

SUPREME COURT OF INDIA

State of U.P.

Vs.

Ilyas

CrI.A.No.168 of 2001

(Dr. Arijit Pasayat and Dr. Mukundakam sharma JJ.)

12.11.2008

JUDGMENT

Dr. Arijit Pasayat, J.

1. Challenge in this appeal is to the judgment of a learned Single Judge of the Allahabad High Court directing acquittal of the respondent. Learned IV Additional District and Sessions Judge, Saharanpur, found the respondent as well as one Multan guilty for offence punishable under Section 397 of the *Indian Penal Code, 1860* (in short the 'IPC') and sentenced each of them to 7 years' rigorous imprisonment.

2. Two appeals were filed i.e. one by Multan and the other by the present respondent. The High Court by the impugned judgment directed their acquittal. According to the High Court the identification was not established and that arrest of the respondents was doubtful and they cannot be treated to have been arrested in the manner stated by the prosecution.

3. Background facts in a nutshell are as follows:

“Written report (Ex. Ka. 5) of the incident in question was delivered by Mahendra Singh at Police Station Bhagwanpur on July 4, 1979 at 1.30 P.M. First Information report (Ex. Ka. 6) was then drawn up and relevant entries were made in the general diary, of which Ex. Ka.7 is a copy. The prosecution case, briefly stated, is that Mahendra Singh was employed as a Munshi with Sardar Prithipal Singh and Company. On July 3, 1979, Mahendra Singh reached village Comawala to settle accounts with the labourers working at the brick-kiln owned by Prithipal Singh and company. He stayed over night at the brick kiln. Others, who slept at the brick kiln that night, were Sarnam Singh, Ram Rikhshpal, Ram Pal and Mustaque. A lighted lamp was available at the spot. At about 1 0' clock in the night, three miscreants, two holding country made pistols and one armed with a knife, appeared at the brick kiln. The miscreants woke up all those sleeping on the spot and robbed them of their belongings one after the other by brandishing the arms they were carrying. Mahendra Singh was robbed of his wrist watch of 'Titus' Make and Rs. 40/- in cash, Satnam Singh was deprived of a wrist watch of 'Titus' make and Rs.125/- in cash and Ram

Rikshpal was robbed of his wrist watch and Rs.35/- in cash. The miscreants lifted an axe lying on the spot and beat Mahendra Singh with bottom of the axe. The miscreants locked the victim of robbery in the office room on the spot and carried away the suitcase and clothes belonging to Ram Rikshpal. The doors of the office were later pushed by those detained inside. The victim of robbery then reported the incident to the residents of village Comawala and an unsuccessful search of the miscreants was made around the village. The complainant Mahendra Singh reported the matter to his employers on the morning following the night of occurrence at Kankhel. The miscreants had been seen and recognised in the light of the lantern on the spot who were unknown persons. Sub Inspector Kali Charan (P.W.9) conducted the investigation. He interrogated Mahendra Singh and others at the Police Station on July 4, 1979 and later reached the place of occurrence on the same day. Ram Rikshpal, Rampal and others were interrogated at the place of occurrence. A site plan with index (Ex. Ka.8) was then drawn up on the basis of the spot inspection. On the following day, the Investigating Officer examined the lamp and entrusted the same to the custody of Mahendra Singh.

After completion of investigation charge sheet was filed. It is to be noted that the respondent was arrested alongwith another person on 4.7.1979 for offence punishable under Section 25 of the *Arms Act, 1959* (in short the `Arms Act'). On interrogation respondent Ilyas confessed his involvement in the present incident and disclosed the name of co-accused. The Test Identification Parade (in short the `TI Parade') was held where the respondent was identified by the three eye witnesses i.e. PWs 4, 5 and 6. Mahavir Singh (PW-1) had arrested accused Ilyas. Placing reliance on the evidence of eye witnesses and the TI Parade the accused persons were held guilty. In appeal the appellants pointed out that in the sketch map the lamp was not correctly shown. The lamp was allegedly kept at the height of 3/4 ft and naturally very little light could have reached out of chapper. There was no sufficient light for the witnesses to recognise the faces of the miscreants. It was also pointed out that the respondent Ilyas was arrested in some other cases alongwith some illicit arms. The High Court held that since he was acquitted in the said case the arrest of Ilyas becomes doubtful and the defence version that he was not arrested as stated by the prosecution but was arrested from his house is believable. It was therefore concluded that the accused was shown to the witnesses. It was also pointed out that Section 397 is not a substantive offence and the accused could not have been convicted under Section 397 only but could have been convicted under Section 394 read with Section 397. As the conviction has been recorded under Section 397 and the use of the weapons was not fully established, the respondent is entitled to acquittal.”

4. Learned counsel for the appellant in the present appeal submitted that PWs 4 and 5 were stated to be eye witnesses and PW-6 was an injured witness. The conclusions of the High Court are without any foundation. It is pointed out that Section 397 does not contain the definition of substantive offence. It only regulates the punishment. The trial Court itself noted that charge was framed under Section 394 read with Section 397 IPC. Mere omission to Section 394 did not cause any prejudice.

5. Learned counsel for the respondent on the other hand submitted that Section 397 does not speak of any substantive offence. The factual scenario has been correctly analysed by the High Court. Therefore, no person can be charged or convicted under Section 397 alone. It regulates the punishment in a given situation. The emphasis is on use of deadly weapon. The conclusions arrived at by the High Court are absolutely sketchy. It came to abrupt conclusions that the accused must have been shown to the witnesses. There is no foundation to such a plea. First Information Report was lodged under Section 394 IPC and charge was accordingly framed. Because of the use of deadly weapon, the trial Court convicted the accused under Section 397 IPC. The trial Court could have altered the charge, but that was not done. The High Court could have altered the conviction and imposed adequate sentence. There was no prejudice involved.

6. Since the High Court's reasonings were perverse the impugned judgment is set aside. However, the respondent is convicted for offence punishable under Section 394 IPC for which he was originally charged. He is sentenced to undergo rigorous imprisonment for 5 years. He shall surrender to custody forthwith to serve the remainder of sentence.

7. The appeal is allowed to the aforesaid extent.