SUPREME COURT OF INDIA

Ashfaq

Vs.

State (Govt. of NCT of Delhi)

(D. Raju and Arijit Pasayat JJ.)

10.12.2003

ORDER

1. Leave granted in SLP(CRL.) No. 1676/2003

2. Criminal appeal No. 1296/2002 has been filed by A-4 (Asfaq) and Criminal Appeal arising out of SLP(Crl.) No. 1676/2003 has been filed by A-3 (Haroon) who stood charged along with two others in Sessions Case No. 274/96 on the file of the Additional Sessions Judge, Shandara.

3. The above appellants were tried before the learned Additional Sessions Judge along with two others by name Ikrar (A-1), and Shahid (A-2) for charges under Section 452 IPC, Section 392 IPC and Section 397 IPC read with Section 34 IPC. A-3 (Haroon) was also charged for an offence under Section 25 of the Arms Act. The sum and substance of the prosecution case was that on 9.11.1991 at about 7.15 p.m. when PW-3 (Bal Kishan) was witnessing a TV programme in the inner room of his house in the company of his wife, PW-10 (Smt. Raj Rani), the accused persons entered their house and when PW-3 (Bal Kishan) came out of the room and was told by one of the four persons that they were sent by one Mahabir Thekedar for white washing of their house, PW-3 (Bal Kishan) was said to have told one of them that he only had already white washed the house and enquired about the need for it again. As the conversation was said to be going on like that the accused closed the door and one of the boys took out a country-made pistol and other took out their knives and by using such threat with such weapons they pushed PW-3 (Bal Kishan) and PW-10 (Smt. Raj Rani) inside and demanded the keys of the almirah. PW-10 (Smt. Raj Rani) the wife seems to have told them that the keys were with her daughter who resides at a different place. But she was not believed and they started searching all around inside for the keys and as this was in progress, PW-2 one of the relatives also arrived there. At that point of time one of the boys opened the door and brought the new coiner also inside and ordered them all to hand over their belongings which included a sum of Rs. 1400/- and Rs. 200/- from Manoj Kumar PW-2. When the search was being made by them one of the accused asked for the sten gun and in the process they were able to lay their hands on the sten gun belonging to the father of PW-3 (Bal Kishan. Thereupon, the sten gun with the magazine and cartridges were also taken away by them after bolting the door outside. On an alarm raised by the inmates, it appears the neighbours came and opened the door. It appears that, the accused also removed

the gold chain in the temple which was also said to be missing. Thereafter Police report was said to have been lodged and on completion of investigation during which the sten gun, magazine and cartridges were said to have been recovered, charges ware laid against the accused as noticed above, A-2 (Shahid), absconded and was also declared as Proclaimed offender, after following procedure under Sections 82 & 83 of the Cr.P.C.

4. The accused denied the charges and thereupon the trial was conducted. Apart from the prosecution witnesses examined and the exhibits marked one Shahid Raza was examined as Defence-witness. After considering the materials on record, the learned trial Judge came to the conclusion that the charges against the accused stood sufficiently proved and established and convicted them under Sections 452, 392 and 397 read with Section 34 IPC. A-3 (Haroon) was further convicted under Section 25 of the Arms Act. Thereupon, seven years R.I. with a fine of Rs. 5000/- each was imposed for the offence under Section 397 IPC and in default one year RI was also imposed. Under Section 392 IPC three, years' R.I. and a fine of Rs. 3000/- was imposed with a default clause therefore. A further sentence of three years' R. I. with a fine of Rs. 2000/- each under Section 452 IPC also was imposed with a default clause therefore. All the sentences were ordered to run concurrently with further benefits under Section 428 Cr.P.C. So far as A-3 (Haroon) is concerned, he was sentenced in addition to undergo 2 years' RI for the offence under Section 25 of the Arms Act. Aggrieved A-3 (Haroon) filed Crl. Appeal No. 225/1998. A-4 (Asfaq) filed Crl. Appeal 293/1998 and A-1 (Ikrar) filed Crl. A. 155/1998 before the High Court. The learned Single Judge in the High Court considered the materials on record by undertaking an independent appreciation of the evidence let in and ultimately affirmed the conviction and sentence imposed, as well. Hence, these appeals.

5. Learned counsel appearing for the appellants strenuously contended that the identification of the accused in the Court without holding a proper test identification parade earlier and at the relevant point of time renders the evidence wholly unreliable and completely vitiated the judgments of the Courts below and that no reliance whatsoever could be placed on the testimony of the witnesses in question to indict the appellants. Learned counsel urged further that even according to the PWs it was only one person who was said to be in possession of the country-made pistol and in the absence of any recovery of the same or proof by concrete materials of the role of others individually as the accused, no conviction under Section 397 with the aid of Section 34 of the Penal Code was permissible and that the necessary ingredient, to attract Section 397 of the Penal Code was also said to be conspicuous by their absence in this case. It was also contended that on the facts and circumstances of the case, when it was not shown by any evidence that the deadly weapon was actually used or put into any use as such, Section 397 IPC cannot at all be resorted to. Reliance has been placed on some of the decisions of this Court with reference to the grievance made on the omission to conduct the test identification Parade. Reliance was also placed on the decision of a Division Bench of the Bombay High Court reported in 1998 Crl. L.J. (1196) (Shravan Dashrath Datrange v. State of Maharashtra) as to the inapplicability of Section 34 IPC for conviction under Section 397 of IPC. The learned Senior Counsel for the respondent-state while inviting our attention to the reasoning of the Courts below, with equal force contended that the evidence on record sufficiently established, the guilt of the accused and the reasons assigned

by the Courts below are fortified by sufficient material and consequently no interference is called for with the concurrent findings of the Courts below.

6. We have carefully considered the submissions made by the learned counsel on either side in the light of the materials on record and the relevant portions of the judgments of the Courts below to which our attention has been drawn to impress upon their respective stands. Though as a matter of general principle, the point urged with reference to the omission to conduct earlier the test identification Parade may be correct, the question as to whether there is any violation of the same in a given case would very much depend on the facts and circumstances of each case and there cannot be any abstract general formula for universal and ready application in all cases. Even the decision . (Ramanbhai Naranbhai Patel and Ors. v. State of Gujarat) relied upon for the appellants, after dealing with the principles in general, adverts to the facts of the case and in so doing the learned Judges have categorically observed that since two eyewitnesses in the said case were assaulted and seriously injured in broad daylight, they could have easily seen the faces of the assailants and their appearance and identity would well remain imprinted in their minds and the third witness who was said to have seen the fatal assault on her husband could also be easily considered to have got imprinted in her mind the faces of the accused and that, therefore, the omission to hold the test identification Parade did not affect the credibility or truthfulness of their evidence. The case on hand is akin to the said case dealt with by learned Judges therein, in that among the accused one was already known on account of having white washed their house, that they have entered their house and was for quite some time present there holding them at ransom by directing and using threat to relieve them of the valuables on which they could lay their hands and it is too much to claim, in spite, of all these, that the evidence of Pws. 2, 3 and 10 could not be either sufficient to properly identify the accused or relied upon against the accused in the absence of proper test identification parade. In this case, it has also further come on record that one whose identity was known was initially traced, that the said trail led the investigating authorities to the others and that the complainant was also said to have been associated even at that stage of investigation to identify the accused and ensure properly the arrest of the real accused. Consequently, we see no merit whatsoever in the grievance made and challenge to the judgments of the Courts below on this ground.

7. So far as the contention urged as to the applicability of Section 397 IPC and the alleged lack of proof of the necessary ingredients therefore, is concerned it proceeds, in our view, upon a misconception that unless the deadly weapon has been actually used to inflict any injury in the commission of the offence as such, the essential ingredient to attract the said provocation could not be held to have been proved and substantiated. We are of the view that the said claim on behalf of the appellants proceeds upon a too narrow construction of the provision and meaning of the words "Uses" found in Section 397 IPC. As a matter of fact, this Court had an occasion to deal with the question in the decision (Phool Kumar. v. Delhi Administration) and it was observed as follows:

> ".....Section 398 uses the expression "armed with any deadly weapon" and the minimum punishment provided therein is also 7 years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. This has created an

> anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed in committing it attracts the minimum punishment of 7 years under Section 398, if he is merely armed with any deadly weapon, while an offender so armed will not incur the liability of the minimum punishment under Section 397 if he succeeded in committing the robbery. But then, what was the purport behind the use of the different words by the Legislature in the two sections, viz "Uses" in Section 397 and "is armed'" in Section 398. In our judgment the anomaly is resolved if the two terms are given the identical meaning. There seems to be a reasonable explanation for the use of the two different expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to any fruitful use because it would have been of use only when the offender succeeded in committing the robbery."

8. Thus, what is essential to satisfy the word "Uses" for the purposes of Section 397 IPC is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of victim and not that it should be further shown to have been actually used for cutting, stabbing, shooting, as the case may be.

9. The further plea that one accused alone, was in any event in possession of the country-made pistol and the others could not have been vicariously held liable under Section 397 IPC with the assistance of Section 34 IPC over-looks the other vital facts on record found by the Courts below that the others were also armed with and used their knives and that knife is equally a deadly weapon, for purposes of Section 397 IPC. The decision of the Division Bench of the Bombay High Court relied upon turned on the peculiar facts found as to the nature of the weapon held by the accused therein and the nature of injuries caused and the same does not support the stand taken on behalf of the appellants in this case. The provisions of Section 397, does not create any new substantive offence as such but merely serves as complementary to Section 392 and 395 by regulating the punishment already provided for dacoity by fixing a minimum term of imprisonment when the dacoity committed was found attendant upon certain aggravating circumstances viz., use of a deadly weapon, or causing of grievous hurt or attempting to cause death or grievous hurt. For that reason, no doubt the provision postulates only the individual act of the accused to be relevant to attract Section 397 IPC and thereby inevitably negates the use of the principle of constructive or vicarious liability engrafted in Section 34 IPC. Consequently, the challenge made to the conviction under Section 397 even after excluding the applicability of Section 34 IPC does not merit countenance, for the reason that each one of the accused in this case were said to have been wielding a deadly weapon of their own, and thereby squarely fulfilled the ingredients of Section 397 IPC, dehors any reference to Section 34 IPC.

10. So far as the other charges are concerned, though an attempt has been made to challenge those findings, we are of the view that the concurrent findings, as rightly contended for the respondent, are not only well merited but are found sufficiently based on and supported by overwhelming materials on record and no patent illegality or infirmity as to warrant our interference have been shown to vitiate in any manner those concurrent findings recorded by the Courts below in this case. The conviction under Section 397 IPC made read with Section 34 IPC alone is consequently altered and sustained under Section 397 IPC itself and the sentence imposed by the Courts below or, this count would stand.

11. The appeals, therefore, fail and shall stand dismissed.