

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT: CODE OF CRIMINAL PRODEDURE

CrI.A. No. 150/05 and CrI.M.A. No. 12285/08

Judgment delivered on: 5th December, 2008

Radhey Sham

Appellant
Through: Mr. Sumit Verma, Adv.

Versus

The State (GNCT) of Delhi

Respondent
Through: Mr. Manoj Ohri, APP for the State.

KAILASH GAMBHIR, J. (Oral)

1. This order shall dispose of the appeal filed by the appellant under Section 374 Cr.P.C. assailing order of conviction and order of sentence dated 3.11.2004 passed by the learned Sessions Judge in case No. 7/2000 and petition filed under Section 482 Cr.P.C. invoking inherent powers of this Court to seek release of the appellant after taking into consideration the sentence undergone by the appellant. The case of the prosecution set up in the challan filed under Section 170(3) of the Cr.P.C. is that on the intervening night of 1st and 2nd June, 2000 at about 12/12.30 in the night, Yamin, a tailor, was coming from Khora colony to Patpargunj on his cycle and when he arrived near 13 Block Trilopuri all the accused persons stopped and told him to hand over whatever he had. Accused also grappled with him. One Radhey Sham caught hold of him, another accused Rohtash snatched away his cycle, the third culprit stabbed him on his face and injured his cheeks. Accused persons removed a sum of Rs. 100/-, snatched away his cycle and then took to their heels. On the same night at about 12.30 or 1 a.m. Mohd. Sharif and Shafiq, father and son respectively, were returning on their respective cycles from their dhabha situated at Gazipur. Shafiq was going ahead while Mohd. Sharif was following him. When they reached near I.T.I., Mohd Shafiq was accosted by all the abovesaid three accused. Accused Rohtas stopped Shafiq, remaining two accused approached his father, took his search and robbed him of Rs. 200/- lying in his pocket. Accused Kailash stabbed Mohd. Sharif on his left thigh and all of them vamoosed with the booty. Both father and son raised alarm. Police arrived there. Police was able to nail accused Radhey Sham from near the spot and a sum of Rs. 200/- was recovered from his possession. The recovered money was seized and then sealed. At that stage, Yamin also appeared before the police and narrated the above facts and identified accused Radhey Sham. The remaining two persons could not be apprehended. On the next following day accused Rohtash was

apprehended by the police. Accused Kailash was declared proclaimed offender. However, police succeeded in apprehending him on 18.3.2001. All the accused were challaned for Sections 394/397 read with Section 34 IPC. The learned Sessions Judge after taking into account the evidence of the prosecution and defence reached to the conclusion that prosecution failed to prove against accused Rothash and Kailash while the case against the present applicant Radhey Sham stood fully proved. The learned Sessions Judge accordingly acquitted Rothash and Kailash after giving them benefit of doubt while holding the present appellant guilty of commission of offence under Section 394/34 IPC. Vide orders dated 3rd November, 2004 the appellant was sentenced to undergo rigorous imprisonment for ten years with fine of Rs. 2000/- and in default of payment of fine to further undergo rigorous imprisonment of one year for committing the said offence under Section 394/34 IPC. During the pendency of the present appeal the appellant has moved aforesaid application under Section 482 Cr.P.C. seeking his release on the period of sentence already undergone by him on humanitarian grounds and also to meet the ends of justice. Counsel appearing for the appellant submits that the appellant has already undergone sentence for approximately 5 years and six months including remission period and throughout the entire period of his incarceration there is not even a slightest blot on his conduct or character. Counsel appearing for the appellant further submits that the family of the appellant comprises of his aged infirm widow mother, illiterate wife, two younger sisters of marriageable age and five years old son and in the absence of the appellant the entire family is leading a life of penury as there is no one else to financially support the family. Counsel appearing for the appellant further submits that the appellant is a first time offender and no other case is pending against him where he was found involved in any nature of crime. The contention of the counsel for the appellant is that the antecedents of the appellant are absolutely clean and such a person must be given a chance to make amends in his life. Opposing the present appeal and the application Mr. Manoj Ohri, APP for the State submits that unexpired portion of sentence left to be undergone by the appellant is quite large and, therefore, merely on account of the good conduct of the appellant such a concession of commutation of sentence of such a large period may not be given to the appellant. I have heard learned counsel for the parties and gone through the record. The appellant in the present case was charged for committing an offence punishable under Section 394/397/34 IPC, but ultimately he was convicted under Section 394/34 IPC. The complicity of the applicant stood proved as he was apprehended from the spot and an amount of Rs. 200/- was also recovered from his possession. The accused persons were charged under Section 397 IPC as one of them had caused grievous hurt at the time of robbery. Had there been no such attempt to cause grievous hurt, certainly the accused persons would have been charged under Section 394 IPC alone. Offence under Section 397 IPC is triable by the Court of Sessions and the minimum sentence with which the offender is punishable is not less than 7 years while no minimum sentence is prescribed under Section 394 IPC, which is otherwise triable by the Magistrate of first class. It is not in dispute that two of the co-accused have been acquitted by the learned Sessions Judge as no evidence could be found against them for committing offences either under Section 394 or 397 IPC. I find there is some merit in the contention raised by the counsel for the appellant that had the appellant faced the conviction only under Section 394 IPC the sentence as awarded by the learned Sessions Judge for a period of 10 years could have been lesser more particularly when the sentence

under Section 394 was triable by the Magistrate of first class and no minimum period of sentence has been prescribed under Section 394 IPC. Taking such extenuating circumstances as set out by the appellant in the said application of his being the only financial support to his family and also the fact that he was found in possession of Rs. 200/- and was not involved in causing any stab injuries to the victim and also the sentence under Section 394 IPC being triable by the Court of Magistrate of First Class, I feel inclined to commute the remaining sentence of the appellant and direct the release of the appellant on the period of sentence already undergone by him while upholding the order of conviction passed by the learned Sessions Judge. With these directions the present appeal and the application are disposed of.

December 05, 2008

Sd./-
KAILASH GAMBHIR, J