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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 18th March, 2015

Crl.A. 820/2013

KESHAV KUMAR @SAJAN

..... Appellant

Through: Mr.U.M.Tripathi, Advocate

Versus

STATE NCT OF DELHI

..... Respondent

Through: Ms.Jasbir Kaur, Additional Public
Prosecutor for the State alongwith SI
Manohar Lal, Police Station Rajouri
Garden, Delhi.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

For detailed order see Crl.A.No.1088/2012.

Sunita Gupta
(SUNITA GUPTA)
JUDGE

MARCH 18, 2015

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Signature Not Verified
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By:AMULYA

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 18th March, 2015

+ Crl.A. 1088/2012

VEER BAHADUR SINGH @ VEERU Appellant
Through: Mr.U.M.Tripathi, Advocate

Versus

STATE

..... Respondent
Through: Mr.O.P.Saxena, Additional Public
Prosecutor for the State alongwith SI
Inderpal from Police Station Rajouri
Garden.

Crl.A. 820/2013

KESHAV KUMAR @SAJAN Appellant
Through: Mr.U.M.Tripathi, Advocate

Versus

STATE NCT OF DELHI

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Through: Ms.Jasbir Kaur, Additional Public
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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Challenge in these two appeals is to the judgment dated 02.12.2011 and order on sentence dated 14.12.2011 qua accused Veer Bahadur Singh

and order on sentence dated 15.04.2013 qua appellant Keshav Kumar alias Sajan, vide which both the appellants were convicted under Section 307/397/34 IPC as under and were sentenced as under:-

- (i) Under Section 397 IPC to undergo rigorous imprisonment for seven years and to pay a fine of Rs.5000/- in default six months further rigorous imprisonment.
- (ii) Under Section 307/34 IPC to undergo three years rigorous imprisonment and to pay a fine of Rs.3000/- in default further three months rigorous imprisonment.

2. Filtering the unnecessary details the broad essential facts as put forth by the prosecution are that on receipt of DD No.40A Ex.PW9/A, ASI Hawa Singh alongwith Constable Ram Kumar reached Kamla Mai Hospital where they came to know that injured Hari Kishan was brought in the hospital but since his condition was serious as such, he was sent to DDU hospital. In the meanwhile, ASI Hawa Singh received DD No.41A Ex.PW9/B regarding admission of injured in DDU hospital. Accordingly, he went to DDU hospital and inspected the MLC. The doctor declared Hari Kishan Yadav unfit for statement. Since no eyewitness was available in the hospital as such, after making endorsement on the DD Ex.PW9/D, rukka was sent to police station through Constable Ram Kumar on the basis of which FIR was registered under Section 307 IPC. Further investigation was entrusted to SI Balbir Singh who alongwith Constable Ram Kumar reached the spot where he met PW-1 Ram Bhagat Yadav who handed over a sweater which was seized vide seizure memo Ex.PW1/C. He disclosed that on hearing the noise of incident he reached the spot and found Hari Kishan Yadav in injured condition and then he was sent to hospital. On 11.02.2009 after the injured

was declared fit for statement his statement was recorded. Thereafter Sections 394 and 397 IPC were added. After the injured was discharged from the hospital, on his pointing out site plan Ex.PW13/A was prepared.

3. It is further the case of prosecution that on 29.03.2009 a secret information was received by the special staff regarding three robbers reaching at Andh Vidhyalya near Khatu Shyam Stadium, Hari Nagar, Ghantaghar Chowk. All the three accused namely Veer Bahadur Singh, Keshav Kumar and Maninder Singh were arrested. Their disclosure statements Ex.PW8/C, Ex.PW8/D and Ex.PW8/E were recorded. One mobile phone make Nokia model no.6610 colour black and silver was recovered from the possession of accused Maninder alias Rocky vide Ex.PW8/A. Motorcycle was also seized. On receipt of information from special staff about the arrest of the accused persons, on 29.03.2009 PW-13, SI Balbir Singh interrogated the accused persons in the Court after seeking permission. Thereafter an application was moved before the learned Metropolitan Magistrate for conducting Test Identification Parade of the accused persons however the accused refused to join the proceedings. Pursuant to the application moved by the Investigating Officer of the case for grant of police remand, two days police remand was granted. Accused Keshav Kumar led the police party at Priyadarshni Park and on his pointing out one purse was recovered from the bushes containing prescription slip of the doctor, driving licence and some visiting cards. The same were seized vide seizure memo Ex.PW-13/D. All the three accused pointed out the place of incident vide pointing out memo Ex.PW13/E, Ex.PW13/F and Ex.PW13/G. After completing investigation chargesheet was submitted against the accused persons.

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4. After compliance of provisions of Section 207 of the Code of Criminal Procedure the case was forwarded to the Court of Sessions. Charge for offence under Sections 397/307/34 IPC was framed against the accused to which they pleaded not guilty and claimed trial.

5. In order to substantiate its case, prosecution examined 14 witnesses. The case of accused persons in their statement under Section 313 Cr.P.C was one of denial simplicitor. According to them, they were falsely implicated in this case. Two witnesses were examined by the accused persons. Learned Additional Sessions Judge considered the evidence adduced by the prosecution as well as accused and convicted the appellants for the aforesaid offences and sentenced them, as mentioned above.

6. Feeling aggrieved, separate appeals have been preferred by two of the convicts.

7. It was submitted by learned counsel for the appellant Veer Bahadur Singh that no recovery was effected either from this appellant or at his instance. In the absence of recovery of any article or weapon of offence from this accused, offence under Section 397 IPC is not made out. Moreover, identification of the accused for the first time in Court is of no consequence. Furthermore, according to PW-1 Ram Bhagat Yadav, he saw the victim lying in a jungle. There is nothing on record to show that there was any electricity so that the victim could have identified the accused persons. As regards recovery of purse and mobile, it was submitted that the contents of the articles recovered from the purse reflects that the same does

not belong to victim and even the colour of the mobile phone is changed. As such, the same does not connect the accused with crime.

8. Learned counsel representing appellant Keshav Kumar submitted that the only role attributed to this appellant is that of beating and catching hold the injured. In the absence of "user of any deadly weapon" by this appellant he could not have been convicted under Section 397 IPC with the aid of Section 34 IPC. Moreover, the appellant has also been convicted under Section 307 IPC however Section 397 and 307 IPC cannot go together. It was also contended that the weapon of offence was not recovered and the contents of the purse goes to show that the same does not belong to victim. Under the circumstances, prosecution has failed to bring home the guilt of the accused beyond reasonable doubt as such, accused are liable to be acquitted.

9. Rebutting the submissions of learned counsel for the appellants it was submitted by learned Additional Public Prosecutor for the State that a conviction can be based on the sole testimony of the victim. In the instant case none of the accused is alleging any enmity with the injured for which reason he will falsely implicate them. The accused persons refused to join Test Identification proceedings as such, adverse inference is liable to be drawn against them. Moreover, they were duly identified by the victim in the Court. Non recovery of weapon of offence does not cast any dent on the prosecution version. Even if the articles lying in the purse are not in the name of the victim, it does not mean that the purse does not belong to him. The impugned judgment does not suffer from any infirmity which calls for interference as such, appeals are liable to be dismissed.

10. The case of prosecution is based on the solitary testimony of PW-7 Hari Kishan Yadav, the victim. The law is well settled that the Court can and may act on the testimony of a single witness provided he is wholly reliable as held in *Sunil Kumar vs. State of NCT of Delhi* (2003) 11 SCC 367; *Namdeo v. State of Maharashtra* (2007 14 SCC 150; *Kunju @ Balachandran vs. State of Tamil Nadu*, AIR 2008 SC 1381.

11. There is no legal impediment in convicting a person on the sole testimony of a single witness. It is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise.

12. Moreover, the victim is also an injured witness. The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he will spare the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness

should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein.

13. In *Abdul Sayed v. State of Madhya Pradesh*, (2010) 10 SCC 259, Supreme Court laid down :

"26. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." [*Vide Ramlogan Singh v. State of Bihar*, 1972 SC 2593; *Malkhan Singh & Anr. v. State of Uttar Pradesh*, AIR 1975 SC 12; *Machhi Singh & Ors. v. State of Punjab*, AIR 1983 SC 957; *Appabhai & Anr. v. State of Gujarat*, AIR 1988 SC 696; *Bonkya alias Bharat Shivaji Mane & Ors. v. State of Maharashtra*, (1995) 6 SCC 447; *Bhag Singh & Ors. (supra)*; *Mohar & Anr. v. State of Uttar Pradesh* (2002) 7 SCC 606; *Dinesh Kumar v. State of Rajasthan*, (2008) 8 SCC 270; *Vishnu & Ors v. State of Rajasthan* (2009) 10 SCC 477; *Annareddy Sambasiva Reddy & Ors. v. State of Andhra Pradesh*, AIR 2009 SC 2261 and *Balraje alias Trimbak v. State of Maharashtra*, (2010) 6 SCC 673.

27. While deciding this issue, a similar view was taken in, *Jarnail Singh v. State of Punjab*, (2009) 9 SCC 719, where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under:

"Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In *Shivalingappa Kallayanappa v. State of Karnataka*, 1994 Supp (3) SCC 235, this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

In *State of U.P. v. Kishan Chand*, (2004) 7 SCC 629, a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present

during the occurrence. In case the injured witness is subjected to lengthy cross- examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana (2006) 12 SCC 459). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below.

28. The law on the point can be summarized to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an in-built guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."

14. In view of this legal position, let us revert to the case in hand.

15. PW-7 has stated that on 28.01.2009 he was coming from his duty at about 7.45 pm and was talking on his mobile to his father near Priya Darshan, Rajouri Park. Accused started snatching his phone. They also picked up his purse and started beating. All the three accused started beating him. Veeru inflicted knife blow on his person while the remaining two accused caught hold of him. Although he did not know the name of two other accused however he pointed out towards accused Maninder and Keshav by deposing that they were the accused who caught hold of him. He received eight injuries on different parts of his body. His intestines came out from the stomach due to the injuries caused by accused Veeru. He became unconscious. Due to injuries caused by the accused persons he was unable to perform his daily pursuits. He saw the accused persons when they caused injury on his person. They robbed him of his purse and phone. He identified his purse Ex.P-1 containing the articles and mobile phone Ex.P-2 which were robbed during the incident. It has come in the cross-examination of the

witness that Veeru was living at Mayapuri Chowk and he was familiar with his face although he did not know his name. Accused Veer Bahadur Singh admitted in his statement recorded under Section 313 Cr.P.C that complainant used to live at a distance of about 100 meters from his residence and was known to him from earlier. He further stated that complainant had no enmity with him and he cannot tell as to why he got him implicated in this case. The witness was subjected to lengthy cross-examination by learned counsels for all the accused persons however nothing material could be elicited to discredit his testimony. Admittedly, he was not having any animosity either with accused Veer Bahadur Singh or the remaining accused persons for which reasons he would falsely implicate them in this case while allowing the real culprits to go scot free. From the deposition of this witness it becomes clear that while he was returning from his duty he was robbed of his purse and mobile phone by all the accused persons and while committing robbery he was inflicted knife blow on his person by accused Veer Bahadur Singh with the assistance rendered by his co-accused who caught hold of him with the result the witness sustained injuries on various parts of his body and he fell unconscious. The testimony of the witness is reliable, credible and inspire confidence.

16. According to PW-1 Mr.Ram Bhagat Yadav on 28.01.2009 at about 9.30 pm he was going to purchase meat alongwith one other person. On the way there was a little jungle. He heard noise of screaming of a person. When he saw him he noticed that the victim was his relative Hari Kishan and blood was oozing out from his mouth. He brought him to his jhuggi and later on he was sent to hospital. MLC of Hari Kishan Ex.PW-14/A prepared by Dr.Rajesh Shah was duly proved by PW-5 Dr.Avinash Bhargav. According

to Dr.Amit Aggarwal, the injuries on the person of Hari Kishan was opined as dangerous.

17. It has come in the statement of PW-9 ASI Hawa Singh that on receipt of DD No.40A he went to Kamla Mai Hospital where he came to know that injured Hari Kishan was in serious condition as such, he has been sent to DDU Hospital. Thereafter on receipt of DD No.41A regarding admission of injured in DDU Hospital, he went to the hospital where the injured was declared unfit for statement. According to PW-13 SI Balbir Singh he could record the statement of injured Hari Kishan only on 11.02.2009 after he was declared fit for statement. Under the circumstances, from the testimony of the injured that in the course of committing robbery he was inflicted knife blow on different parts of his body resulting in his intestines coming out and due to injuries sustained by him he is unable to perform his daily pursuits find corroboration from the medical evidence that the injured sustained dangerous injuries. It is also evident that although the incident took place on 28.01.2009 the victim was able to give the statement only on 11.02.2009 i.e., after about 14 days of the incident.

18. As regards the identity of the accused being the assailants of the crime, it is a matter of record that after the accused persons were arrested, applications for conducting their Test Identification proceedings was moved by SI Balbir Singh and were presented before PW-2 Sh.Ashish Aggarwal, Metropolitan Magistrate. All the three accused i.e., Maninder Singh alias Rockey, Keshav Kumar alias Sajjan and Veer Bahadur Singh alias Veeru refused to join the proceedings on the ground that they were shown to the witnesses in special cell. In their statements recorded under Section 313

Cr.P.C accused Veer Bahadur Singh and Keshav Kumar have admitted that they refused to TIP however no reason was assigned regarding this refusal whereas accused Maninder Singh took a plea that he never refused to join the proceedings which however is belied by the proceedings Ex PW-13/B which reflect that he had refused to join TIP on the ground that he was shown to the witnesses. There is absolutely no evidence on record to show that the accused were shown to the witness in special cell. In fact when the complainant came in the witness box the appellant did not even suggest to him that the witness has seen them in special cell. Even no suggestion was given to the Investigating Officer of the case that the accused were shown to the witness at special cell. It was for the appellants to show that they had been shown to the complainant and, therefore, they were justified in refusing to join TIP proceedings. However, they failed to discharge the aforesaid onus placed on them. The purpose of prior test identification in the presence of a Magistrate is primarily to test and strengthen the trustworthiness of an eye witness during the course of investigation. The test identification enables the eye witness to identify the persons involved in the offence who are not previously known to them or the case property, subject matter of the crime. Such identification also satisfies the Investigating Officer of the bonafide of the witness besides corroborating his testimony during the course of trial. The identification during the course of such proceeding also serves the purpose of reassuring the investigating agency that the investigation proceedings are in the right direction and an innocent person is not being falsely implicated.

19. The legal position with respect to identification of an accused was summarized by Hon'ble Supreme Court in **Dana Yadav @ Dahu and Ors. vs. State of Bihar**, (2002) 7 SCC 295 inter alia as under:

"37...(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of accused by a witness in court.

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(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check value to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above."

20. This judgment was followed by this Court in *Rijaul Khan vs. State*, 2014 (1) JCC 670 and it was observed as under:-

"As a legal principle, the substantive evidence of a witness is the statement made by him in the Court. The identification for the first time in the Court, by its very nature, is of a weak character and, therefore, the Court normally looks for corroboration of such evidence by way of some other evidence which may, inter alia, include identification in a Test Identification Proceeding. Identification in a Test Identification Parade is not a substantive piece of evidence, though it can be used as a piece of

corroborative evidence if the witness identifies the accused while deposing in the Court."

21. The power to identify also varies in terms of power of observation and memory of the identifying person. Another relevant circumstance in this regard is as to for how much time the witness had seen the accused. If, for instance, he had only a glimpse of the accused, he may not be in a position to firmly recall his identity, but if he had interacted with the accused for a substantial time and had ample opportunity to observe him, he may face no difficulty in identifying him at a later date.

22. In *Raman Bhai Naran Bhai Patel & Others vs. State of Gujarat*, (2000) 1 SCC 358, the two injured eye witnesses PW2 and PW14 tried to identify the accused only in the Court and they were not knowing them earlier. No identification parade was held during the course of investigation. It was held by the Apex Court that though their evidence is to be treated to be one of a weak nature, but it cannot be said to be totally irrelevant or inadmissible. The Court was of the view that since the aforesaid witnesses were seriously injured in the incident and could have easily seen the faces of the persons assaulting them and their appearance and identity would well remain imprinted in their minds especially when they were assaulted in broad day light, they could not be said to be interested in roping any innocent person by shielding the real accused who had assaulted them.

23. In *Budhsen & Anr. vs. State of U.P.*, 1970, CrI. L.J. 1149, the Apex Court, inter alia, observed that though as a general rule, identification of the accused for the first time in the Court without there being any

corroboration whatsoever cannot form the sole basis for conviction, there may be exceptions to the said general rule when for example the Court is impressed by a particular witness, on whose testimony it can safely rely, without corroboration.

24. If the accused refuses Test Identification Parade without any justifiable cause, he does at his own peril and the Court will, in such circumstances, be justified in drawing an inference that had the appellant participated in Test Identification Parade he would have been identified by the witnesses and that precisely was the reason why he refused to join the TIP. Similar view was taken by the Hon'ble Supreme Court in *Suraj Pal vs. State of Haryana*, (1995) 2 SCC 64. Therefore, the Court would be justified in inferring that had the appellant participated in the TIP, he would have been identified by the complainant. What can be culled out from the aforesaid decision is that the identification of the accused by the complainant in court coupled with his refusal to join TIP establishes the identity of the accused as the assailant of the crime.

25. It has come in the deposition of the victim that there was light and he had seen the faces of all the three assailants. The mere fact that in the site plan the Investigating Officer has not shown any light does not mean that there was no light so as to identify the accused persons. Even PW-1 Ram Bhagat Yadav has deposed that there was street light. According to the victim the incident continued for about half an hour during which period he was robbed of his purse and mobile phone and was inflicted knife blow on different parts of his body as such, the complainant had ample time and opportunity to retain in his mind the imprint of the persons who attacked

him and robbed him of his articles. Moreover, so far as Veer Bahadur Singh is concerned, the complainant alleges that he knew him from earlier although he did not know his name at that time. Even the accused admits that he was living at a short distance from his house and, therefore, was known to the complainant. Under the circumstances, the complainant could not have committed mistake in identifying the accused during the course of trial. Therefore, identification of the accused in Court coupled with their refusal to join TIP before the Metropolitan Magistrate is sufficient to establish their identity as the perpetrators of the crime.

26. It has further come on record that when accused Maninder Singh was arrested, mobile phone belonging to the complainant was recovered from his possession. Pursuant to the disclosure statement made by accused Keshav Kumar, purse Ex.PW-13/D belonging to the complainant was recovered from the bushes of Priyadarshni Park which was containing prescription slip of doctor, driving licence and some visiting cards. The mere fact that some of the articles contained in the purse do not belong to the complainant does not mean that the purse does not belong to the complainant.

27. As regards the non-recovery of weapon of offence in *Praveen Kumar vs. State*, 1997 Cr.L.J 577 (Bom) it was observed that simply because the knife used in the commission of offence could not be recovered, it cannot be said that the weapon was not used, especially where there is unimpeachable evidence to indicate that knife was actually used by the accused. In the instant case also, PW-7 has categorically deposed that he was given injuries on different parts of the body by knife which resulted in his intestines

coming out and he had to remain hospitalised for number of days which find corroboration from the medical evidence where injuries on the person of complainant was opined to be dangerous. Under the circumstances, there is clinching evidence available on record that the complainant was robbed of his mobile and purse and while committing robbery dangerous injuries were caused on the person of the injured.

28. The learned Sessions Judge charged all the accused simplicitor under Section 397 read with Section 34 of the IPC and then under Section 307 read with Section 34 of the IPC. Section 397 and Section 398 of the IPC do not create any substantial offence but regulate the measure of punishment when certain facts are found in an aggravated situation. Therefore, there cannot be a charge simplicitor under Section 397 of the IPC. The charge has to be under Section 392 read with Section 397 or under Section 394 read with Section 397 or under Section 395 read with Section 397 of the IPC. Moreover, when Section 397 does not refer to any substantial offence, Section 34 of the IPC would be inapplicable. The word "offender" in Section 397 refers only to the person who is proved to have actually used deadly weapon and not to the others, who in combination with such persons, have committed robbery or dacoity. Therefore, Section 34 of the IPC has no application in construction of Section 397 though it may read with Sections 392, 394 or 395 of the IPC to determine the substantial offence.

29. The law is very well explained, as early as, in the case of *Emperor v. Ali Mirza*, 1924 ILR (Vol.LI) Calcutta Series 265. In this case, it is held as follows:

"Section 397 and 398 of the Penal Code do not create any offence but regulate the measure of punishment when certain facts are found. Section 34 of the

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Penal Code has no application in the construction of Sections 397 and 398, though it may be read with Section 392 and 395 to determine the substantive offence which is created."

30. Thereafter in *Emperor v. Dulli*; 1925 ILR (VOL.XLVII) Allahabad Series 59 it is held as follows:

"Before section 397 of the Indian Penal Code can be made applicable it is necessary that each of the accused should be proved to have been the offender doing the acts mentioned therein. When section 397 does not refer to any substantive offence, section 34 of the Indian Penal Code would be inapplicable. For the purposes of section 397 all the persons participating in the dacoity would not be held responsible for the acts of the others."

31. In *Phool Kumar v. Delhi Administration*; 1975 CRI.L.J 778, the Supreme Court held as under:-

"The use of a deadly weapon by one offender at the time of committing robbery cannot attract Section 397 for the imposition of the minimum punishment on another offender who had not used any deadly weapon."

32. The Apex Court in *Ashfaq v. State (Govt of NCT of Delhi)*, 2004 CRI.L.J 936 explained the provision of Section 397 IPC and held as follows:-

"No doubt the provision postulates only the individual act of the accused to be relevant to attract Section 397 IPC and thereby inevitably negates the use of the principle of constructive or vicarious liability engrafted in Section 34, IPC."

33. In view of the aforesaid legal position, framing the charge simplicitor under Section 397 of the IPC was contrary to law. Further, applying Section 34 to Section 397 of the IPC was another defect in the charge as well as in recording conviction of the accused under Section 397 read with Section 34 of the IPC.

34. In the instant case, it is the specific case of the prosecution that the appellant Veer Bahadur Singh was carrying a knife at the time of

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committing robbery which was a deadly weapon in view of the medical evidence. As regards accused Keshav Kumar, it is not the case of prosecution that he was also armed with any deadly weapon. His role is confined to rendering assistance to Veer Bahadur Singh by catching hold the complainant hence his conviction with the aid of Section 34 IPC cannot be legally sustained. However, in the process of committing robbery hurt was caused to the victim as such, he is liable to be convicted under Section 394/34 IPC.

35. So far as Veer Bahadur Singh is concerned, there is ample evidence on record against him to establish that he was carrying a deadly weapon with him at the time of alleged robbery with which he caused grievous hurt on the person of the complainant as such, he is liable to be convicted under Section 394 read with 397 IPC. No prejudice is caused to any of the accused for their conviction under Section 394 IPC as all the essential ingredients of this Section were put forth while framing charge against them.

36. As regards the submission that Section 397 and 307 IPC cannot go together, this submission has no legs to stand in as much as in *Ankush Maruti Shinde & Ors. vs. State of Maharashtra*, (2009) 6 SCC 667, the appellants were convicted under Section 397 read with Sections 395 and 396 IPC and Section 307 read with Section 34 IPC. Again in *Pargan Singh vs. State of Punjab*, (2014) CrI.L.J 4413 the conviction of the appellant under Sections 302, 397 as well as Section 307 IPC read with Section 34 IPC was upheld.

37. The essential ingredients required to be proved in the case of offence under Section 307 are:-

- (i) that the death of a human being was attempted;
- (ii) that such death was attempted to be caused by or in consequence of the act of the accused;
- (iii) that such act was done with the intention of causing death; or that it was done with the intention of causing such bodily injury as;
 - (a) the accused knew it to be likely to cause death; or
 - (b) was sufficient in the ordinary course of nature to cause death, or that the accused attempted to cause death by doing an act which was so imminently dangerous that it must in all probability cause (a) death, or (b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

38. In offence under Section 307 all the ingredients of offence of murder are present except the death of the victim. For the application of Section 307 IPC it is not necessary that the injury capable of causing death should have been actually inflicted. In the instant case the injuries sustained, the manner of assault and the weapon used clearly make out a case of Section 307 IPC. While accused Veer Bahadur Singh inflicted knife injury on the person of the complainant the remaining two accused assisted him in the commission of crime by catching hold of the victim therefore they were rightly convicted under Section 307/34 IPC.

39. In view of the above, I am of the view that the instant case does not present special features warranting review of the impugned judgment.

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Thus, there is no cogent reason to interfere with the impugned judgment except for the modification that accused Keshav Kumar is convicted under Section 394/34 IPC, and Veer Bahadur Singh is convicted under Section 394 read with 397 IPC. Conviction under Section 307/34 IPC does not call for interference.

40. Coming to the quantum of sentence, so far as Veer Bahadur Singh is concerned, he was sentenced to undergo rigorous imprisonment for a period of seven years for offence under Section 397 IPC besides fine and three years RI for offence under Section 307/34 IPC besides fine. This sentence does not call for interference as the minimum sentence prescribed under Section 397 IPC is seven years.

41. As regards accused Keshav Kumar, he was also awarded the same sentence as awarded to Veer Bahadur Singh. However, keeping in view the fact that he is liable to be convicted under Section 394/34 IPC besides 307/34 IPC as such while maintaining the sentence under Section 307/34 IPC the conviction under Section 394/34 IPC is modified to rigorous imprisonment for five years while maintaining the quantum of fine. With these modifications the appeals stand disposed of.

Copy of the judgment along with Trial Court record be sent back.
Appellants be informed through Superintendent Jail.

Sunita Gupta
(SUNITA GUPTA)
JUDGE

MARCH 18, 2015
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