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

Judgment delivered on: 10th February, 2016

+ CRL.A.837/2002

MANGE RAM @ MANGE@MAHESH Appellant
Represented by: Mr. M.L. Yadav and
Mr. Lokesh Chandra, Advocates.

versus

THE STATE OF GOVT OF NCT DELHI Respondent
Represented by: Mr. Mr. Arun Kr. Sharma,
APP for State.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

1. Vide the present appeal, the appellant has assailed the order and judgment dated 09.09.2002 and order on sentence dated 10.09.2002 whereby the appellant was held guilty under Sections 395/397 of the IPC and was sentenced to undergo RI for ten years with fine of Rs.5,000/-.

2. Learned counsel appearing on behalf of the appellant submits that there were five accused who were convicted by the aforesaid judgment. The appeals filed by Bobby and Suresh being Crl. A. 979/2002 and 498/2003 respectively have been decided by this Court vide common judgment dated 09.05.2014 whereby the substantive sentence awarded to the appellants Bobby and Suresh has been reduced to the period already undergone.

3. Mr. M.L. Yadav, learned counsel appearing on behalf of the appellant submits that the appellant was a TSR driver and no recovery was effected from him. He did not use any weapon and, moreover, was not identified during TIP. There was no overact by the appellant in the incident. He vehemently submits that since the substantive sentence of both the appellants Bobby and Suresh has already been reduced to the period already undergone, on parity the substantive sentence of the appellant Mange Ram may be reduced to the period already undergone.

4. I note, all the accused, except the appellant, were convicted under Section 412 IPC and sentenced to undergo RI for 10 years with Rs.5000/- fine.

5. The prosecution case against the accused persons was that the complainant M.A. Siddiqui engaged a TSR No.DL-1R-E2997 of the appellant for going to Noida. Already, there were two passengers. The TSR left for Noida along with the complainant. After some distance, two other boys/accused also accommodated in the TSR. One of them sat along with the driver-appellant. After 3/4 minutes' drive, the accused persons, who were sitting with the complainant, took out a knife and robbed the complainant of his I-card, i.e., security pass, Timex watch, purse containing Rs.400/-, VIP suitcase 21" which contained some clothes, Kodak camera No. KB-10 with film roll and one bag which contained leather jacket. In the meantime, another accused who was also sitting with the complainant took out a knife. All the accused took away the complainant's goods and fled away.

6. Thereafter on 26.11.1999 SI Shailender Tomar received an information that five persons were planning to commit a dacoity. He prepared a raiding party which included SI G.C. Sharma, HC Satender, HC Jitender, HC Duli Chand and constables. All the five accused were arrested in case FIR No.431/99 under Section 399/402 IPC pertaining to PS Anand Vihar. On the basis of their disclosure statements, SI Shailender Tomar recovered the Camera in question from the house of accused Bobby.

7. Further on 26.11.1999 SI Sanjay Bhardwaj, the IO of this case, received an information from SI Shailender Tomar regarding the arrest of the accused in case FIR No. 431/1999. He went to PS Anand Vihar, collected disclosure statements, other documents and interrogated all the five accused. He obtained police remand of accused Suresh, Dharam Singh and Daleep. Thereafter, accused Dharam Singh led them to the house of accused Suresh and at his instance one leather jacket kept in an iron almirah was recovered. Thereafter, they went to the house of accused Daleep bearing No.11/274, Trilok Puri and one t-shirt was produced by him from a box.

8. On 21.01.2000, the aforesaid articles were produced for identification before the Magistrate and the complainant identified all the goods. On 09.02.2000 the complainant identified the accused Bobby and Suresh and on 10.02.2000 he identified the accused Daleep Kumar and Dharam Singh in Tihar Jail.

9. In view of the facts recorded above, it is established that no article was recovered from the appellant. He was not identified by the complainant. However, he has been convicted under section 395/397 IPC. It is not in dispute that the complainant has not assigned any role to the appellant. He was only driving the TSR.

10. In support of his submissions, Id. Counsel for the appellant relies upon the judgment of the Supreme Court in ***Dilawar Singh vs. State of Delhi (2007) 12 SCC 641*** wherein the Supreme Court observed as under:-

“ 19. The essential ingredients of Section 397 IPC are as follows:

1. Accused committed robbery.

2. While committing robbery or dacoity (i) accused used deadly weapon (ii) to cause grievous hurt to any person (iii) attempted to cause death or grievous hurt to any person.

3. "Offender" refers to only culprit who actually used deadly weapon. When only one has used the deadly weapon, others cannot be awarded the minimum punishment. It only envisages the individual liability and not any constructive liability. Section 397 IPC is attracted only against the particular accused who uses the deadly weapon or does any of the acts mentioned in the provision. But other accused are not vicariously liable under that Section for acts of co-accused.

20. As noted by this Court in Phool Kumar v. Delhi Admn. the term "offender" under Section 397 IPC is confined to the offender who uses any deadly weapon. Use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397 IPC for the imposition of minimum punishment on another offender who had not used any deadly weapon. There

is distinction between 'uses' as used in Sections 397 IPC and 398 IPC. Section 397 IPC connotes something more than merely being armed with deadly weapon.”

11. Learned counsel further relies upon the judgment of this Court in ***Pramod Kumar vs. State 2013 (4) JCC 2818*** wherein this Court observed as under:-

“ 6. Admittedly, A-2 was a TSR driver who drove TSR No. DL-IR-2454 in which the incident of robbery took place. He was implicated in the incident because the two assailants sitting in the TSR had robbed the complainant by using knives. Learned Additional Public Prosecutor urged that A-2 being TSR driver facilitated the commission of crime by the other assailants as he stopped the TSR on the way. This circumstance itself, in my view, is not sufficient to connect Kamal (A-2) with the commission of crime and to hold that he shared common intention with the other two assailants to rob the complainant. No overt act was attributed/assigned by the complainant to him. There are no allegations that he in any manner assisted the other assailants to rob the complainant or exhorted them to commit the crime. Admittedly, no robbed article or weapon was recovered from his possession at the time of his apprehension. His presence in the TSR being a driver was natural and probable and that per se cannot be a factor to held him vicariously liable for the acts of other assailants. The Investigating Officer did not collect any evidence during investigation, if A-2 had association with the other assailants prior to the incident. It is not unusual for a TSR driver to allow more passengers to travel to earn more fare. The complainant had not objected to the TSR driver allowing the other passengers to sit in the TSR. PW-3 (Narinder Singh) has given somewhat inconsistent version on this aspect. In the statement (Ex. PW-3/A), he disclosed that when he took the TSR

on hire, three boys including the driver were already sitting in it. The said two assailants sat on his left and right sides. However, in the Court Statement, he informed that two boys were made to sit on the driver's seat. A-2's personal search did not yield recovery of any incriminating article. No adverse inference can be drawn that A-2 being a TSR driver was in hand and glove with other assailants and in any manner facilitated the commission of crime. Since the other assailants were armed with knives possibility of A-2 not to intervene due to fear cannot be ruled out. Since A-2 did not participate in the commission of crime and no overt act was attributed to him and in the absence of any recovery of weapon or robbed article from his possession, his conviction under Section 392/34 IPC cannot be sustained and he deserves benefit of doubt.”

12. The present case is squarely covered by **Pramod Kumar (supra)** and he is entitled for the benefit as awarded in **Dilawar Singh (supra)**. Moreover, the co-accused Bobby and Suresh have been acquitted under section 397 in Crl. A. Nos. 979/2002 and 498/2003 respectively.

13. The appellant has already undergone 1 year 9 months 29 days and earned 6 months 12 days remission. Thus, he has already undergone more than two years imprisonment.

14. Since the co-accused Bobby and Suresh have already been acquitted under section 397, the case of the appellant is on better footing. Accordingly, his conviction under Section 395 IPC is maintained but he is acquitted under section 397 IPC. Therefore, on parity, the sentence of appellant is reduced to the period already undergone by him.

15. The order on sentence dated 10.09.2002 is modified to the above

extent.

16. The appeal is partly allowed.

17. The appellant has been granted bail by order dated 13.10.2014. The bail bond executed by him, if any, stands cancelled. The surety is discharged.

18. TCR be sent back to the trial court.

SURESH KAIT, J

FEBRUARY 10, 2016
RS/jg