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

*Date of decision: 19.03.2020*

+ CRL.A. 1215/2018 & CRL.M.(BAIL) 1894/2018

HARI SHANKAR

..... Appellant

Through Mr.V.P.Katiyar, Adv.

versus

STATE

..... Respondent

Through Mr.Panna Lal Sharma, APP for State  
with Insp.Amrit Raj, PG Cell, District  
Shahdara and SI Narender Singh, PS  
Lahori Gate

+ CRL.A. 1216/2018 & CRL.M.(BAIL) 1895/2018

SAURABH

..... Appellant

Through Mr.V.P.Katiyar, Adv.

versus

STATE

..... Respondent

Through Mr.Panna Lal Sharma, APP for State  
with Insp.Amrit Raj, PG Cell, District  
Shahdara and SI Narender Singh, PS  
Lahori Gate

**CORAM:**

**HON'BLE MR. JUSTICE SURESH KUMAR KAIT**

**J U D G M E N T (O R A L)**

1. The present appeals have been filed under Section 374(2) of Cr.P.C.  
for setting aside the judgment dated 13.11.2018 and order on sentence dated

16.11.2018 passed by learned Additional Sessions Judge-02 (Central), Tis Hazari Courts, Delhi in case SC No.29026/2016, FIR No.177/2011 for offences punishable under Sections 393/394/398/34 IPC, registered at Police Station Lahori Gate, Delhi, whereby, appellants have been convicted and sentenced to undergo RI for 7 years each for the offence punishable under Section 393 read with Section 398/34 IPC and to pay a fine of ₹12,000/- each and in default thereof, they would have to further undergo SI for three months. Appellants were also sentenced to undergo RI for 7 years each for the offence punishable under Section 394 IPC read with Section 398/34 IPC and to pay a fine of ₹13,000/- each and in default thereof, they would have to further undergo SI for three months. The amount already paid as fine vide judgment dated 03.10.2013 was directed to be adjusted. Both the sentences were directed to run concurrently and benefit of Section 428 Cr.P.C. was also given to appellants.

2. It is not in dispute that vide order dated 10.04.2012, joint charges were framed against appellants under sections 393/394/34 IPC and under section 397 IPC. The appellants pleaded not guilty and faced trial.

3. Learned counsel for appellants submits that the prosecution has examined total five witnesses. PW-1 Dr. Lalit Sagar who had examined

Smt.Sadiya PW-2 and opined simple injuries on her right hand finger and palm. PW-3 is Ms. Madiya and PW-4 is Ms. Hadiya, the daughters of PW-2. The prosecution has also examined Sh. Akif Amani, a public witness as PW-5, who had allegedly handed over the accused persons to the police and also handed over the knives to the police but he has subsequently turned hostile and did not support the prosecution case at all.

4. It is submitted that as per statement of Akif Amani (PW-5) recorded U/s 161 Cr.P.C., he had stated that after hearing noise from House No.1219, he alongwith Mohd. Ramiz and Aman Kapoor entered house of complainant and saw two persons having knives in their hands who had surrounded Sadia, Nadia and Hadia. With the help of Sadia, Nadia and Hadia, he overpowered both the persons. Those two persons threw the knives on the ground. Thereafter, two police persons alongwith SI Bharat Ratan also reached at the spot and Akif Amani (PW-5) handed over apprehended persons and their knives to police. The names of apprehended persons were revealed as Saurabh S/o Santosh R/o Sarai Meera, Distt. Kannauj, UP and Hari Shankar S/o Ram Gulam R/o Moholla Bajariya Shikhana, PS & Distt. Kannauj, UP. The said fact was confronted to him by learned APP during his cross-examination as Ex.PW-5/1, but PW-5, Akif Amani has denied

having made any such statement to the police. The seizure memo of appellant bears signatures of Mohd. Ramiz, HC Kundan and SI Bharat Ratan. Even the sketch of knife bears signature of Mohd. Ramiz and SI Bharat Ratan and Left Thumb impression of appellants. But none of the witnesses were examined by prosecution. Therefore, recovery of alleged knife from appellants and the sketch of knife were not proved against appellants.

5. Further, it is submitted that on 03.10.2013, no prosecution witnesses were present and in view of statement of PW-5, prosecution was not able to prove its case beyond reasonable doubt, therefore, Trial Court asked learned APP, whether appellants can be released for a period undergone during the trial, which has been continuing since 22.12.2011. Accordingly, learned APP suggested that they can be released subject to imposition of a heavy fine on them. At that stage, a joint plea of guilt of confession of appellants was recorded. Consequently, they were convicted for offences punishable under Sections 393/394/397/34 IPC vide order and judgment dated 03.10.2013 and vide even date sentenced to undergo for a period already undergone in the Jail during the pendency of the trial since 21.12.2011 to

03.10.2013 i.e. almost one year and 10 months and to deposit a fine of ₹50,000/-.

6. It is not in dispute that the fine amount was deposited on 5.10.2013 and appellants were released from jail.

7. Being aggrieved, the State (respondent herein) challenged judgment and order on sentence dated 3.10.2013 passed by Trial Court and same was allowed vide judgment dated 16.3.2016 in CrI.A. 417/2014 with the following direction:

*“The matter is remanded to Learned Trial Court to give specific findings on the basis of evidence and confessional record as to what offence exactly have been proved against the respondent to hold them guilty. The respondent if found guilty shall be heard on the point of sentence and a specific sentence order under the offence proved would be passed.”*

8. Thereafter, Trial Court convicted appellants through a common judgment dated 13.11.2018 and sentenced the appellants as mentioned above.

9. Counsel for appellants submits that present appeals have been filed on the ground; the court below committed error in convicting appellants for offence punishable under Section 398 IPC alongwith Sections 393/394/34 IPC by ignoring the fact that for holding appellants guilty under Section 398

IPC, appellants at the time of committing alleged robbery or dacoity must be armed with deadly weapons. However, in present case, knife allegedly recovered from appellants was put on a white paper and sketch of the same was prepared. Length of blade of one of the knives is 15.5 cm and the width is 2.6 cm and length of blade of second knife is 20 cm with 3.3 cm width. Whereas, according to Schedule-I of Arms Rules, 2016 to bring the alleged knife into the definition of deadly weapons, the length of the blade should be longer than 9" and width of the blade should be more than 2". However, dimension of both knives is less than that. Therefore, alleged knives are not falling under definition of deadly weapons and appellants cannot be convicted for offence punishable under Section 398 IPC.

10. Further, this is a case of double jeopardy. Appellants were arrested on 21.12.2011 and were tried for the offences punishable under Sections 393/394/397/34 IPC. Vide judgment dated 03.10.2013, they were convicted for the offences punishable under Sections 393/394/397/34 IPC and were sentenced to undergo imprisonment for the period already undergone i.e. from 22.12.2011 to 03.10.2013 (about 1 year and 10 months), and further, to pay a fine of ₹25,000/- each. Thus, appellants cannot be again tried or convicted on the same set of facts or any other provision of IPC arising out

of the same set of facts. However, appellants have been again convicted for the offences under Sections 393/394 IPC read with Sections 398/34 IPC. The subsequent conviction dated 13.11.2018 and order on sentence dated 16.11.2018 are barred under Section 300 (1) Cr.P.C. and Section 20(2) of Constitution of India.

11. Regarding deadly weapon, reliance is placed on the case of **Salim vs. State (Delhi Admin.): (1988) 14 DRJ 85**, wherein this Court referred to the decision of the Supreme Court in **Phool Kumar vs. Delhi Administration: 1975 (1) SCC 797** and relying on the observation that a knife is a deadly weapon, did not accept the view as articulated in **Balik Ram vs. State: 1983 Crl.L.J.1438 Del.** and held as under:

*"9. ....We all understand what a knife means and to categorize 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. In the present case, the evidence shows that the injury was caused to Singh Ram witness by a sharp-edged weapon and there is a statement that the accused Salim was carrying a knife and it was with that knife that the injury was caused to the witness. It would not be necessary for the witness to further state as to that was the size of the knife to attract the provisions of Section 397 Indian Penal Code as was contended by Mrs.*

*Ahlawat. This contention that case under Section 397 Indian Penal Code is not made out fails."*

12. Subsequently, the coordinate bench of this Court in the case of ***Gulfam vs. State*** in ***Crl.A.391/2016*** decided on 03.02.2020 observed as under:

*"24. In Sonu @ Shahnawaz v. State (NCT Govt. of Delhi): Crl. 1141/2017 decided on 19.11.2019, this Court had examined the two lines of cases and had held that in view of the observations made by the Supreme Court in Phool Kumar (supra) and Ashfaq (supra) as well as the decisions of this Court in Salim (supra); Ikram Ansari and Ors. v. State (NCT of Delhi) and Ors.: (2014) 8 High Court Cases (Del) 277 and Sanjay Kumar v. State: Crl.A. 442/2014 decided on 18.09.2014, and held that it was not essential to categorize a weapon in order to determine whether it is a deadly weapon or not.*

*25. A paper cutter is also a species of knife inasmuch as, it has a handle and a blade. Although it is meant for a specific purpose of cutting paper, there is no denying the fact that its blade is very sharp and is capable of delivering a fatal injury."*

13. It is not in dispute that while remanding back the present case to Trial Court in Criminal Appeal No.417/2014, this Court has passed specific directions vide order dated 16.03.2016, which are as under:-

*"To give specific findings on the basis of evidence and confessional record as to what offence exactly has been proved against the respondents to hold them guilty. The respondent if found guilty shall be heard on the point of sentence and a specific sentence order under the offence proved would be passed."*

14. Regarding joint confessional statement made by appellants, perusal of the same does not disclose any offence committed by appellants. Joint statement of appellants pleading guilty is that they are residents of Kannauj and had come to Delhi for business purpose with Raju Muzammil, who was known to them and was working as a driver with complainant's family. They had merely accompanied Raju @ Muzammil. But due to alleged misdeeds of Raju @ Muzammil, they were also implicated. In the said confessional statement, there is no offence made out from joint plea of confession of the appellants herein and the Trial Court did not put to the appellants for which particular offences they plead guilty. Thus, if the Sections of offence were not put to the accused pleading their guilt, it vitiates the said pleading of guilt by the accused.

15. In case of *Ghamandi Vs. State: 25(1984) Delhi Law Times 170*, it was held by this Court that mandatory provisions of plea of guilt under Sections 251 and 252 Cr.P.C. are that the substance of accusation i.e. particulars of the offences are to be put to the accused under Section 251 Cr.P.C. and then the statement of the accused should be recorded under Section 252 Cr.P.C. in the words of the accused. From the statement of the

accused under Section 252 Cr.P.C., if any, offence is made out, he would be convicted. If the accused does not plead guilty, he will be put to trial.

16. In the case in hand, substance of accusation or particulars of offences were not put to appellants under Section 251 Cr.P.C. and their statements were recorded under Section 252 Cr.P.C., which are not in compliance of mandatory provision of law. Thus, the confession is vitiated.

17. In the case of ***Balaji vs. Inspector of Police: 2001-2-LW(Crl)528***, it was observed as under:

*“7. The scheme of the provision in the Code of Criminal Procedure makes it clear that when particulars of the offence are put to the accused under Section 242 Cr.P.C., it is open to him to admit the allegation or if he does not plead guilty the Magistrate shall proceed to take evidence under Section 242(3) Code of Criminal Procedure and thereafter question the accused under Section 313 Code of Criminal Procedure on the incriminating circumstances appearing against him. If at that stage, the accused admits the incriminating circumstances, then the Magistrate can accept the said plea, but not before the case reaches the stage of 313 Code of Criminal Procedure. There is no provision in the Code which contemplates filing of a memo by the accused admitting the guilt after the initial stage under Section 242 Code of Criminal Procedure and the conviction passed on such memo is not according to law and following such a procedure is not justified.”*

18. In the case of ***Gaurav Aggarwal vs. State: 263(2019) DLT 641***, whereby it was observed as under:

*“44. It bears repetition to say that the Code of Criminal Procedure does not provide for recording the plea of the accused (in answer to the charge framed against, or notice of accusations put to, him) more than once. If the accused pleads not guilty (or if his plea of guilty is not acted upon) and the prosecution is called upon to furnish proof of guilt, the procedure prescribed for trial resulting eventually in judgment based on evidence is to follow. This holds good even if the charge is altered in terms of Section 216 Cr.P.C. If after the addition or alteration of charge, the court is of the opinion that prejudice is likely to be caused to the accused in his defence on account of such alteration or addition, it may direct "a new trial" in terms of Section 216(4) Cr.P.C. It is inherent in this that the procedure applied and the proceedings recorded anterior to such stage stand effaced on account of direction for de-novo trial. Necessarily, in such event, the charge, or notice, will have to be framed afresh. If in such new trial, the charge is framed or notice of accusation served, the accused will have the liberty to enter a fresh plea which may be plea of guilty or not guilty. But generally speaking, in the trial that continues, even after alteration or addition of charge [under Section 216(3) Cr. PC], the case cannot revert to the stage of recording the plea of the accused.*

*45. To put it simply, once the trial has commenced, the prosecution having been called upon to adduce its witnesses (in the wake of accused having pleaded not guilty or notwithstanding the plea of guilty entered by him), the case must result in the judgment (of conviction or acquittal) only on the basis of evidence. Without doubt, the admission of evidence or of facts showing complicity in acts that constitute the guilt of an accused as appearing in proceedings held under Section 294 Cr.P.C. or his statement under Section 313 Cr. PC can be basis of the final judgment of conviction. But then, it is inherent in this that such admission(s) would be read as confirming the credibility of the evidence formally adduced at the*

*trial and, therefore, the decision would essentially be founded on evidence and not (merely) on admission(s) or plea of guilty.”*

19. Moreover, it is trite that guilt can be pleaded at three occasions: (i) at the time of framing the charge; (ii) on moving an application, during evidence; (iii) recording the statement of accused under section 313 Cr.P.C. In the present case, the guilt was pleaded during recording the statements of prosecution witnesses. But fact remains that appellants did not move any application for pleading guilty. Thus, pleading of guilt in this manner is not recognized by criminal jurisprudence.

20. It is not in dispute that in the cross-examination by learned APP, PW-5 Sh. Akif Amani denied entering the house of Mohd. Rizwan after hearing noise of family members of Mohd. Rizwan. He denied that after seeing him and other persons of the locality, persons who entered in the house of Rizwan threw away their knives on ground or that PW-5 & others overpowered them. He has further denied that he handed over those persons to police with knives. PW-5 has also denied that in his presence, police measured knife and prepared sketch of knife on the spot. Further denied denied that knives were taken into possession and were converted into

Pulanda. He also denied that his true and correct statement was recorded by police or the same had been read over and explained to him in detail.

21. PW-5 has further stated that in this case, he had signed some papers but does not know on how many papers he has signed. He has denied the suggestion that police had recorded his statement on 21.12.2011 mentioning that he alongwith Aman Kapoor reached at the house of Mohd. Rizwan after hearing some disturbance. He further denied that accused persons present in Court were present in the house of Mohd. Rizwan and both of them had caused injury to Sadia W/o Mohd. Rizwan. PW-5 has also denied that he alongwith Aman Kapoor apprehended both accused persons and handed over them to the police with knives. However, PW-5 has admitted to his signatures on the sketch of knives, but stated he cannot say at what place the police had prepared said documents. He has denied the fact that police had prepared sketch of knives at the place of occurrence.

22. In the impugned order, the learned ASJ has observed as under:

*“41. PWs 2 to 4 had deposed that both accused were armed with knives. Thus when a person carried a weapon with him with the intention to use it if the occasion requires, he is liable by Section 398 IPC. To attract Section 398 IPC what is required is that accused should be armed with a deadly weapon at the time of attempt to commit robbery or dacoity.*

42. Thus from the testimonies of PWs 2 to 4 and medical evidence, it has been established that accused Hari Shankar and accused Saurabh were armed with knives and accused Hari Shankar inflicted injury on PW-2 with a knife. PWs 2 to 4 had identified both accused correctly and also testified regarding the recovery of knives from the possession of both accused. Both accused were apprehended at the spot with knives.

43. PW-1 Dr. Lalit Sagar, SR(Ortho) had proved the MLC of the complainant Ms.Sadia/PW-2 stated that on 21.12.2011, he examined complainant and found wound on right index finger size 3 X .5 cm, another wound 5 X .5 cm over distal palmer region, and a wound 3 X .5 cm over third web-space and clinically no bony and tendon injury, his findings on the MLC No.2619 Ex.PW1/A and he opined simple injury from the Ortho side on the person of complainant Ms.Sadia.”

23. Regarding size of knives, learned APP has relied upon case of **Sonu @ Shahnawaz vs. State (NCT Govt. of Delhi): CRL.Appeal No.1141/2017** passed by this Court on 19.11.2019 whereby in view of observations made by Supreme Court in **Phool Kumar vs. Delhi Administration : 1975 (1) SCC 797** and **Ashfaq vs. State (Govt. of NCT of Delhi) : (2004) 3 SCC 166** and decisions of this Court in **Salim vs. State (Delhi Administration): (1988) 14 DRJ 85, Ikram Ansari vs. State: (2014) 8 High Court Cases Del 277** and **Sanjay Kumar vs. State: 2014 SCC OnLine Del 4846**, it was held that it is not essential to categorise the knife in order to determine whether it is a deadly weapon. Thus, irrespective of whether a knife is a kitchen knife,

or a butcher knife, it would qualify as a deadly weapon for the purposes of Section 397 of the IPC.

24. It is pertinent to mention here that earlier, appellants were convicted for offences punishable under Sections 393/394/397/34 of IPC vide order dated 03.10.2013 and thereafter, this Court remanded the matter back to Trial Court and thereafter, appellants have been charged and convicted for offence punishable under Section 398 IPC in addition to Sections 393/394 r/w 34 IPC and were released on sentence already undergone with fine amount of ₹25,000/- each.

25. Be that as it may, learned counsel appearing on behalf of the appellants submits that since the appellants, pursuant to order of conviction dated 03.10.2013 were released from jail after completion of 1½ years of incarceration, he prays that appellants accept conviction under Sections 393/394/34 IPC and seeks directions to be released on the sentence already undergone.

26. It is important to record here that appellants herein were earlier tried and convicted. They accepted the same, since they pleaded guilty, though not properly, as per the law and procedure laid down. Thereafter, by

impugned order, they were again convicted for the offences punishable under section 393/394/34 and section 398 IPC.

27. However, fact remains that charge was not framed against the appellants under section 398 IPC. The Trial Court has convicted them on the basis of observations made by this Court vide order dated 16.03.2016 in Crl.A. 417/2014 filed by the State of NCT of Delhi. Moreover, evidence was not led to substantiate the offence under section 398 IPC. Thus, I am of the view that conviction under section 398 IPC is perverse.

28. As discussed above, PW-5 has not supported the case of prosecution regarding the fact that appellants were apprehended and knives were recovered from them. Said witness has not identified the appellants.

29. On the seizure memo Ex.PW-5/1, PW-5 has denied his signatures. Mohd. Ramiz, HC Kundan and SI Bharat Ratan, witnesses of seizure memo, have not been examined. Thus, said recovery of knives has not been proved.

30. In view of above, this case deserves to be remanded for fresh trial. However, it will be great injustice to the appellants who have been facing trial since the year 2012. Fact remains that from the testimonies of PWs 2 to 4, it is evident that petitioners were prime accused and according to medical

evidence, injuries were inflicted upon PW-2 (Sadia) and the fact that appellants are happy with conviction under sections 393/394/34 IPC.

31. Accordingly, I hereby set aside conviction order dated 13.11.2018 to the extent that appellants were convicted under section 398 IPC. However, rest of the said conviction order remains intact. Consequently, order on sentence dated 16.11.2018 is also set aside to that extent. Accordingly, above orders are modified. However, while maintaining conviction under section 393/394/34 IPC, justice would be met, if appellants are released on the sentence already undergone.

32. The present appeals are partly allowed and disposed of, accordingly.

33. Pending applications stand disposed of.

34. The Jail Superintendent concerned is directed to release the appellants forthwith, if they are not required in any other case.

35. Copy of this order be transmitted to Jail Superintendent concerned and Trial Court concerned for necessary information.

**(SURESH KUMAR KAIT)**  
**JUDGE**

**MARCH 19, 2020**  
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