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**(1992) 02 BOM CK 0031**

**In the Bombay High Court**

**Case No : Criminal Appeal No. 290 of 1989**

Babulal Jairam Maurya and another

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

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**Date of Decision :** 17-02-1992

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 34, 342, 392, 397, 398

**Citation :** (1993) 3 BomCR 478 : (1992) 94 BOMLR 608 : (1993) CriLJ 281 : (1992) MhLj 1106

**Hon'ble Judges :** S.M. Daud, J;M.F. Saldanha, J

**Bench :** Division Bench

**Advocate :** B.M. Jadhav, for the Appellant; K.H. Chopda, Public Prosecutor, for the Respondent

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## Judgement

Daud, J.—This appeal takes exception to the conviction and sentences recorded against the appellants for the offences punishable under Sections 392 and 342 read with 34 and 397 of the Indian Penal Code.

2. The prosecution case is that complainant-P.W. 1 Rajendrakumar is in the business of diamond polishing. His workshop is located at Shop No. 10, Tulsi Vrindavan Building, L.T. Road, Borivli (West), Bombay. For the purpose of polishing diamonds there is a work force of about 10-12 employees - some of them being related to the employer. The rest of the employees use the workshop also for sleeping at nights. The normal working hours of the workshop are 8.00 a.m. to 8.00 p.m. Rajendrakumar gets unpolished diamonds from his customers and returns the same to them after the polishing has been completed.

3. The incident figuring in this appeal took place on 22nd August 1985. Inside the cabin of the employer were Rajendrakumar and a friend of his Karsanbhai. All the employees were inside except one who had left the shop a little early to attend to a guest. At about 10 minutes past 8.00 p.m. the inmates of Shop No. 10 were surprised by the arrival of appellants Babulal and Michael. Babulal was flourishing a knife while Michael had with him what looked like a pistol. The

frightened inmates of the shop were overawed by the armed appellants who therefore managed to take away seven packets containing diamonds rough and polished both. After doing their deed, the culprits fled. Rajendrakumar went to the Borivli Police Station and there lodged a report which is at Ex. 6. An offence was registered. The police arrested Babulal on 30-8-1985 and Michael on 31-8-1985. While in police custody both gave statements. So far as Michael is concerned, his statement is at Ex. 16 and it led to the recovery of the knife and the toy pistol used in the commission of the crime. Babulal gave out that he had made over diamonds to a resident of Malad who had been entrusted the task of disposing them of. He agreed and led the police and the panchas to the Malad man. It was PW 6 Adityanath and Adityanath in turn had made over the diamonds to different persons. The entire booty was recovered and attached under Exs. 18 to 22. On 5-9-1985 at the request of the police, the Executive Magistrate PW 10 Mulye scheduled an identification parade. In this parade the victims identified Babulal and Michael as those who had participated in the robbery using for that purpose a knife and what looked like a pistol. True copy of the identification memorandum is at Ex. 28. The Investigating Officer has established that the original of Ex. 28 has been misplaced and that renders Ex. 28 inadmissible in evidence. After completion of the investigation a charge-sheet was lodged and in due course Babulal and Michael found themselves before an Additional Sessions Judge of Greater Bombay.

4. To the charge of having committed offence punishable under sections 392 read with 34 and 397 as also S. 342 read with S. 34, I.P.C., Babulal and Michael pleaded not guilty. Their defence was that they had been falsely implicated.

5. To substantiate the accusation levelled against the appellants, the prosecution examined Rajendrakumar, Karsanbhai, Pravinkumar, Babu, Adityanath, Mulye and a number of others. The learned trial Judge found appellants guilty under sections 392 and 342 both read with 34 of the Indian Penal Code and S. 392 read with S. 397 of the Indian Penal Code. For the offence punishable under S. 392 read with 34 of the Indian Penal Code, the appellants were sentenced to suffer seven years R.I. For the offence punishable under sections 392 read with 397 the appellants were sentenced to suffer seven years R.I. and no separate sentence was awarded for the offence of wrongful confinement punishable under S. 342 of the Indian Penal Code. The substantive sentences were to run concurrently.

6. Mr. Jadhav arguing the appeal on behalf of the appellants contends firstly that the evidence did not establish the culpability of his clients, and next that in any case, the trial Court was in error in finding appellants guilty under S. 392 as also S. 397 I.P.C. Learned counsel submits, and with some justification, that only one offence was committed if at all by the appellants and that the application of S. 397, I.P.C. vis-a-vis Michael was an error.

7. To take up the major contention of Mr. Jadhav it is not possible for us to agree with learned counsel's submission that the evidence vis-a-vis the commission of

robbery by Babulal and Michael is in any sense vulnerable. First, there are the eye-witnesses Rajendrakumar, Pravinkumar and Karsanbhai who all testify to the appellants coming at about closing time into Shop No. 10, Babulal being armed with a knife which he was flourishing and Michael armed with what looked like a real pistol which also was flourished by him. The frightened inmates were too stunned to look closely at the toy pistol which Michael was using. Believing that the same was genuine, the victims raised not a finger to resist the robbers. The robbers made away with seven packets of diamonds. The next weapon in the prosecution armoury is the recovery of the weapons used and the stolen diamonds at the instance of Michael and Babulal respectively. The evidence adduced on this aspect of the case is fully acceptable. The last feature is a virtual clincher, in that Babulal and Michael were identified by the victims on 5-9-1985 in an identification parade which was chaired by the Special Executive Magistrate Mulye. Mr. Jadhav argues that the Magistrate had not taken care in the selection of the dummies. Babulal was a teenager and Michael little better. The dummies chosen were aged persons and therefore the test identification cannot be said to be free from the taint of the witnesses being virtually given a cue as to who the culprits were. It is not possible to agree with the submission of learned counsel. The identification memorandum shows that near about four persons were in the age group 22 to 23 years. Of the total of 16 persons barely two to four could be said to be outside the age range considered comparable material vis-a-vis the appellants. Even those beyond 23 years may have been in build and appearance similar to the appellants. Mr. Jadhav argues that the identifying witnesses did not actually touch appellants. We do not see how this would constitute a serious infirmity. A witness standing before a suspect and pointing out to him as the criminal is not different from another who places his finger against the person of the criminal identified by him. The arrest of the appellants took place in the last two days of August 1985. The crime itself had taken place at about the start of the last week of August 1985 and the identification parade was held on 5-9-1985. By that time the weapons used and the looted property had also been recovered. Considered as a whole, the evidence is a sure pointer to the culpability of the appellants.

8. The next question is whether appellants should have been convicted under S. 397 as distinct from S. 392 I.P.C. ? Section 397 is an aggravated form of robbery or dacoity. This section is attracted to one found guilty of the offence of robbery or dacoity if amongst other things, he uses a deadly weapon at the time of committing the offence. Section 397 does not create a different offence by itself. One found guilty under S. 392 merits the punishment prescribed by S. 397, if while committing the offence of robbery he does various things one of them being, use of a deadly weapon. In imposing the sentence upon the appellants the learned trial Judge has proceeded to impose two sentences upon them - one being under S. 392 read with S. 34 and the other being S. 392 read with S. 397, I.P.C. Truly speaking, the appellants had committed a single offence, that being the offence of robbery punishable under S. 392 read with S. 34, I.P.C. As to

whether or not S. 397 I.P.C. was attracted would be a matter of significance only in relation to the sentence that the offender merited.

9. This brings us to the last contention of Mr. Jadhav that assuming the prosecution case to be true, appellant-Michael could not have been convicted under S. 397, I.P.C. Learned counsel says that S. 397 predicates the use of a deadly weapon. The weapon used must have a deadly potential. A toy pistol can never be said to be a deadly weapon whatever the impression it seeks on the frightened victims. In other words, a fake pistol though used as a deadly weapon and assumed to be one by the victims is not a deadly weapon as contemplated by S. 397, I.P.C. A toy pistol continues to be a toy pistol whatever be its impact on the frightened victims. The learned Public Prosecutor disputes this contention saying that a weapon becomes deadly when it is used as such a weapon and has that effect upon the victims. The language of Sections 397 and 398 which deal with "deadly weapons" indicates the correctness of Mr. Jadhav's submission. The weapon used has to be a deadly weapon and not assumed or mistaken to be a deadly weapon. Michael was using a toy pistol and that is the end of the matter so far as the applicability of S. 397, I.P.C. is concerned. He merited a conviction only under S. 392, I.P.C. As to the sentence, the Penal Code prescribes for a minimum of seven years vis-a-vis appellant Babulal. So far as Michael is concerned, three years R.I. would be more than adequate for the offence brought home to him.

10. The result of the foregoing discussion is that the appeal has to be partly allowed. We affirm the conviction recorded against Babulal for the offences punishable under sections 392 and 342 read with S. 34 and having regard to S. 397, I.P.C., the sentence of 7 years R.I. imposed upon him.

Michael's conviction under S. 342 read with S. 34, I.P.C. is confirmed. However his conviction under S. 392 read with S. 397 is converted to one falling under S. 392 read with S. 34 I.P.C. only. His sentence is reduced to three years R.I.

Appellants be released after the expiry of their sentences, unless otherwise required.

11. Appeal partly allowed.