the person who had put the knife on his son. Thus, there is some discrepancy in the evidence, as to whether he had put the knife on the grandson of the complainant.

Though it has come in the deposition of PW-17 Smt. Beenu that all the three appellants were armed with knives she did not tell the Court as to in what manner the appellant Yaseen had used the knife. She did not claim that it was the Yaseen who had put a knife against her son who was on the bed and had been covered with the blanket. However, the complainant when he came in the witness box expressly stated that

all the four persons were having knives in their hand. He also maintained that the knives were picked up from his kitchen since later they found the knives missing from the kitchen. Thus, though there is no firm evidence of the appellant Yaseen having put the knife on the grandson of the complainant, the fact remains that the complainant as well as his daughter-in-law are emphatic in saying that all the persons were armed with knives, which of course were kitchen knives. Since the knife was in the hand of the appellant Yaseen was actually seen by the complainant and his daughter-in-law, the obvious purpose behind carrying the knife was to intimidate them so that they do not resist the commission of robbery by the appellants. Therefore, carrying knife in the view of the victim would amount to use of the knife within the meaning of Section 397 of the Indian Penal Code. The appellant Yaseen therefore has been rightly convicted under Section 392 of IPC read with Section 397 thereof.

Conviction u/s 14 of Foreigners Act, 1946

(27) Coming to the conviction of the appellants under Section 14 of Foreigners Act. The said Section, inter alia, provides that whoever contravenes the provisions of the Act or of any order made thereunder, or any direction given in pursuance of this Act or such orders, for which no specific punishment is provided under the Act shall be punished with imprisonment for a term which may extend to 5 years and shall also be liable to fine. In exercise of the powers conferred upon it by Section 3 of Foreigners Act, 1946, the Central Government made an order called the Foreigners Order, 1948, which came into force on 14.01.1948. The said order inter alia provides that no foreigner shall enter India without

the leave of the civil authority having jurisdiction at the port or any other place on the borders of India. Therefore, the first question which arises in this regard is as to whether the appellants are foreigners. Section 9 of the Foreigners Act places the burden of proving that a particular person is not a foreigner, places upon that person. The said Section reads as under:-

> "9. Burden of proof. If in any case not falling under section 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner or is or is not a foreigner of a particular class- or description the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwith- standing anything contained in the Indian Evidence Act, 1872 , lie upon such person."

This is not a case which would attract applicability of Section 8 of the Act and, therefore, the onus of proving that they are not foreigners would be upon the appellants. Section 3 of the Citizenship Act provides for acquisition of citizenship by birth whereas Section 4 of said Act provides for acquisition of citizenship by descent. Section 5 of the Act provides for acquiring citizenship by registration whereas Section 6 provides for acquisition of citizenship by naturalization. Section 6(A) contains certain special provisions as to citizenship of persons covered by Assam Accord.

(28) The appellants did not tell the trial court as to how they were citizens of India. No evidence was led by any of them except Sikander.

Sikander came in the witness box as DW-1 and, inter alia, stated that he was residing in Jhuggi No.392 of East of Kailash and had ration card and election card at the said address. Exhibit DW-1/A is the copy of his election card, Exhibit DW-1/B is the copy of ration card, Exhibit DW-1/C is the copy of the voter ID card of his wife, Exhibit DW-1/D is the copy of the birth certificate of his son, Exhibit DW-1/E is the copy of the birth certificate of his daughter and Exhibit DW-1/F is the copy of birth certificate of his other son. However, nowhere did the appellant Sikander claim that he was born in India. He did not claim that either of his parents is/was a citizen of India. No evidence at all was produced by him to prove that he had acquired citizenship of India by birth or by descent, registration or naturalization. He also does not claim to be a person covered by Assam Accord, therefore, Section 6(A) of the Citizenship Act also does not apply to him. It is, thus, evident that he has failed to discharge onus placed on him by Section 9 of the Act.

(29) As regards the other two appellants, no evidence at all has been led by them that they are not foreigners or are Indian citizens either by birth or by descent or registration or naturalization. In these circumstances, the conviction of the appellants under Section 14 of the Foreigners Act cannot be interfered with.

(30) For the reasons stated hereinabove, the conviction of all the three appellants under Section 392/397 of IPC as well as under Section 14 of the Foreigners Act is confirmed. However, in the facts and circumstances of the case, the substantive sentence awarded to the appellants under Section 392/397 of IPC is reduced to 7(seven) years each. There is no ground to reduce the substantive sentence awarded to

the appellants under Section 14 of the Foreigners Act, 1946. The amount of the fine imposed upon them under Section 392/397 of IPC is reduced to Rs.1000/- each whereas the fine imposed upon them under Section 14 of the Foreigners Act is reduced to Rs.2,000/- each. In default of payment of fine imposed under Section 392/397 of IPC, the appellants shall undergo S.I. for 15(fifteen) days whereas, in default of payment of fine imposed under Section 14 of the Foreigners Act, the appellants shall undergo S.I. for 1(one) month each.

The appellants shall be entitled to benefit of Section 428 of the Code of Criminal Procedure and all the sentences shall run concurrently.

The appeals stand disposed of accordingly.

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

The Lower Court Record be sent back forthwith, along with a copy of this order.

FEBRUARY 25, 2014 V.K. JAIN, J.

rd/b'nesh/ks