



* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 21.09.2021

Date of decision: 06.07.2022

+ CRL.A. 344/2020

RAHIS

..... Appellant

Through: Mr. U A Khan, Mr. S A Khan & Mr.
Shahrukh Khan, Advocates.
Appellant through VC from JC.

Versus

STATE

..... Respondent

Through: Ms. Asha Tiwari, APP for State with
SI Himanshu, PS Welcome.

+ CRL.A. 567/2020

JAVED

..... Appellant

Through: Mr. Gautam Khazanchi, Advocate.
Appellant through VC from JC.

Versus

STATE

..... Respondent

Through: Ms. Asha Tiwari, APP for State with
SI Himanshu, PS Welcome.

+ CRL.A. 568/2020

JAKIR @ CHUHI

..... Appellant



Through: Mr. Mayank Mikhail Mukherjee,
Advocate.
Appellant through VC from JC.

Versus

THE STATE (NCT OF DELHI)

..... Respondent

Through: Ms. Asha Tiwari, APP for State with
SI Himanshu, PS Welcome.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J

1. The appellants namely Rahis, the appellant of CRL.A. 344/2020, Javed, the appellant of CRL.A. 567/2020 and Jakir @ Chuhi, the appellant of CRL.A. 568/2020 assail the impugned judgment dated 22.02.2020 and the impugned order on sentence dated 28.02.2020 of the Court of the learned ASJ-02, E-Court, Shahdara, KKD, Delhi in relation to FIR No.244/16, PS Welcome registered under Sections 392/397/411/34 of the Indian Penal Code, 1860 qua which the three appellants were held guilty and convicted for the offence punishable under Sections 392/34 of the Indian Penal Code, 1860 read with Section 397 of the Indian Penal Code, 1860 and vide the impugned order on sentence dated 28.02.2020 were all sentenced to RI for a period of seven (7) years under Sections 392/34 r/w Section



397 of the Indian Penal Code, 1860 and to pay a fine of Rs.5,000/- each and in default of the payment of the said fine to further undergo SI for a period of three months with the benefit of Section 428 of the Cr.P.C. having been given to all the convicts. In as much as all the appeals arise out of the same impugned common judgment dated 22.02.2020 and impugned order on sentence dated 28.02.2020, the three appeals though filed separately are being taken up together for consideration in terms of proceedings dated 01.09.2021.

2. Notice of the appeals was issued to the State.
3. The Trial Court Record was requisitioned and has been received and perused.
4. The nominal rolls dated 03.07.2022 qua the three appellants are on the record.

PROSECUTION VERSION

5. As per the prosecution version set forth through the impugned judgment and as also indicated through the FIR No.244/2016, PS Welcome which was registered at 1.50 hours on 04.06.2016, DD No.96B was recorded on 03.06.2016 at 11:47 PM on receipt of a call from a passenger of an auto-rickshaw that at Lakdi Market, Z1 block, near Usmania Masjid three boys who had boarded the auto-rickshaw as passengers had beaten the passenger and looted Rs.12,000/- from him and had run away on foot, that this call was received from Mobile No. 9897905054 of which information was given by Constable Sudhir 2913 PCR and was recorded in the Rojnamcha and entrusted to SI Brij Mohan who along with Constable Vinay 3389 NE left for the spot and



on reaching there they found a TSR No. DL 1RQ 1537 stationed there and also found the complainant Bhagat Singh S/o Sh. Kuwar Pal Singh and another passenger of the vehicle who on enquiries gave his name to be Altabarak Haq S/o Mohd. Sharif at the spot and SI Brij Mohan recorded the statement of the complainant Bhagat Singh who stated to the effect that on 03.06.2016, he came to Delhi for his personal work and at about 10.50 PM, he boarded an auto-rickshaw bearing No. DL 1RQ 1537 from Moujpur Red Light to go to Welcome in which one passenger was already sitting on the rear seat and he too sat with him and when the TSR reached a little ahead of the red-light at Moujpur, three boys of ages between 20-25 years also boarded the TSR, of whom two of them sat towards the left and right side of the driver and the third one sat on the rear seat on the left side of the complainant. It has *inter alia* been stated through the FIR that at about 11:00 PM, when the TSR reached near the under construction metro station of Jafrabad before the Idgah Pulia, then the boy who was seated on the right side of the driver who was tall, thin and of dark complexion asked the driver to park the TSR on the side of the road and as the TSR driver parked the TSR on a side, the boy who was seated on the left of the complainant who was of a short height, fat and of dark complexion took out one *ustara* from his pocket and showed the same to the complainant and to the other passenger (whose name was subsequently learnt to be Altabarak Haq) and asked them to give whatever they had with them and in the meantime, the other two boys who were seated in the TSR, got down from the TSR and apprehended both the complainant and the other passenger i.e. Altabarak Haq and



the boy who was seated on the left side of the TSR driver who was tall, thin and fair and wearing a blue T-Shirt forcibly took out the brown colour purse from the rear pocket of the pant of the complainant- Bhagat Singh and according to the complainant, there was a sum of Rs.6,000/- in cash, one PAN Card, one DL, Adhar Card, an SBI ATM Card, a Voter ID Card and other documents and this person also took out a mobile phone of Zen Company of black colour without a SIM from the front right pocket of the pant of the complainant and took out another phone of the make Samsung model no. 350 of black colour with a Vodafone SIM no. 8006623834 and an Airtel SIM of No.9717821599, forcibly.

6. As per the FIR, the complainant had further stated that in the same manner, the boy seated on the right side of the driver who was tall, thin and dark complexioned forcibly took out the money and the mobile from the other passenger of the TSR (i.e. Altabarak Haq) and then all those three boys ran towards the Idgah. The complainant as per the FIR has stated that after enquiry, he learnt of the name of the other passenger as being Altabarak Haq S/o Md. Sharif R/o Village Magrena, Post PS Mohammadi Khiri, Distt. Lakhimpur Khiri, UP and the name of the driver as Md. Shahrukh S/o Jamil Akhtar R/o L-427, Sundar Nagri, Delhi. The complainant through the FIR has stated that thereafter, he and the other passenger along with the TSR driver went to the Welcome Pulia and the complainant called his employer and informed him of the whole incident who informed the police at number 100. As per the FIR, the complainant had stated that none of them had been injured and that they did not want to get themselves



medically examined but that they could identify the three persons if they came in front of them.

7. As per the FIR, the Investigation Officer, SI Brij Mohan on enquiries learnt the name of the other passenger of the TSR as being Altabarak Haq and of the TSR driver as being Mohd. Shahrukh. The FIR was got registered on the basis of the statement of the complainant Bhagat Singh under Sections 392/397/34 of the Indian Penal Code, 1860.

8. As per the charge sheet, the Investigation Officer prepared the site plan at the instance of the complainant, made enquiries from persons nearby but got no clue about the accused persons and went in search of the accused persons along with the complainant and the staff and recorded the statements of witnesses. The Investigation Officer also obtained the CDR details of the mobile numbers 8006623834, 9643388671 and 9717821599 and during the course of investigation on 14.06.2016, the Investigation Officer at the pointing out of the other eye witness i.e. the other passenger i.e. Altabarak Haq with the aid of other police personnel opposite the Tent Wala School near the dustbin at the 66 Futtta Road apprehended three boys whose names were learnt to be Javed S/o Riyazuddin i.e. the appellant of CRL.A. 567/2020, Jakir @ Chuhi S/O Wasi Ahmed i.e. the appellant of CRL.A. 568/2020 and Rahis S/o Shahbuddin i.e. the appellant of CRL.A. 344/2020. The Investigation Officer conducted the search of these persons and from the right hand pocket of the pant worn by the accused/appellant Jakir @ Chuhi, the appellant of CRL.A. 568/2020, a mobile of the make Samsung Model no.350 of black colour was



recovered and on opening which the IMEI number of the same was found to be 35421207341157/4 which was a mobile robbed in relation to the FIR in question which was seized by the Investigation Officer.

9. As per the charge sheet, on the search of the accused/appellant Rahis, S/o Shahbuddin (i.e. the appellant of CRL.A. 344/2020) from the right pocket of the pyjama worn by him, a used *ustara* was recovered which was placed on a white paper and a sketch of the same was prepared and was placed in a transparent plastic box which was sealed with the seal of BM and seized and in view of seizure of the mobile phone, Section 411 of the Indian Penal Code, 1860 was also invoked by the Investigating Agency and the three accused persons i.e. the appellants herein namely Rahis, Javed & Jakir @ Chuhi were arrested who allegedly gave their disclosure statements in relation to the incident.

10. It is further stated through the charge sheet that during investigation at the pointing out of the accused/appellant Javed, a Samsung Phone was recovered from his house, a mobile phone of King bell Company was recovered from the house of Jakir @ Chuhi and two mobile phones of the make of Tata Indicom and Micromax company were recovered at the pointing out of the accused/appellant Rahis from his house and the accused persons allegedly disclosed that these mobiles related to other incidents which were also seized by the Investigating Agency and deposited in the Malkhana.

11. As per the prosecution version, the Investigation Officer produced the three accused persons on 15.06.2016 in a muffled face before the Court and also sought the grant of police custody remand



and the police custody remand for one day was granted in relation to the three accused i.e. the three appellants herein, whereupon, at the pointing out of the accused Jakir @ Chuhi, the appellant of CRL.A. 568/2020, one more mobile phone robbed in relation to the incident which he allegedly disclosed to have robbed in association with the other two accused persons named Javed and Rahis was recovered from Jakir @ Chuhi, which was also seized by the police.

12. As per the charge sheet, no other articles robbed in the incident were recovered. The Investigation Officer is stated to have thereafter, after the three accused persons i.e. the appellants herein were remanded to judicial custody, moved applications before the Court for conducting of the Test Identification Parade but all the three accused persons refused to participate in the same. It is further stated through the charge sheet that after SI Brij Mohan was transferred, the further investigation of the case was entrusted to SI Rajiv Kumar of PS Welcome and during the course of investigation, the subsequent Investigation Officer collected the certificate under Section 65B of the Indian Evidence Act, 1872 qua the PCR Call and PCR form and also qua the robbed mobile phone Nos. 8006623834, 9643388671 and 9717821599 along with their CDR, CAF, ID details which were obtained from the concerned Nodal Officers.

13. The Trial Court Record indicates that the charges were initially framed on 23.11.2016 against the three appellants herein qua the commission of the offences punishable under Sections 392/34/397 of the Indian Penal Code, 1860 in relation to the user of the deadly weapon i.e. the *ustara* for robbing the complainant Bhagat Singh in



furtherance of their common intention with the charge having been framed against the accused Jakir @ Chuhi under Section 411 of the Indian Penal Code, 1860 in relation to his having been found in possession of the Samsung phone Model No.350 belonging to the complainant which charges were amended on 19.02.2020 against the three appellants wherein, they were charged for having in furtherance of their common intention robbed the complainant Bhagat Singh, S/o Kunwar Pal Singh of his purse containing cash and two mobile phones of the make Zen Company and Samsung Model no.350 as well as Altabarak Haq of his black coloured purse containing Rs.1,000/- and documents and a mobile phone of the make Intex Aqua Y-4 golden colour with Vodafone SIM bearing No.9643388671 who were both passengers of an auto rickshaw driven by Shahrukh by using deadly weapons i.e. *ustara* and *knives* and were thus charged with having committed offences punishable under Sections 392/34/397 of the Indian Penal Code, 1860.

14. The accused persons are indicated as per the Trial Court Record to have pleaded not guilty to all charges framed. The Trial Court Record indicates that the prosecution evidence was closed on 27.04.2019 after examination of 14 prosecution witnesses.

15. The statements under Section 313 of the Cr.P.C., 1973 of the three accused persons i.e. the appellants herein were recorded on 03.07.2019. The accused/ appellants herein named Javed and Rahis sought to lead defence evidence and one defence witness named Smt. Zubeda was produced on 21.08.2019 which witness was apparently produced by the accused/appellant herein Javed, she being stated to be



his neighbour and had deposed that on 14.06.2016, at about 4.00- 5.00 pm, the police officials came to the house of the accused Javed and had taken him with them. The defence evidence was closed on 30.09.2019 at the request of the counsel for the accused persons.

16. Vide order dated 19.02.2020 of the Trial Court, it is indicated that the amended charge was framed as there was no reference in the charge initially framed on 23.11.2016 qua the witness Altabarak Haq. The Amicus Curiae for all the accused persons Mr. Mohd. Hasan on 19.02.2020 submitted that he did not want to examine any witness after framing of the amended charge.

17. The Trial Court Record and the impugned judgment dated 22.02.2020 indicate to the effect that the factum of the incident of robbery on 03.06.2016 is corroborated in relation to all material particulars through the statements of Bhagat Singh, the complainant of the FIR No.244/2016, PS Welcome examined as PW-1, Sh. Altabarak Haq examined as PW-3, the other passenger in the TSR bearing No. DL 1RQ 1537 driven by PW-5 Mohd. Shahrukh, S/o Jameel Akhtar.

PROSECUTION EVIDENCE LED

18. However, whereas, as per the FIR, the complainant Bhagat Singh had stated that one boy had sat on the rear seat with him and one boy had sat on the left side of the driver and one boy had sat on the right side of the driver and had boarded the TSR a little ahead of the Moujpur Red-Light and through his deposition on oath as PW-1 through his examination in chief, Bhagat Singh had stated that one of the boys sat with the driver of the TSR and the other two boys sat at



the back, one on his side and the other on the side of the other passenger already seated in the TSR.

19. As per the statement made by the complainant, Bhagat Singh which forms the basis of the FIR, the boy seated on the right side of the driver and as per the deposition on oath of Bhagat Singh, the boy seated along with the driver had got stopped the TSR. After the TSR stopped as per the FIR, the boy seated on the left of the complainant Bhagat Singh who was short in height, fat and of dark complexion, took out the *ustara* from his pocket and showed the same to both the complainant and the other passenger and apprehended them and the boy seated on the left of the driver of the TSR was wearing a blue colour T-Shirt had robbed the complainant of his cash, ATM Card, mobile phone from the rear pocket of the pant of the complainant and the Samsung phone from the front pocket of the pant of the complainant, and the complainant-Bhagat Singh through his deposition on oath has stated that after the TSR had been got stopped by the boys sitting along with the driver, all the three boys put *knives* on them and had taken out his purse with its contents including his Aadhar Card, PAN Card, Voter I-Card, driving licence, SBI ATM Card, other documents and cash of Rs.6,000/- and his two mobiles and had run away. The complainant in his deposition on oath had stated that he was illiterate that he did not accompany to the place of incident and that after lodging of the FIR, he left for the native place and that he had subsequently gone to the police station when he was called by the police officials who told him of the recovery of his mobile phone and on reaching there, he identified his mobile phone of the make



Samsung. *Inter alia* he had stated that he could not identify the auto driver at it was dark and also stated that none of the accused persons who were present in Court had committed the robbery.

20. The complainant examined as PW-1 on being cross examined by the learned APP for the State admitted that out of the three boys, the boy who asked the auto driver to stop the auto on side was thin, tall and of *sanwala* (dark) complexion, but the complainant PW-1 denied that the boy seated on his left side was of short height, fatty and of a dark complexion and stated that he could not recollect the stature and complexion of the third boy. Even on being cross examined by the learned APP for the State, this witness i.e. the complainant denied categorically that the three accused were the persons who had committed the robbery with him and denied that he was deliberately not identifying the accused persons having been won over by their family members. He however denied that the mobile phone of the make Samsung with the dual SIM bearing IMEI Nos. 354212/07/341157/4 and 354213/07/341167/2 exhibit P1 did not belong to him and rather stated that it belonged to him.

21. The other passenger in the TSR i.e. Altabarak Haq examined as PW-3 stated that the person seated on the right side of the driver took out the *ustara/knife* and put it on his neck and asked him to hand over his valuable articles and identified the accused/ appellant herein named Rahis as being that boy who had robbed him of his mobile phone and purse on the point of an *ustara/knife* and this witness identified the other two accused persons present in Court as being those who had caught hold of the co-passenger and robbed him of his



mobile phone and purse. PW-3, Altabarak Haq just as was stated by PW-1, Bhagat Singh stated that all the three accused had run away after committing the robbery but that they had overpowered the auto driver. This witness Altabarak Haq i.e. PW-3 had also stated that after some days, he had gone to the police station to enquire whether his mobile phone had been recovered or not and on 14.06.2016 he joined the investigation with SI Brij Mohan and other police officials and started searching for the accused persons and when they reached near the Tent Wala School, he saw that all the three accused persons were present there and on his identification they were overpowered and an *ustara/knife* was recovered from Rahis and a mobile phone of the make Samsung was recovered from the possession of the accused Jakir @ Chuhi but nothing was recovered from the accused Javed. This witness categorically denied that he was a tutored witness and denied that he had signed any blank papers and denied that no *ustara* was recovered from the accused Rahis.

22. The driver of the auto-rickshaw examined as PW-5, Shahrukh identified the accused Jakir @ Chuhi as being the person who was seated on his left side and Javed as being the person who was seated on the rear seat. He stated that these two persons, one sitting on his left and one sitting behind him had put a *knife* on his back. He however stated that he could not see the face of the third boy and thus he was unable to identify him. On being cross-examined by the learned APP for the State, this witness, PW-5, the auto driver however identified the accused/ appellant named Rahis as being the person



sitting on his right-hand side who had boarded the auto and had robbed the passengers.

23. Written submissions were submitted on behalf of the accused/appellants Rahis, Javed & Jakir @ Chuhi.

CONTENTIONS OF THE APPELLANTS

24. On behalf of the appellant Rahis from whom the *ustara* is stated to have recovered and who as per the prosecution version is the person who utilized the *ustara* and pointed it towards both the complainant Bhagat Singh and the co-passenger Altabarak Haq calling upon to hand over whatever goods were in their possession. It was submitted on behalf of the said appellant-Rahis vide written submissions dated 25.09.2020 to the effect that the conviction of the appellant could not be sustained, in as much as, the complainant had not identified the said appellant and it was only the other two public witnesses i.e. Altabarak Haq, the other passenger of the TSR and the TSR driver Mohd. Shahrukh who had identified the appellant and that the factum that Bhagat Singh, the complainant had stated that none of the accused persons were present and had not identified any of the accused, makes the alleged recovery of the *ustara* from the appellant and any other role attributed to him, wholly circumspect. It has been submitted on behalf of the appellant-Rahis that even though PW-5 identified the appellant, it was only on being cross examined by the learned APP for the State that he was so identified by the driver of the TSR in which the complainant and the co-passenger were robbed and that this makes the entire testimony of the prosecution doubtful. The said appellant had further submitted that the discrepancies in the prosecution



witnesses are wholly fatal in the instant case whereas as per the prosecution version PW-1, 3 & 5 were present in the TSR when they were robbed and their statements were recorded by the Investigating Agency, though the statements of all the witnesses were verbatim similar, but the statements made before the Court were at much variance with each other in relation to all material particulars with it having been submitted that whereas as per their statements, the person who was sitting on the left side of Bhagat Singh on the back seat of the TSR had taken out the *ustara* and whilst showing the same, they were robbed and the other two accused persons were overpowered during the course of the robbery, however, in his deposition on oath before the Court, PW-1 stated that all the three accused persons put a *knife* upon them and on the other hand, PW-3 Altabaraq Haq says that the boy who was sitting on the right side of the TSR took out *ustara/knife* and put the same on his neck while PW-5 Shahrukh says that one who sitting on his left and one who was sitting behind put the *knife* on his neck. The said appellant Rahis submits that the statements of all the three witnesses are read together then it can easily be presumed that they were lying and that these accused persons had not committed any offence and thus the witnesses were not able to ascertain their roles exactly and were not sure whether the *ustara* or the *knife* was used by the assailants.

25. The appellant further submits that all the accused persons were lifted from their respective houses and falsely implicated in the present case pursuant to the initial statement of the public witnesses and a call to number 100 was made by the employer of the complainant but in



that call there was no mention of use of any weapon and that even in the PCR form exhibited as Ex.PW12/A, there is no mention of the same. *Inter alia*, it has been submitted on behalf of the said appellant that the recoveries in the instant case are planted as at the time of robbery no IME or ownership proof was given by the complainant to the Investigation Officer and the mobile phone was working even after the robbery as per the CDR of the mobile phone of the complainant exhibited as Ex.PW-9/A and thus, the possibility of the mobile phone being planted by the police later on could not be ruled out. It has been submitted on behalf of the said appellant that despite the availability of public persons no sincere effort was made by the Investigation Officer to join the public persons at the time of search, seizure and arrest of the accused persons from the public place and as per the prosecution story all the documents were prepared by SI Brij Mohan but the handwriting and ink of the pens were different which has suggested that the documents were prepared by different police officials, and that the signature of Altabaraq Haq was not present on the seizure memo & sketch of the recovered *Ustara*. *Inter alia*, it was submitted on behalf of the said appellant that whereas PW-7 ASI Krishan Pal had stated that the seal of BM was affixed and the *ustara* was having blood on it, was recovered. It was further submitted on behalf of the said appellant that there was no injury sustained by the complainant and the other co-passenger nor by the auto driver.

26. A contention was raised on behalf of the appellant Rahis that the *ustara* is not a deadly weapon in relation to which it is essential to observe that the verdict of this Court in “*Abhishek @ Pritam Vs. State*



of NCT of Delhi” CRL.A.388/2012 dated 12.02.2015 categorically makes mention of the *ustara* falling within the ambit of a deadly weapon which aspect is also so delineated in *“Wasim Pahadi Vs. State”* CRL.A.588/2012 reported in *ILR (2013) VI DELHI 4269*.

27. On behalf of the appellant Javed, the appellant of CRL.A. 567/2020, it has been submitted that the complainant had not supported the prosecution version having not identified the accused, in as much as, the complainant had not identified the accused in Court and had denied identifying them earlier before the police and also denied that the other co-passenger PW-3 was robbed. It has been submitted on behalf of the said appellant that there are major discrepancies in the testimonies of the eye witnesses in relation to the role of the accused persons and the discrepancies submitted are to the effect:-

“a. With respect to the positions of the three accused:

- *As per the Complainant/PW-1, of the three boys who boarded the TSR, one of them sat along with the driver, while the other two boys sat on his side and on the other side of PW-3.*
- *As per PW-3, two boys sat on the left and right of the TSR driver, and the third boy sat on the rear seat "on the side of a passenger".*
- *As per PW-5, two boys sat on his left and right side, while one boy sat on the rear seat along with the two passengers.*

b. With respect to the person who wielded the weapon:

- *As per the Complainant/PW-1, "all three boys put knives upon us".*
- *As per PW-3, the boy who was sitting on the right side of the TSR driver put ustara/ knife on his neck. He identified said boy as Accused No. 3 Rahees.*



- *As per PW-5, the boy sitting on his left and one sitting behind put a knife on his back. He identified them as Jakir and the Appellant.”*

28. *Inter alia*, it was submitted on behalf of the said appellant that the observations of the learned Trial Court that the statements of witnesses PW-3 & PW-5 were of “sterling quality” were wholly erroneous. On behalf of the appellant-Javed, it has been further submitted that there was nothing recovered from him and that the appellant had been picked up by the police from his house on 14.06.2016.

29. A further submission made on behalf of the appellant-Javed was to the effect that the person who had used the deadly weapon can only be punished under Section 397 of the Indian Penal Code, 1860 and reliance in relation thereto was placed on the observations in paragraph 19 of the verdict of the Hon’ble Supreme Court in **“Dilawar Singh v. State of Delhi” (2007) 12 SCC 641** which reads to the effect:-

“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 (11) to cause grievous hurt to any person (Hi) 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."

30. It was further submitted on behalf of the said appellant that the verdicts of this Court in "***Dinesh Rai v. State***" 2013 SCC OnLine Del 3503 and "***Tej Singh @ Goldy v. State***" 2017 SCC OnLine Del 7236 also adhered to the ratio in ***Dilawar Singh*** (supra).

31. On behalf of the accused/appellant Jakir @ Chuhi, the appellant of CRL.A. 568/2020, it was *inter alia* submitted that there are material contradictions in the eye witnesses accounts, reiterating thus the contention raised on behalf of the other two appellants named Javed and Rahis submitting to the effect that PW-1 has not been able to identify the appellant in Court and states that only one boy sat at the side of the Auto driver and two were sitting at the back and that PW-1 also stated merely that one *ustara* was shown, that PW-3 states that Rahees showed him an *Ustara* and looted his valuables and that the alleged *Ustara* was also recovered from Rahees only. It was further submitted on behalf of the said appellant Jakir @ Chuhi that PW-5, the Auto Driver stated that the Appellant was sitting on his right hand side and that at no point does he state that the Appellant had taken out a *knife* in the entire incident. *Inter alia*, it was submitted that PW-5 also mentions a *knife* and does not mention an *Ustara* and that the *ustara* is not a deadly weapon, in as much as, the *ustara* does not have a blade and that the *ustara* is a common tool used by barbers and is completely harmless unless a blade exists.



32. *Inter alia*, the said appellant submits that the prosecution had failed to show that the mobile phone recovered from him was the same mobile phone as was allegedly robbed from PW-1. It has thus been submitted on behalf of the said appellant adopting the submissions made on behalf of the other two accused/appellants i.e. Rahis, the appellant of CRL.A. 344/2020 and Javed, the appellant of CRL.A. 567/2020 that in view of material contradictions in the testimonies of the prosecution witnesses as well as the material on record, and the impugned judgment dated 22.02.2020 and the impugned order on sentence dated 28.02.2020, have essentially to be set aside.

CONTENTIONS OF THE STATE

33. On behalf of the State, it was contended that the testimonies of the prosecution witnesses were consistent in relation to all the material particulars and that there exists no ground whatsoever for the modification of the impugned judgment dated 22.02.2020, nor for the modification of the impugned order on sentence dated 28.02.2020.

ANALYSIS

34. On a consideration of the entire available record and rival pleas addressed on behalf of either side, it is essential to observe that as held hereinabove vide paragraph 17, the testimonies of all prosecution witnesses examined in the matter are consistent in relation to all material particulars qua the occurrence of robbery having taken place on 03.06.2016 at the 66 Foota Road near the Idgah Pulia, Welcome Delhi at about 11:00 PM and of there being the user of an *ustara* for the commission of the robbery from the passengers in the TSR bearing No. DL 1RQ 1537, which was done at the point of an *ustara*.



35. As regards the contention raised on behalf of the accused/appellants that no public witness had joined the proceedings on the date 14.06.2016 when the accused/appellants were apprehended by the police personnel at the pointing out of PW-3 Altabarak Haq, it is essential to observe that the Investigation Officer of the case SI Brij Mohan, PW-14 has categorically stated that he had tried to join the public witnesses but none agreed. The factum that members of the public do not join investigations, is not unknown and the same cannot detract from the veracity of the prosecution version which is corroborated through the statements of PW-3 i.e. Altabarak Haq and the Investigation Officer of the case SI Brij Mohan, as well as the testimony of ASI Kishan Pal, PW-7 then posted as HC on 14.06.2016, PS Welcome when the three accused/appellants herein were apprehended on the identification and pointing out of Altabarak Haq as being the three persons who had robbed him.

36. As regards the contention raised on behalf of the accused/appellants that the complainant did not identify the accused persons, the observations of the learned Trial Court to the effect that PW-3 Altabarak Haq, the co-passenger & PW-5 Shahrukh, the TSR driver in whose TSR the incident of robbery had occurred had deposed about the roles of the accused in the commission of the offence in a cogent manner, have essentially to be accepted qua the observations that the said witnesses have supported the prosecution version on all material aspects.

37. Though, there are undoubtedly discrepancies in the testimonies of PW-1, PW-3 & PW-5 *inter se*, the testimony of PW-3 as already



observed elsewhere hereinabove brings forth the prosecution version, wholly in relation to all material particulars.

38. The observations of the learned Trial Court which take into account the testimonies of all the prosecution witnesses detailed as under:-

“.....

24. As per prosecution case, PW-1 Bhagat Singh and PW-3 Altabarak Haq both boarded the TSR of PW-5 Shahrukh for going to Seelampur and on the way all the three accused persons also boarded the said auto rickshaw and robbed the PW-1 & PW-3 while using ustara/knives. PW-3 Altabarak Haq ha deposed the entire incident in cogent manner and pointed out specific role of each of the accused. As per testimony of PW-3 Altabarak Haq, accused Rahis robbed his mobile phone and purse on the point of Ustara/knife and other two accused i.e. Javed and Jakir caught hold co-passenger and robbed his mobile phone and purse. PW-3 deposed that out of the three boys, two boys sat on left and right side of TSR driver while third boy sat on the rear seat of the auto with passengers. PW-5 Shahrukh who was driving auto rickshaw has also corroborated the version of PW-3 while pointing out towards accused Jakir and Javed as the persons who were sitting on his left side and on rear seat. He further confirmed that accused Rahis was also sitting on his right hand side in the auto. PW-1 Bhagat Singh on whose statement present case FIR was registered although corroborated the case of prosecution on material aspects but he did not support the case of prosecution regarding description of accused persons as well as their identity, Ld. Amicus curie cross-examined PW-3 & PW-5 at a length but nothing which may diminish the evidentiary value of their testimonies came on record. Their testimonies appear to be reliable and trustworthy and there is no reason to disbelieve the same. Reliance is placed upon the judgment of Hon'ble Supreme Court in AIR 2012 SC 3157, **Rai**



Sandeep @ Deepu vs State of NCT of Delhi with Hari Singh v State of NCT of Delhi, wherein while laying down the quality of a witness, Hon'ble Court held as under:

"Sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be more relevant would be the consistency of the statement right from the time when the witness makes the initial statement and ultimately before the Court...The witness should be in a position to withstand the cross examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of occurrence, the person involved, as well as, the sequence of it. It should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of the circumstances, to hold the accused guilty of the offence alleged against him.To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant material namely, oral documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve."

PW-3 & PW-5 both have specifically deposed about the individual role of all the accused in the commission of offence in a cogent manner. PW-3 & PW-5 appear to be a



witness of very high quality on the basis of whose testimony alone conviction can be based.

25. First contention of Ld. Amicus curie was that complainant who made a call at 100 number has not supported the case of prosecution. In this regard perusal of testimony of prosecution witnesses i.e. PW-1 Bhagat Singh, PW-3 Altabarak Haq and PW-5 Shahrukh show that all three witnesses have supported the case of prosecution on material aspects. Although, complainant has not identified the accused persons, however, other two witnesses have explained the role of each of the accused during the incident as well as identified them. Complainant has deposed that after the incident he alongwith co-passenger and driver went to Welcome, where he called his employer and call at 100 number was made by his employer. This fact is also corroborated by PW-3 & PW-5 that after the incident PW-5 took them near the house of relative of complainant where he called his employer and made call at 100 number. Complainant has also confirmed in his cross-examination that name of co-passenger was revealed as Altabarak Haq S/o. Md. Sharif R/o. Lakhimpur Khiri, U.P. His presence at the spot is also corroborated by CDR of his mobile phone Ex.PW9/A and Cell Location Ex.PW9/DA. When PW-3 Altabarak Haq, who was also robbed in the incident and PW-5 Shahrukh the TR driver in whose TSR incident of robbery occurred supported the case of prosecution and identified all the three accused, the case of prosecution cannot be thrown away only due to non-identification of accused persons by complainant.

26. Ld. Amicus Curie for accused persons further argued that there is no evidence on record that PW-3 came from Amroha to Delhi on the day of incident or that he boarded the TSR for going to Seelampur. In this regard complainant Bhagat Singh has also admitted that the name of co-passenger who boarded TSR with him at the time of incident was revealed as Altabarak Haq. PW-3 further



clarified in this regard that he came from Amroha on a private bus and ticket was also taken by the conductor and that he de-boarded the bus at Anand Vihar. When as per PW-3 his ticket was also taken back by the conductor of the private bus there was no occasion for IO to seize the said ticket.

.....

28. PW-3 Altabarak Haq & PW-5 Shahrukh have specifically deposed about the role of each of the accused and that accused Rahis robbed PW-3 Altabarak Haq while using Ustara while other two accused robbed the co-passenger. PW-5 Shahrukh specifically pointed out towards accused Jakir & Javed as the persons who put knives on his back. DW-1 Smt. Jubeda has admitted in her cross-examination that she did not try to know as to why accused was taken by police. It appears that she has deposed to save accused Javed being her neighbour.”,-

have essentially to be taken into account.

39. The testimonies thus, of the prosecution witnesses as observed hereinabove undoubtedly bring forth the commission of the offence punishable under Sections 392/34 of the Indian Penal Code, 1860 against all the three accused/appellants.

40. As regards the commission of the offence punishable under Section 397 of the Indian Penal Code, 1860, though undoubtedly, it has been detailed and observed by the learned Trial Court that all the three accused persons i.e. the appellants herein in furtherance of their common intention robbed PW-3 Altabarak Haq when they hired the auto rickshaw of PW-5 Shahrukh to go to Seelampur and used *ustara* and *knives* whilst committing a robbery, the factum of *knives* having been utilized is nowhere detailed in the FIR.



41. However, PW-1, the complainant-Bhagat Singh who as per the FIR had stated that the boy seated on his left on the rear seat had taken out the *ustara* and pointed it towards him and the co-passenger calling upon them to hand over all their goods and in the meantime the other two boys seated with the driver came and apprehended them. The said witness in his testimony on oath however, stated that when the tempo reached under the Metro Station near Eidgah Pulia at about 10.30 - 11.00 pm, thereafter the boy who was sitting along with the driver, got stopped the TSR and thereafter all three boys put *knives* upon them and took out his purse and his two mobiles of make Zen company and Samsung Company and according to the complainant, in his purse there was an Adhar card, PAN card, Voter I- card, his driving license, SBI ATM card, some documents and cash Rs.6000/- and that the Samsung Mobile phone was of No.9717821599, while his other phone was without a SIM card and after committing robbery, all the three accused ran away from the spot.

42. The witness PW-3 Altabarak Haq in relation to the incident stated that when the auto reached at the red light Welcome, three boys had boarded the TSR and that out of the three boys, two boys sat inside the tempo on the left and right side of the TSR driver and the third boy sat on the rear seat on the side of a passenger. He has further stated that when the said TSR reached Jafrabad pulia near the metro construction work, the TSR driver was asked by one boy to stop the same at about 10.00 pm and as the TSR driver stopped the TSR, the boy who was sitting on the right side of the TSR driver suddenly took out one *ustara/knife* and put the same on his neck and asked to



handover valuable articles and that the said boy took out his mobile phone make of Intex in golden color and his wallet containing his card, Adhar card, visiting card and Rs.1000/- forcefully. The said boy i.e. the accused/appellant Rahis, the appellant of CRL.A. 344/2020 who was present in Court, was pointed out by the witness as being the person who had robbed his mobile phone and purse on the point of *ustara/knife*. The said witness PW-3 had pointed out the remaining two accused persons (present in Court) and stated that the said both accused persons caught hold of the co-passenger and robbed his mobile phone and wallet and thereafter, all three accused persons fled away from the spot but they PW-1 and PW-3 overpowered the auto driver PW-5.

43. As per the testimony of PW-3 Altabarak Haq thus, the *ustara/knife* are apparently interchangeable words used for the weapon utilized. This witness also identified the *ustara* Ex.P2 as being the same recovered from the accused Rahis, the appellant of CRL.A. 344/2020.

44. PW-5, Shahrukh, the auto driver in his deposition on oath has stated to the effect that on 03.06.2016, he was driving his Auto on the route of Gagan Cinema to Seelampur and on that day, at about 10.35 pm, two passengers boarded his auto and they were alighted at Shiv Mandir and from Shiv Mandir two passengers boarded his Auto and three boys boarded from the Red light of Moujpur and two of them sat on his left and right side while one boy sat on the rear seat of the auto alongwith two other passengers. He has further stated that at about 11 pm, when his auto reached near Tent Wala School, where construction



work of Metro Station was going on and there was darkness, two of the three boys, who had boarded his auto from the Red light of Moujpur, asked him to stop the auto at a side and stated that two of them i.e. one who was sitting on his left and one who was sitting behind, put a *knife* on his back and that two of them were also present in the Court. This witness also pointed out towards the accused Jakir and Javed as the person, who were sitting on his left side and on the rear seat and has stated that due to fear, he could not see the face of the third boy and thus he was unable to identify him in the Court and has further stated that those boys robbed the other two passengers whilst showing *knife* and asked them to hand over their belongings and then they called the police by making a call at 100 number. This witness has further stated that he told those passengers that he would remain with them and that they informed the police that Rs.6,000/- and two mobile phones were robbed from one passenger while Rs.1,000/- and one mobile phone was robbed from the other passenger and after robbing, all the three accused ran away.

45. This witness i.e. PW-5 on being cross examined by the learned APP for the State when the attention of this witness was drawn towards the accused Rahees further stated that the accused Rahees present in the Court, was also sitting on his right hand side in the Auto and was one of those three boys, who boarded his Auto and robbed the passengers and has stated that he has correctly identified the accused Rahees.

46. It is essential to observe that the incriminating evidence put to the three accused in their statements under Section 313 of the Cr.P.C.,



1973 which were all recorded on 03.07.2019 in relation to the user of the *knife* and *ustara* details the same through question nos. 3 & 4 qua the appellant Javed, which read to the effect:-

“Q3. It is in evidence against you that when at about 11.00 pm auto rickshaw reached near tent wala school where construction work of metro station was going on, you as well as your co-accused Jakir put knife on the back of PW-5 Shahrukh and asked him to stop the auto rickshaw. What have you to say?

....

Q4. It is in evidence against you that your co-accused Rahis took out one ustara/knife and put the same on the neck of PW-3 Altabarak Haq and robbed his mobile phone, of Intex of golden colour and his wallet containing his Card, Aadhar Card, visiting card and Rs.1000/- forcefully. What have you to say?

...”

and qua the accused Jakir @ Chuhi question nos.3 & 4 read to the effect:-

“Q3. It is in evidence against you that when at about 11.00 pm auto rickshaw reached near tent wala school where construction work of metro station was going on, you as well as your co-accused Javed put knife on the back of PW-5 Shahrukh and asked him to stop the auto rickshaw. What have you to say?

....

Q4. It is in evidence against you that your co-accused Rahis took out one ustara/knife and put the same on the neck of PW-3 Altabarak Haq and robbed his mobile phone, of Intex of golden colour and his wallet containing his Card, Aadhar Card, visiting card and Rs.1000/- forcefully. What have you to say?

...”



47. On behalf of the accused/ appellants i.e. Javed, the appellant of CRL.A. 567/2020 and Jakir @ Chuhi, the appellant of CRL.A. 568/2020, it was contended whilst placing reliance on the verdict of the Hon'ble Supreme Court in ***"Dilawar Singh v. State of Delhi"*** (2007) 12 SCC 641 and the verdicts of this Court in ***"Dinesh Rai v. State"*** 2013 SCC OnLine Del 3503 and ***"Tej Singh @ Goldy v. State"*** 2017 SCC OnLine Del 7236 that it is only the offender who uses the deadly weapon who can be awarded the minimum punishment of seven (7) years whilst invoking the provision of Section 397 of the Indian Penal Code, 1860 and no vicarious liability in relation thereto can be attributed to them, in as much as the essential ingredients of Section 397 of the Indian Penal Code, 1860 read as under:-

"397. Robbery, or dacoity, with attempt to cause death or grievous hurt.—If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years."

and are as observed in ***Dilawar Singh*** (supra) in paragraph 19 reproduced elsewhere hereinabove with it having been observed by the Hon'ble Supreme Court therein that as noted in ***"Phool Kumar Vs. Delhi Administration"*** (1975) 1 SCC 797, the term offender under Section 397 of the Indian Penal Code, 1860 is confined to be the offender who uses any deadly weapon and the observations of the Hon'ble Supreme Court in ***Dilawar Singh*** (supra) vide paragraph 20 thereof, which reads to the effect:-



“20. As noted by this Court in Phool Kumar v. Delhi Admn. [(1975) 1 SCC 797 : 1975 SCC (Cri) 336 : AIR 1975 SC 905] 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.”

has essentially to be borne in mind.

48. The learned Trial Court has undoubtedly observed to the effect that all the three accused in furtherance of their common intention had robbed PW-3 Altabarak Haq when he hired the auto rickshaw of PW-5 Shahrukh to go to Seelampur and used an *ustara* and *knives* whilst committing a robbery and they were thus convicted for the commission of the offence punishable under Sections 392/34 of the Indian Penal Code, 1860 read with Section 397 of the Indian Penal Code, 1860.

49. The deposition of PW-3 Altabarak Haq, the co-passenger who has corroborated the prosecution version as set forth through the FIR in toto has been adverted to hereinabove and his deposition puts forth that the boy who was sitting on the right side of the TSR driver suddenly took out one *ustara/knife* and put the same on the neck of Altabarak Haq and asked to hand over the valuable articles and the said boy took out his mobile phone of the make of Intex in golden colour and his purse containing his ID Card, Aadhar Card, Visiting



Card and a sum of Rs.1,000/- forcibly and that the said accused Rahis was identified by Altabarak Haq as being the boy who robbed his mobile phone and purse at the pointing of *ustara/knife* and Altabarak Haq pointed out to the remaining two accused persons namely Javed and Jakir @ Chuhi and stated that those two accused persons had caught hold of the co-passenger and robbed his mobile phone and purse. In his deposition dated 18.05.2018, Altabarak Haq does not make mention of user of any *knife/ustara* by Javed, the appellant of CRL.A. 567/2020 and Jakir @ Chuhi, the appellant of CRL.A. 568/2020.

50. As observed by the Hon'ble Supreme in ***“Ram Ratan Vs. State of Madhya Pradesh” 2021 SCC OnLine SC 1279*** whilst making a reference to the observations of the Hon'ble Supreme Court in ***“Ganesan Vs. State Rep. by Station House Officer” 2021 SCC OnLine SC 1023***, it has been observed by the Hon'ble Supreme Court vide paragraphs 16 & 17 in ***Ram Ratan*** (supra) to the effect:-

*“16. In the decision of **Ganesan** (supra) referred to by the learned counsel for the appellant, the above noted decisions of this Court has been referred and this Court has held as hereunder:—*

“12.7. Thus, as per the law laid down by this Court in the aforesaid two decisions the term ‘offender’ under Section 397 IPC is confined to the ‘offender’ who uses any deadly weapon and 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 has not used any deadly weapon. Even there is distinction and difference



between Section 397 and Section 398 IPC. The word used in Section 397 IPC is 'uses' any deadly weapon and the word used in Section 398 IPC is 'offender is armed with any deadly weapon'. Therefore, for the purpose of attracting Section 397 IPC the 'offender' who 'uses' any deadly weapon Section 397 IPC shall be attracted.

In light of the above observations and the law laid down by this Court in the aforesaid two decisions the case on behalf of the accused in the present appeals is required to be considered. Even as per the case of the prosecution and even considering the evidence on record it can be seen that the present accused A1 and A3 are not alleged to have used any weapon. The allegation of use of any weapon was against Benny and Prabhakaran. Therefore, in absence of any allegations of use of any deadly weapon by the appellants herein-Accused Nos. 1 and 3 Section 397 IPC shall not be attracted and to that extent the Learned Counsel appearing on behalf of the appellants-accused are right in submitting that they ought not to have been convicted for the offence punishable under Section 397 IPC."

17. From the position of law as enunciated by this Court and noted above, firstly, it is clear that the use of the weapon to constitute the offence under Section 397 IPC does not require that the 'offender' should actually fire from the firearm or actually stab if it is a knife or a dagger but the mere exhibition of the same, brandishing or holding it openly to threaten and create fear or apprehension in the mind of the victim is sufficient. The other aspect is that if the charge of committing the offence is alleged against all the accused and only one among the 'offenders' had used the firearm or deadly weapon, only such of the 'offender' who has used the firearm or deadly



weapon alone would be liable to be charged under Section 397 IPC.”

51. It is also essential to observe that the Hon’ble Supreme Court in **Ram Ratan** (supra) has further observed vide paragraphs 18 & 19 to the effect:-

“18. Though the above would be the effect and scope of Section 397 IPC as a standalone provision, the application of the same will arise in the totality of the allegation and the consequent charge that will be framed and the accused would be tried for such charge. In such circumstance, in the teeth of the offence under Section 397 IPC being applicable to the offender alone, the vicariability of the same will also have to be noted if the charge against the accused under Sections 34, 149 IPC and such other provisions of law, which may become relevant, is also invoked along with Section 397 IPC. In such event, it will have to be looked at differently in the totality of the facts, evidence and circumstances involved in that case and the provisions invoked in that particular case to frame a charge against the accused. In the instant case, the charge under Section 34 IPC was not framed against the appellant nor was such an allegation raised and proved against the appellant. Hence, benefit of the interpretation raised on the scope of Section 397 IPC to hold the aggressor alone as being guilty, will be available to the appellant if there is no specific allegation against him.

19. Keeping this aspect in view, it is necessary to examine the manner in which PW1 has alleged against the appellant so as to consider whether the appellant is also an ‘offender’ who used the firearm so as to be charged under both, Section 392 and 397 IPC even if he is complicit to the incident, more particularly when Section 34 IPC has not been invoked in the instant case.,



Thus, undoubtedly, in terms of the verdict of the Hon'ble Supreme Court in **Ram Ratan** (supra), though the invocation of the offence punishable under Section 397 of the Indian Penal Code, 1860 in relation to the charge of committing the offence is alleged against all the accused and where only one among the offenders has used the fire arm or deadly weapon, it is only such of the offenders who has used the fire arm or deadly weapon who would liable to be charged under Section 397 of the Indian Penal Code, 1860. The totality of the allegations and consequent charges that are framed and of the accused being tried for such charge has essentially to be considered with the aspect of the vicariability of the offence punishable under Section 397 of the Indian Penal Code, 1860 being required to be noted if the charge against the accused under Sections 34, 149 of the Indian Penal Code, 1860 and other provisions of law is invoked which may become relevant if invoked along with Section 397 of the Indian Penal Code, 1860 in which event it would have to be looked at differently in the totality of the facts, evidence and circumstances involved in that case and the provisions involved in that particular case to frame a charge against the accused. In the case before the Hon'ble Supreme Court in **Ram Ratan** (supra), the charge under Section 34 of the Indian Penal Code, 1860 was not framed against the appellant therein nor was such an allegation raised and proved against the appellant and hence the benefit of the interpretation raised on the scope of Section 397 of the Indian Penal Code, 1860 to hold the aggressor alone as being guilty, was held to be available to the appellant therein if there was no specific allegation against him. The evidence in that case was thus



taken into account which indicated that it was only one accused who had used the fire arm and there was no allegation apart from a stray sentence against the appellant Ram Ratan in that case of having used any fire arm with it thus having been held that the charge under Section 397 of the Indian Penal Code, 1860 could not be held to be proved.

52. In the instant case, the charges have been framed under Sections 392/34 of the Indian Penal Code, 1860 r/w Section 397 of the Indian Penal Code, 1860,- yet, it cannot be overlooked as observed hereinabove that there is no user of any *knife* mentioned in the FIR by the complainant and though the word *ustara* has been used as an interchangeable term by PW-3 Altabarak Haq, the co-passenger, it is the deposition of this PW-3 himself which attributes user of the *ustara/knife* **only** to the accused/appellant Rahis even at the time of the robbery committed qua the other passenger.

53. In these circumstances, the testimony of PW-5, the driver named Shahrukh which makes an omnibus statement to the effect:-

“Those boys robbed the other two passengers while showing knife and asked them to hand over their belongings. They called police by making a call at 100 number. I told those passengers that I will remain with them. They informed the police that Rs.6,000/- and two mobile phones were robbed from one passenger while Rs. 1,000/- and one mobile phone was robbed from other passenger. After robbing, all the three accused ran away. One of the passengers told me that his relatives were residing in the nearby area of Jafrabad. At his request, I took them to their relative's house in my auto where they made a call at 100 number.”



is insufficient to bring forth any vicarious liability against the accused/appellants i.e. Javed, the appellant of CRL.A. 567/2020 and Jakir @ Chuhi, the appellant of CRL.A. 568/2020 qua the commission of an offence punishable under Section 397 of the Indian Penal Code, 1860. Thus, though the conviction of all the three appellants qua the commission of the offence punishable under Section 392/34 of the Indian Penal Code, 1860 for the commission of robbery on the date 03.06.2016 in the auto rickshaw bearing no. DL 1RQ 1537 near the under construction metro station of Jafrabad before the Idgah Pulia whereby the articles in possession of Bhagat Singh, the complainant and the co-passenger Altabarak Haq were robbed on the accused/appellant Rahis having shown an *ustara* to them stands established with the recovery of the *ustara* from the accused Rahis, the appellant of CRL.A. 344/2020, recovery of the mobile phone of the make Samsung phone belonging to the complainant from the accused/appellant i.e. Jakir @ Chuhi, the appellant of CRL.A. 568/2020, the conviction of the accused/appellants Javed, the appellant of CRL.A. 567/2020 and Jakir @ Chuhi, the appellant of CRL.A. 568/2020 qua the alleged commission of an offence punishable under Section 397 of the Indian Penal Code, 1860 in the facts and circumstances of the instant case, is not held to be vicariously made out and the conviction of the accused/appellants Javed and Jakir @ Chuhi in relation thereto is thus set aside.

CONCLUSION

54. The sentence imposed qua the accused/appellant Rahis vide the impugned order on sentence dated 28.02.2020 of the Court of the



learned ASJ-02, E-Court, Shahdara, KKD, Delhi in relation to FIR No.244/16, PS Welcome qua the sentence imposed of Rigorous Imprisonment for a period of seven (7) years under Sections 392/34 of the Indian Penal Code, 1860 r/w Section 397 of the Indian Penal Code, 1860 and a fine of Rs.5,000/- and in default of payment of the said fine to further undergo Simple Imprisonment for a period of three (3) months with the benefit of Section 428 of the Cr.P.C., 1973 is sustained.

55. Thus, the minimum mandatory sentence of seven years for the offence punishable under Section 397 of the Indian Penal Code, 1860 against the accused person namely Javed, the appellant of CRL.A. 567/2020 and Jakir @ Chuhi, the appellant of CRL.A. 568/2020 is set aside, and the sentence imposed on the said two appellants under Sections 392/34 of the Indian Penal Code, 1860 is modified and reduced to be a sentence of Rigorous Imprisonment for a period of five (5) years with the fine of Rs.5,000/- each and in default of payment of the said fine, to further undergo Simple Imprisonment for a period of three (3) months with the benefit of Section 428 of the Cr.P.C., 1973 being granted to these two appellants as well.

56. Copy of this judgment be supplied to the appellants and be also sent to the Superintendent Jail, Delhi for information.

ANU MALHOTRA, J.

JULY 06, 2022

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