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

+ CRL.L.P. 178/2021
CRL.M.A. 19209/2021 (Exemption)

STATE

..... Petitioner

Represented by: Mr. Tarang Srivastava, APP for State
with SI Indra Pal Singh, PS Madhu
Vihar.

Versus

RAHUL @ SHANKY & ANR.

..... Respondents

Represented by: None.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

ORDER

% **10.12.2021**

CRL.M.A. 19209/2021 (Exemption)

1. Exemption allowed subject to just exceptions.
2. Application is disposed of.

CRL.L.P. 178/2021

1. By this petition, the State seeks leave to appeal against the judgment dated 12th February, 2020 against the two respondents, namely, Rahul @ Shanky and Mangal Singh for their acquittal for offence punishable under Section 397/34 IPC.
2. In FIR No.187/2011, four accused were charge-sheeted for offences punishable under Sections 393/397/34 IPC. Accused Rahul Tak@ Kalia was discharged vide order dated 3rd September, 2013 and three other accused, namely, Rahul @ Shanky, Mangal Singh and Rajeev @ Gombi Prasad Rahi were tried. Thereafter, Rajeev @ Gombi Prasad Rahi pleaded guilty and he

was sentenced vide order dated 19th March, 2019. Thus, vide the impugned judgment dated 12th February, 2020, Rahul @ Shanky and Mangal Singh were convicted and held guilty for offences punishable under Sections 393/34 IPC. Grievance of the State is that the two respondents have been acquitted for offence punishable under Sections 397/34 IPC and hence, the present leave to appeal petition by the State.

3. Case of the prosecution based on the statement of the complainant Raj Kumar, who lodged the FIR was that on 8th July, 2011 at about 9.00 PM, he hired a taxi i.e. Tata Indica Car in which three persons were already sitting besides the driver. Driver of the said car asked ₹20/- as fare for going to Sarai Kale Khan. The complainant was made to sit in the middle of the back seat and two persons were sitting on his side. One person was sitting in front besides the driver. Immediately after sitting inside the car, the person sitting near to the driver seat asked him to handover whatever he was having at that time and the person who was sitting with him pointed a knife towards him. Since the complainant had no amount with him, the person who was sitting next to the driver's seat, hit him with a fist blow on his nose. Thereafter, the complainant was attacked by knives on his thighs by the two assailants who were sitting on the rear seat next to him. Thereafter, they threw out the victim in unconscious condition near U-Turn Sarai Kale Khan.

4. Accused Mangal Singh who was the driver of the vehicle was the first one to be arrested and on his disclosure, three accused, namely, Rajeev, Rahul @ Shanky and Rahul @ Tonk were arrested. Accused Rajeev and Rahul @ Shanky refused to join the Test Identification Parade (in short 'TIP'). The victim could not identify accused Rahul@Tonk during the TIP.

5. As noted above, Mangal Singh was the driver and was not armed with any weapon and hence, he has been acquitted for offence punishable under Section 397 IPC. The role attributed to Rahul@ Shanky was that he gave fist blow on the nose of the complainant and was sitting on the front seat. The roles attributed to Rajeev @ Gomti Prasad Rahi and Rahul Tak @ Kalia were that they used the deadly weapons of offence i.e. knives attracting Section 397 IPC. As noted above, Rahul Tak @ Kalia was discharged as the victim failed to identify him and Rajeev @ Gomti Prasad Rahi had been sentenced after he pleaded guilty vide order dated 19th March, 2019.

6. According to the State, the learned trial court erred in acquitting the respondent Nos. 1 and 2 for offence punishable under Section 397/34 IPC even though they have been convicted for offence punishable under Section 393/34 IPC and thus pray that the two respondents i.e. Mangal Singh and Rahul@ Shanky, who were sitting on the driver seat and the front seat next to the driver of the vehicle and have not used any deadly weapon of offence be convicted for offence punishable under Section 397 IPC with the aid of Section 34 IPC.

7. It is well settled proposition of law that Section 397 IPC cannot be invoked with the aid of Section 34 IPC as held by the Hon'ble Supreme Court in Shri Phool Kumar versus Delhi Administration, (1975) 1 Supreme Court Cases 797 and Ashfaq vs. State (Govt. of NCT of Delhi) (2004) 3 SCC 116.

8. In Dilawar Singh vs. State of Delhi (2007) 12 SCC 641 Hon'ble Supreme Court reiterating the legal proposition laid down in Shri Phool Kumar and Ashfaq (supra), held as under:-

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

1. *The accused committed robbery.*
2. *While committing robbery or dacoity (i) the 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 the other accused are not vicariously liable under that section for acts of the co-accused.*
20. *As noted by this Court in Phool Kumar vs. 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 Section 397 IPC and 398 IPC. Section 397 IPC connotes something more than merely being armed with deadly weapon."*

9. Since the respondents are not the accused who used the deadly weapons, they cannot be held vicariously liable and convicted for the offence punishable under Section 397 IPC with the aid of Section 34 IPC. Petition is thus dismissed.

10. Copy of this order be sent to the Secretary, Law and Justice, Government of NCT of Delhi so that it is ensured that a proper scrutiny is carried out before the matters are sent to High Court for seeking leave to appeal by the State.

11. Order be uploaded on the website of this Court.

MUKTA GUPTA, J.

DECEMBER 10, 2021

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