
(1995) 01 GUJ CK 0042
In the Gujarat High Court

Gordhanbhai Dhulabhai Damor

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 16-01-1995

Acts Referred:

Evidence Act, 1872 — Section 134, 134, 3, 3, 9, 9
Penal Code, 1860 (IPC) — Section 395, 397

Citation : (1996) 2 GLR 251

Hon'ble Judges : J.N. Bhatt, J

Bench : Single Bench

Judgement

J.N. Bhatt, J.—The appellant-original accused has questioned the judgment and order of conviction dated 13th June 1993 passed by the learned Additional Sessions Judge at Valsad in Sessions Case No. 30 of 1992 by filing this appeal through jail.

2. The accused is found guilty for the offences punishable under Sections 395 and 397 of the Indian Penal Code and he is convicted and sentenced to undergo Rigorous Imprisonment for five years and to pay a fine of Rs. 300/- and in default of payment of fine, to undergo further Rigorous Imprisonment for three months for the offence u/s 395 of the Indian Penal Code and he is also convicted and sentenced to undergo Rigorous Imprisonment for a period of three years and to pay a fine of Rs. 200/- and in default of payment of fine, to undergo further Rigorous Imprisonment for two months for the offence u/s 397 of the Indian Penal Code, by the trial Court.

3. The accused has filed this appeal from the jail since he has not been able to engage services of a lawyer of his own. This Court has given him services of a lawyer under Legal Aid Scheme and learned Advocate Mr. Kirit R. Raval is appointed for the appellant-accused who has contended that the impugned judgment and order of conviction and sentence are erroneous and illegal and accused is entitled to acquittal. Learned A.P.P. Mr. S.P. Dave has countenanced the said submission.

4. With a view to appreciating the merits of this appeal, firstly factual backgrounds giving rise to the present appeal, may be narrated.

The prosecution case is that the accused along with some other accused persons who are absconding and some of them who are dead, have committed the offences punishable under Sections 395 and 397 of the Indian Penal Code. Along with the accused, there were more than five persons at the time of incident which occurred in the house of the complainant one Prabhakar Gajand at about 1-30 early in the morning on 11-4-1991. The complainant was residing in his house at village Kalath Sarigam in Valsad District along with his family members at the relevant lime.

5. The complainant and his family members were fast asleep before the incident occurred. The accused and other persons who were more than five in number entered the house of the complainant with a criminal intention. Firstly, they went in the room of sons of the complainant Sandesh & Pankaj. The prosecution witness Sandesh was assaulted. There was a noise and shouts, as a result of which the complainant woke up who heard filthy abuses uttered by one of the accused persons in Marathi language.

6. Apprehending threats to his life the complainant also raised the shout and tried to call one neighbour Gajubhai. The complainant shouted that thieves had come. In the meantime, the accused persons broke open the room of the complainant with big stone and four persons entered into his room. Three persons were armed with sticks, one person was armed with sickle. The complainant was pushed back on the couch and one of the assailants inflicted one stick blow on the left side portion of the head. A tall man out of said assailants also told the complainant to give the money. Some of the assailants had also snatched away golden ornaments like chain, ear-rings, bangles from the person of daughter of complainant Manikben. One of the assailants tried to inflict stick blow upon the complainant but the daughter of the complainant, Manikben intervened in order to save him from the stick blow and hence daughter Manikben received stick blow on her head. The wife of the complainant was also forced to give four golden bangles. The assailants had also taken out cash amount of Rs. 5,000/- from the cup-board. Thereafter, the assailants had fled away. The accused persons had taken away golden ornaments, cash and other items worth Rs. 62,975/-.

7. The complainant lodged the complaint with regard to the said incident before Umargam Police Station. The offence was registered and complainant and injured persons were taken to the hospital for treatment. On completion of investigation, the charge-sheet was filed against the accused persons. The accused persons were absconding. Later on some of the accused persons were arrested and trial had been conducted against them. Supplementary charge-sheet was filed later on against the accused on his arrest. The case was committed to the Sessions Court for trial.

Considering the facts and circumstances and the allegations of the prosecution, the Sessions Court at Valsad framed charges against the accused for the offence punishable under Sections 395 and 397 of the Indian Penal Code. The accused denied the charges and claimed to be tried. The prosecution relied upon the evidence of as many as 10 witnesses and the documentary evidence and the medical certificates and the panchnamas. On appreciation of the facts and circumstances of the case and evidence on record, the trial Court found accused guilty for the offence under Sections 395 and 397 of Indian Penal Code and passed the order of sentence as aforesaid. Therefore, this appeal is filed by the appellant-original accused from the jail who is provided services of the lawyer under Legal Aid Scheme.

8. This Court is taken through the excursion of the entire testimonials and collections of evidence during the course of the submissions. The trial Court on appreciation of the facts and circumstances found that the complainant, his son Sandesh & Pankaj, his daughter Manikben have sustained injuries and accused who was one of the dacoits who in all were more than five in numbers, was identified by the witnesses.

9. The accused was absconding as he had also run away along with other assailants. The injuries sustained by the complainant, his son Sandesh and his daughter Manikben are established by the prosecution by leading medical evidence also. The Medical Officer was examined at Ex. 7 who had examined the injured persons. The medical certificates are also proved. In view of the evidence of Dr. Patel and Dr. Modi and the medical papers, the prosecution has established the injuries on the person of the complainant and two of his family members, namely, son Sandesh and daughter Manikben.

10. There is consistent evidence of the complainant, his wife and injured son Sandesh and injured daughter Manikben. It is very clear from the evidence of aforesaid four witnesses that on the date of incident, in the early morning (on 11-4-1991), the accused persons who were more than five in numbers had entered the house. The trial Court has considered thread-bare evidence of prosecution witnesses and has held that the accused was one of the assailants (who were more than five in numbers.)

It is also very clear from the evidence on record that the dacoits has taken away golden ornaments cash amount and other items worth Rs. 62,795/-. After the incident, the dacoits had run away, the different places and some of them crosses the border of Gujarat State. Some of the accused persons were tried for the said offence. Nothing is pointed out from the record about the result of the trial against the absconding accused persons held by the Sessions Court earlier. Unfortunately, nobody is in a position to throw light in this aspect. Identification Parade was also held wherein the prosecution witness Manikben had identified the accused as one of the assailants. There is clear evidence on record that the present accused has caught hold of Sandhya, the wife of the complainant. One other accused aimed stick blow on her person but at that time, daughter of the

complainant intervened and the below was landed on her. Thus, there persons were injured by accused persons. Injuries sustained by the complainant, his son Sandesh & Pankaj and his daughter Manikben are established by the prosecution it is also very clear from the record that the appellant-accused Gordhan Dhula was one of the assailants/dacoits.

There is a clear and consistent evidence from the record of the present case that accused was one of the assailants/dacoits who had entered into the house of the complainant with a criminal intention and had caught hold of wife of the complainant. Thus, the presence of the accused along with other assailants which were more than five in number, is established beyond reasonable doubt. The injuries are also established beyond doubt.

11. It has been seriously contended that the Identification Parade was not held in accordance with law. There was no proper identification of the accused and no charge is established against him. Therefore, it is urged that accused should be acquitted. This contention cannot be accepted in view of the clear, consistent and reliable evidence on record. Nothing has been successfully pointed out which would show that the Identification Parade was not held as provided under the law.

12. The Identification Parade was conducted by one Rameshchandra Bhagwandas Bhavsar who was a Mamlatdar at the relevant point of time. He is examined, at Ex. 9. Panchnama regarding Identification Parade was prepared on 10-10-1991 and it is produced at Ex. 10. The prosecution witness injured Mankikben is examined at Ex. 14. The conjoint reading of the evidence of the prosecution Mamlatdar Rameshchandra Bhagwandas Bhavsar at Ex. 9, the Panchnama of Identification Parade at Ex. 10 and the evidence of Manikben Ex. 14 leaves not any manner of doubt that the Identification Parade was held properly and Manikben was able to identify the accused who is the appellant in this appeal.

13. Learned Advocate Mr. Kirit R. Raval while appearing for the accused in Legal Aid, has forcefully submitted that there is no proper description of the dacoits much less the description of the accused and there is no proof of identity of the accused. It is also submitted by him that the Identification Parade was not conducted properly and legally. Therefore, no reliance should be placed on the Identification Parade. In support of his submission, he has placed reliance on the decision of the Apex Court rendered in Wakil Singh and Others Vs. State of Bihar, .

14. The above submission of Mr. Raval is not sustainable in the light of the facts and circumstances emerging from the record of the present case. The prosecution has successfully established that the Identification Parade was properly and legally held. There is no reason to disbelieve the evidence of an independent witness Rameshchandra who is examined at Ex. 9, Panchnama of Identification Parade produced, at Ex. 10 supports his oral evidence. The evidence of Manikben at Ex. 14, also supports the said evidence. It is also very clear from the evidence of prosecution witness Manikben who is injured that she

had identified the appellant-original accused in deem light available in her room at the time of incident. Thus, apart from the Identification Parade, the prosecution witness has clearly, stated in her evidence that she had identified the accused and it is confirmed on holding of Identification Parade. The evidence of prosecution to prove identity of the accused is quite trustworthy and believable and cannot be brushed aside.

15. Reliance placed on *Wakilsinh* 's case (supra) is also of not avail to the accused in his defence. In the case before the Supreme Court, none of the witnesses in their earlier statement/oral evidence has given any description of any dacoits or has any occasion to identify any dacoit. So is not the case in this trial. It is true that in absence of such description or identification, it will be impossible for the Court to convict any of the accused on the basis of a single identification. The decision rendered in the said case is not at all helpful to the accused in the present case. In the case before this Court, there is clear and cogent evidence of the prosecution to prove identity of the appellant-accused. It is established beyond reasonable doubt that the accused along with some other dacoits who are more than five in numbers had entered the house of the complainant with a criminal intention and who had inflicted injuries on three persons in the house successfully and attempted to cause injuries on the wife of the complainant successfully. The dacoits thus had entered the house of the complainant and had beaten three members of the family and thereafter they had taken away golden ornaments, cash money and other valuable things worth Rs. 62,975/-. They had immediately fled away after commission of the offences. They were absconding. It is succinctly established that there were more than five persons who had entered the house of the complainant with a criminal intention and had committed an act of robbery. The accused was one of the persons whose identity has been established beyond reasonable doubt.

16. The contention that the Identification Parade was held on 10-10-1991 and incident had occurred on 11-4-1991 and therefore, on the ground of delay, Identification Parade should not be taken into consideration, has no merit. It may be noted that the accused came to be arrested on 8-10-1991 and Identification Parade was conducted on 10-10-1991. Therefore, there is no delay in holding the Identification Parade. The Identification Parade evidence may lose its significance, if it is held after long period. In the present case, the accused was absconding and immediately within two days" after his arrest, Identification Parade was held. Therefore, it cannot be said that there was delay in holding the Identification Parade.

17. The relevant provisions for the purpose of Identification Parade are under Sections 3, 9 and 134 of Evidence Act. No infirmity is found in the Identification Parade proceedings. The prosecution witness injured Bai Manik has also identified the accused in deem light kept in her house at the time of incident. It is also clearly found from her evidence that she had rightly identified the accused at the time of Identification Parade. Thus, the evidence of the prosecution witness is

quite clear, consistent and coherent involving the accused in commission of the offences. There is not any manner of doubt from the evidence on record that the accused was one of the five dacoits or assailants who had entered in the house of the complainant. The finding recorded by the trial Court that the appellant-accused was one of the assailants and offenders, who were more than five in numbers, has remained unshaken and unquestionable.

18. Now the question would arise as to whether the accused is rightly held guilty for the offence punishable under Sections 395 and 397 of the Indian Penal Code by the trial Court. Section 395 prescribes punishment for dacoity. Whoever commits dacoity shall be punishable with imprisonment for life, or with Rigorous Imprisonment for a term which may extend to ten years, and shall also be liable to fine u/s 395 of the Indian Penal Code. The word "dacoity" Is defined in Section 391. Section 391 of the Indian Penal Code reads as under:

When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more every person so committing attempting or aiding, is said to commit "dacoity.

When five or more persons conjointly commit or attempt to commit a robbery and aiding every person so committing, attempting or even aiding such commission or attempt is covered under statutory definition of dacoity. Offence of robbery is defined in Section 390. Robbery is a special and aggravated form of either theft or extortion. The chief distinguishing element in robbery is the presence of imminent fear of violence. Section 390 of the Indian Penal Code reads as under: -

In all robbery there is either theft or extortion.

Theft is "robbery" if in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, or instant hurt, or of instant wrongful restraint to that person, or to some other person, and, so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation: The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, or instant hurt, or of instant wrongful restraint.

19. Dacoity is a robbery committed by five or more persons, otherwise there is no difference between these two offences under the Indian Penal Code. The

seriousness and gravity of the offence consist in the terror if caused by the presence of a number of offenders. Abettors who are present and aiding when the crime is committed are counted in the number of persons or offenders. It is very clear from the provisions of the Indian Penal Code that the dacoity is perhaps the only offence which the legislature has made punishable at four stages. When five or more persons assemble for the purpose of committing dacoity, each of them is punishable u/s 402 I.P.C. merely on the ground of joining the assembly. Another stage is that of preparation and if any one makes preparation to commit a dacoity, he is punishable u/s 399. The definition of "dacoity" in this section shows that the other two stages, namely, the stage of attempting to commit and the stage of actual commission of robbery, have been treated alike, and come within the definition. Thus, in other words, attempt to commit dacoity is also considered and treated as an offence of dacoity.

20. It is settled proposition of law that it is possible to commit the offence of dacoity u/s 395 of the Indian Penal Code by merely attempting to commit a robbery by five or more persons without being successful in getting any booty whatsoever. Therefore, if in a particular case, the dacoits are forced to retreat due to stiff opposition from the villagers or witnesses without collecting money or any other items or any booty, then it could be held that the offence of dacoity is completed the moment the dacoits take to their heels without any materials or items or valuables. Even in such a case, all the dacoits could be convicted and punished u/s 395 of the Indian Penal Code. Whereas in the present case, the prosecution has established beyond reasonable doubt that the dacoits had taken away booty of about Rs. 62,975/- in terms of golden ornaments, cash money and other items and those dacoits have, successfully, looted and got booty. The evidence of the prosecution witness is clearly consistent and trustworthy showing involvement and presence of accused as one of the dacoits who had entered into the house of the complainant with a criminal intention and had as such beaten three prosecution witnesses and had taken away golden ornaments, cash money and other items worth Rs. 62,975/-. Thus, there is no any iota of doubt in the mind of this Court in transfixing culpability of accused for the offence punishable u/s 395 of the Indian Penal Code and therefore, the conviction of the accused for the offence punishable u/s 395 is quite justified, correct and supportable.

21. In the circumstances, the conviction to accused under Section 395 of the Indian Penal Code is confirmed.

22. The question which, now, would arise for consideration is with regard to sentence for the offence u/s 395 of the Indian Penal Code, the trial Court has sentenced the accused to undergo Rigorous Imprisonment for five years and to pay a fine of Rs. 300/- and in default, further Rigorous Imprisonment for three months. Section 395 prescribes punishment for imprisonment for life and fine both. It is contended by the learned Counsel for the appellant-accused that as the accused is of young age and he has to maintain his old poor parents and there is no other earning member in his family except the accused and he has

responsibility to look after small brother and unmarried sister. Therefore, it is contended that sentence of five years imposed by the trial Court is harsh and excessive in the circumstances. Having regard to the facts and circumstances, the ends of justice will be satisfied, if the period of five years is reduced to the period of four years.

23. With the result, sentence to undergo imprisonment for five years awarded by the trial Court is reduced to imprisonment for four years. In other words, the accused is sentenced to undergo Rigorous Imprisonment for a period of four years, instead of five years for the offence punishable u/s 395 of the Indian Penal Code inflicted by the trial Court and the order of payment of fine of Rs. 300/- and in default of payment of fine, to undergo further Rigorous Imprisonment for three months is hereby maintained.

24. Next in leaves into the field a question of examination and appreciation of impugned conviction and sentence order under the provisions of Section 397 of the Indian Penal Code. Section 397 prescribes punishment for robbery or dacoity which attempted to cause death or grievous hurt. It will be now, therefore, important to refer the provisions of Section 397 which reads as under:

If, at the time of committing robbery or dacoity, the offender uses any deadly weapon or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punishable shall not be less than seven years.

It does not create any offence but merely regulate the punishment already provided for robbery and dacoity. This section fixes a minimum term of imprisonment when the commission of robbery and dacoity has been attended with certain aggravating circumstances, viz. (1) the use of a deadly weapon, or (2) the causing of grievous hurt, or (3) attempting to cause death or grievous hurt. It becomes very clear from the aforesaid provisions that in order to attract rigours of provisions of Section 397, it must be shown that at the time of committing robbery, the accused was armed with deadly weapon and not merely that one of the robbers who was with him at the time carried one.

25. The liability to enhanced punishment is limited to the offender only who actually uses the weapon himself and causes grievous hurt and not to others who in combination with such person have committed robbery or dacoity. Obviously, plainly and unambiguously, it is found from the provision of Section 397 that there cannot be any constructive or vicarious liability for punishment u/s 397. This section does not provide for constructive liability as in the case of offence u/s 149 of the Indian Penal Code.

26. Unfortunately, the trial Court has failed to appreciate the material ingredients and correct construction of provision of Section 397 of the Indian Penal Code. Not only that even while holding accused guilty for the offence u/s 397 of the Indian Penal Code, the trial Court has not inflicted minimum sentence prescribed in Section 397. This aspect is totally over-looked. Serious error is committed by

the trial Court in not appreciating material provisions of Section 397. Apart from that, the trial Court has also held accused guilty on the basis of constructive or vicarious liability which is not even permissible under the provision of Section 397 of the Indian Penal Code. It is clearly held in the impugned judgment that the accused could be convicted u/s 397 of the Indian Penal Code as some accused persons who are absconding had held deadly weapons and used for causing injuries to the prosecution witnesses. The accused was very much present. The learned additional Sessions Judge found accused guilty on constructive liability which is impermissible. Therefore, the conviction and sentence passed u/s 397 is required to be quashed and set aside being, totally, illegal.

27. Expression "offender" in Section 397 means, it is confined only to the offender who actually uses any deadly weapon. Use of deadly weapon by one of the offenders at the time of committing robbery, obviously would not, therefore, attract provision of Sec, 397 for imposing punishment on the another offender who had not used or who had not held or had used any deadly weapon. The trial Court has again committed serious error in appreciating correct and true tenure of the term "offender" used in this section. The use of deadly weapon or attempting to cause death or causing grievous hurt to any person "by the offender" at the time of committing robbery or dacoity signifies with the person who actually uses the weapon himself and causes grievous hurt or attempts to cause death is liable for punishment u/s 397 and not others on the basis of constructive liability. The liability to enhance punishment u/s 397 is limited to the offender who actually is responsible either for using the weapon or for attempting to cause death or for causing grievous hurt at the time of committing the dacoity or robbery as the case may be. No punishment should be inflicted on the basis of vicarious liability as in Section 149 of the Indian Penal Code. From the evidence on record there is nothing to show that the accused had held deadly weapon or had attempted to cause death or had as such caused grievous hurt. The evidence on record goes to show that he had caught hold of one prosecution witness, Bai Manikben and other dacoits were inflicting injuries. There is no evidence to show that he had as such held or used weapon or caused grievous hurt.

28. Having regard to the facts and circumstances of the case, it is found that the conviction u/s 397 of Indian Penal Code is justified and has remained unshaken and therefore, it is confirmed. However, the sentence order of five years is required to be reduced to four years as aforesaid in the peculiar facts emerging from the record of the case. However, the conviction u/s 397 is impermissible under the circumstances of the case and under the settled proposition of law. Therefore, conviction and sentence order passed in the impugned judgment and order for the offence punishable u/s 397 I.P.C. is hereby quashed and set aside. In view of the facts and circumstances narrated hereinbefore, the appeal is required to be partly allowed. Obviously impugned judgment and order shall stand modified to the aforesaid extent only. However, order directing accused to

undergo imprisonment for five years is modified and the accused is directed to undergo Rigorous Imprisonment for a period of four years instead of five years under the circumstances of the case. The amount of payment of fine of Rs. 300/- and in default of payment of fine, to undergo Rigorous Imprisonment for three months remains undisturbed and is confirmed.

29. In the result, the appeal is partly allowed. The order of conviction and sentence passed by the learned trial Court in Sessions Case No. 30 of 1992 for the offence punishable u/s 397 of the Indian Penal Code is quashed and set aside. The order of conviction u/s 395 of the Indian Penal Code is justified and therefore, it is confirmed. However, sentence for the same of five years inflicted by the trial Court is reduced to four (4) years only.

30. Thus, the appellant-accused is sentenced to undergo Rigorous Imprisonment for four years only for the offence punishable u/s 395; G.R. 33 of the Indian Penal Code, instead of five years and the order of payment of fine and in default of payment of fine awarded by the trial Court is confirmed. Appeal stands allowed accordingly.