

(2012) 09 KAR CK 0232
In the Karnataka High Court
Case No : Criminal A. No. 2177 of 2005 (C)

M.S. Ramu @ Nagaraja

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 18-09-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428
Penal Code, 1860 (IPC) — Section 120 B, 391, 394, 395

Citation : (2012) 09 KAR CK 0232

Hon'ble Judges : K.N. Keshavanarayana, J

Bench : Single Bench

Advocate : M. Shashidhara, for the Appellant; K. Rajesh Rai, Government
Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.N. Keshavanarayana

1. This appeal by the convicted accused No. 1 is directed against the judgment of conviction and order of sentence dated 28.10.2005 passed by the Presiding Officer, Fast Track Court, Kadur in S.C. No. 92/2002 convicting him for the offence punishable u/s 394 read with 395 of IPC and sentencing him to undergo rigorous imprisonment for 5 years and to pay fine of Rs. 2,000/- for the said offence. The appellant along with 5 other persons was tried for the offences punishable under Sections 397, 398, 120(B) read with 395 of IPC inter alia alleging that all the accused persons hatched a conspiracy to commit dacoity and in furtherance of the said conspiracy, at about 8.15 p.m. on 25.7.2001 while PW. 1-Siddalingaiah and his brother-PW. 2-Chandraiah were proceeding on their motor cycle bearing registration No. KA-18-E-3255, the appellant and accused No. 4 way laid PWs. 1 and 2, accused No. 4 first assaulted PW. 2 who was sitting as pillion rider on the motor cycle, with chopper twice or thrice, as a result of the impact PW. 1 who was riding the motor cycle lost balance and both of them fell down, thereafter accused No. 1 assaulted PW. 1 with knife thereby both PWs. 1

and 2 sustained injuries, at that juncture PW. 2 snatched the weapon from the hands of accused No. 1 and assaulted accused No. 1 as a result, accused No. 1 also sustained injury and fell down. On seeing this, accused No. 4 and other accused who were waiting at a distance ran away from the place and before running away, accused No. 4 by searching the pockets of PW. 2 attempted to commit robbery. As Accused No. 4 was shown as absconding, case against him was split up while the case against accused Nos. 1 to 3, 5 and 6 came to be committed to the Court of Sessions. Before the Court of Sessions, the appellant and other accused persons pleaded not guilty for the charges levelled against them and claimed to be tried. The prosecution in order to bring home the guilt of the accused persons for the charges levelled against them examined PWs. 1 to 20, relied on documentary evidence Exs. P.1 to P.30 and M.Os. 1 to 8. The appellant and other accused persons denied all the incriminating circumstances appearing against them in the evidence of the prosecution witnesses. However, they did not choose to lead any defence evidence. Their defence was one of total denial and that of false implication.

2. After hearing both sides and on assessment of oral and documentary evidence, the learned Sessions Judge by the judgment under appeal, held that the evidence placed by the prosecution though established an attempt to commit robbery and in the process PWs. 1 and 2 were assaulted with dangerous weapons like chopper and knife as a result of which PWs. 1 and 2 sustained injuries, the evidence placed on record does not establish the complicity of accused Nos. 2, 3, 5 and 6 and it only establishes the complicity of accused No. 1 and absconding accused No. 4. In that view of the matter, the learned Sessions Judge acquitted accused Nos. 2, 3, 5 and 6 of all the charges levelled against them. In the light of the same, the learned Sessions Judge convicted the appellant / accused No. 1 for the offence u/s 394 read with 395 of IPC and sentenced him to undergo imprisonment as well as to pay fine. Aggrieved by the said judgment, accused No. 1 is in appeal before this Court.

3. I have heard the learned counsel for the appellant and learned Government Pleader. Perused the records secured from the court below.

4. Learned counsel for the appellant contended as under:

that the judgment under appeal is highly perverse and illegal inasmuch as the findings recorded by the learned Sessions Judge are not based on any legal and acceptable evidence as such it calls for interference by this Court; that even according to the evidence of PWs. 1 and 2 there was complete darkness at the alleged place of incident, therefore, there was no opportunity for PWs. 1 and 2 to identify the assailants as such the identification of the appellant before the court as one of the assailant could not have been the sole basis to record conviction against the appellant, in the absence of conduct of TI parade immediately after the occurrence of the incident alleged; that even if the evidence of PWs. 1 and 2 are accepted at its face value, it would not establish that there was any attempt to commit robbery and therefore the act said to have been committed by the

appellant do not fall within the purview of offence punishable u/s 394 IPC, at best it may attract the offence u/s 324 of IPC; that having acquitted accused Nos. 2, 3, 5 and 6 by recording a finding that there is absolutely no evidence regarding conspiracy and since even according to PWs. 1 and 2 there were only two assailants, the learned Sessions Judge has committed serious error of law in finding the appellant guilty of the offence punishable u/s 394 read with 395 of IPC; that in this regard the learned Sessions Judge has failed to notice that to constitute an offence punishable u/s 395 of IPC, it should answer the requirement of Section 391 of IPC which defines dacoity and it is only if the act of robbery or an attempt to commit robbery is by five or more persons conjointly, it would become dacoity within the meaning of Section 391 punishable u/s 395 of IPC and since in the case on hand, even according to the findings of the learned Sessions Judge, there were only two assailants viz., accused Nos. 1 and 4, the appellant could not have been convicted for the offence u/s 394 read with 395 IPC.

Therefore, he sought for setting aside the judgment under appeal.

5. On the other hand, the learned Government Pleader sought to justify the judgment under appeal and contended that the judgment under appeal does not suffer from any perversity or illegality since the learned Sessions Judge on proper appreciation of oral and documentary evidence has recorded findings which are sound and reasonable regard being had to the evidence on record and therefore the judgment under appeal does not call for interference by this Court; that though as per the case of the prosecution the accused hatched a conspiracy to commit dacoity and in furtherance of the same, accused No. 1 and another committed the acts of robbery while PWs. 1 and 2 were proceeding on the motor cycle, during their evidence, PWs. 1 and 2 have disclosed only the role played by accused No. 1 and another and therefore the learned Sessions Judge in the light of the evidence available on record has rightly held that there is no evidence regarding conspiracy and the evidence of PWs. 1 and 2 beyond reasonable doubt establishes the complicity of accused No. 1 in attempting to commit robbery and in the process causing hurt to PWs. 1 and 2 along with another accused; that the very fact that the appellant/accused No. 1 had sustained injury and he was found lying at the place of the incident and later removed to the Government Hospital at Kadur, where he was treated as inpatient, puts a stamp of proof about his presence and complicity, therefore, in the absence of any explanation from the appellant, the learned Sessions Judge is justified in holding the appellant guilty for the offence u/s 394 of IPC.

The learned Government Pleader fairly submitted that having regard to the findings recorded by the learned Sessions Judge acquitting accused Nos. 2, 3, 5 and 6 which has not been assailed by the State, the ingredients of the offence u/s 391 punishable u/s 395 of IPC are not attracted, therefore, the conviction for the offence u/s 395 of IPC may not be sustained. However, he contended that the conviction recorded against the appellant for the offence punishable u/s 394

of IPC does not call for interference by this Court.

6. In the facts and circumstances of the case and in the light of the submissions made on both sides, the point that arise for consideration is,

(1) Whether the judgment under appeal suffers from perversity or illegality warranting interference by this Court? and

(2) Whether the learned Sessions Judge is justified in convicting the appellant/accused for the offence u/s 394 read with 395 of IPC?

7. I have bestowed my serious considerations to the submissions made by learned counsel on both sides.

8. As noticed supra, the case of the prosecution was that the appellant along with other accused persons hatched a conspiracy to commit dacoity and in furtherance of the same, accused No. 1 and the absconded accused No. 4 way laid PWs. 1 and 2 while they were proceeding on a motor cycle at about 8.15 p.m. on 25.7.2001, assaulted them with chopper and knife, caused them severe injuries, attempted to commit robbery and in the incident, accused No. 1 sustained injury as a result of assault by PW. 2 after snatching the weapon from the hands of accused No. 1 and thereby there was an attempt to commit robbery and in the process caused hurt to PWs. 1 and 2. In respect of this incident, according to the prosecution, the statement of PW. 1 was recorded in the Hospital where he was taking treatment, as per Ex. P.1 based on which case came to be registered and investigation was taken up. The fact that PWs. 1 and 2 while proceeding on the motor cycle in the night of 25.7.2001 sustained injury as a result of assault by some miscreants is established by their oral evidence as well as the medical evidence.

9. The evidence of PW. 17-Dr. Dayanand establishes that at about 9.00 p.m. on 25.7.2001, PWs. 1 and 2 came to the Government Hospital, Kadur with history of assault by two unknown persons at about 8.15 p.m. on the same day and when he examined PW. 1, he noticed lacerated wound on the scalp measuring about 5 cms and lacerated wound in left forearm measuring 3 cms and when he examined PW2 he noticed,

(i) two lacerated wounds measuring 10 x 1 cms side by side linear extending front anterior to posterior separated by 2 cms in the scalp.

(ii) Tenderness over right shoulder joint;

(iii) Cut injury on the right deltoid region measuring 4 cms;

(iv) Cut injury about 7.5 cms on the right side of the neck;

(v) Cut injury on the right ear extending from anterior part of the ear to the posterior part;

(vi) Lacerated injury about 7.5 circumstances posterior to right ear and

(vii) Fracture of right clavicle.

According to PW. 17, in this regard, he has issued wound certificates Exs. P.21 and P.25. The only suggestion put to PW. 17 in the cross-examination on behalf of the appellant was that the nature of the injuries found on the persons of PWs. 1 and 2 could occur even by a motor vehicle accident. Thus the presence of the injuries on the persons of PWs. 1 and 2 is not seriously disputed by the appellant - accused. Having regard to the time at which PWs. 1 and 2 were shown to have been examined by PW. 17 in the Government Hospital at Kadur, the say of PWs. 1 and 2 that they sustained those injuries at about 8.15 p.m. while they were proceeding on a motor cycle deserves to be accepted.

10. According to the evidence of PWs. 1 and 2, while they were proceeding on the motor cycle, since the road was upgradient at the place of the incident, PW. 1 as rider of the motor cycle was going at a low speed and with the help of the head light of the vehicle they saw two persons standing by the side of the road and when they covered few yards from that place, from behind PW. 2 was assaulted with a chopper twice or thrice and on account of the impact PW. 1 lost balance and fell down and thereafter PW. 1 also was assaulted. It is their say on oath that with the help of the headlight, they saw the assailants. PW. 2 has further stated that at the time of the assault he snatched the knife from the hands of accused No. 1 and assaulted accused No. 1 with the said weapon as a result accused No. 1 sustained injuries and at that time the absconding accused No. 4 with an intention to commit robbery, searched the pockets of PW. 2 but since he did not find anything and on seeing accused No. 1 sustaining injuries, he ran away from the place. According to PWs. 1 and 2, at that time their brother PW. 3 who along with PW. 4 was proceeding in an autorikshaw from Kadur side, on seeing them stopped there and shifted them to the Hospital at Kadur in the said autorikshaw. As these two witnesses did not support the case of the prosecution with regard to the role of other accused and all the accused hatching conspiracy, were treated hostile and cross examined by the learned Public Prosecutor. However in the cross-examination by the learned Public Prosecutor, both of them have denied the suggestions put to them with regard to the role assigned to accused Nos. 2, 3, 5 and 6. Though the learned counsel for the appellant - accused No. 1 cross-examined PWs. 1 and 2 at length, perusal of the cross-examination indicates that nothing has been elicited to discredit their testimonies. Merely because PWs. 1 and 2 did not support the case of the prosecution as to the complicity of accused Nos. 2, 3, 5 and 6, and on that ground they were treated hostile, their testimonies with regard to the acts of assault by the appellant / accused No. 1 in an attempt to commit robbery cannot be discarded.

11. It is now fairly well settled that evidence of a hostile witness is not necessarily be discarded in to. To the extent his/her evidence supports the case of the prosecution could still be relied upon. The fact that the appellant / accused No. 1 sustained injuries in the night of 25.7.2001 is not seriously disputed. In

fact, the evidence of PW. 17 indicates that accused No. 1 was also examined by him in the same night in Government Hospital at Kadur and on examination he noticed the following injuries:

- (i) Incised wound measuring 5 cms x 2 cms over left side of the forehead 2 cms above the left eye bone
- (ii) a lacerated wound about 5 cms on the right side of the fore head extending up to angle of the eye and
- (iii) Incised wound about 5 x 2 cm on the medial aspect of the right forearm.

To this effect, he has issued wound certificate as per Ex. P.26. In the cross-examination PW. 17 has denied the suggestion that he did not examine accused No. 1 on that day. Thus, the evidence of PW. 17 clearly establishes that accused No. 1 had sustained injuries in night of 25.7.2001. Accused No. 1 has not come out with any explanation as to where and how he sustained those injuries. In the absence of any such explanation, the say of PWs. 1 and 2 as to how and where accused No. 1 sustained the injuries deserves to be accepted. Thus, the presence of injuries on the person of accused No. 1 puts a stamp of proof about his presence at the scene of occurrence. Therefore, the testimonies of PWs. 1 and 2 that appellant / accused No. 1 was one of the assailants who caused the injuries to them has been rightly accepted by the learned Sessions Judge. The findings recorded by the learned Sessions Judge in this regard do not suffer from any perversity or illegality. Those findings are sound and reasonable regard being had to the evidence on record.

12. It is in the evidence of PWs. 2 that accused No. 4 before running away from the place searched his (PW. 2) pockets to find out as to whether he could find any valuables but since he did not find any such valuables, accused No. 4 ran away from the place. There is no serious challenge to this part of the evidence of PW. 2. Of course, the learned counsel for the appellant pointing out to the evidence of PW. 1 to the effect that later he was informed by his brother-PW. 2 that the accused committed the said act with an intention to commit robbery / dacoity and he (PW. 2) came to know the same through some one, contended that the evidence on the part of PWs. 1 and 2 regarding accused No. 4 searching the pockets of PW. 2 cannot be believed. I find no substance in this contention. Even according to the case of the prosecution, PW. 1 was the rider while PW. 2 was the pillion rider. According to PW. 2, his pockets were searched. More over the intention on the part of the person being the mental state of affairs, the same will have to be gathered from the attending circumstances. The very fact that PWs. 1 and 2 while proceeding on the motor cycle were waylaid and were assaulted at about 8.15 p.m. would indicate that the said act was only to rob them of their valuables. Therefore, the evidence of PWs. 1 and 2 clearly establishes that there/ was an attempt to commit robbery by the appellant and another person and in that process they have caused hurt to PWs. 1 and 2 by using dangerous weapon. Therefore, in my considered opinion, the evidence

placed on record, as rightly held by the learned Sessions Judge, would establish the ingredients of the offence punishable u/s 394 of IPC. In this view of the matter, the conviction recorded by the learned Sessions Judge against the appellant for the offence punishable u/s 394 IPC does not suffer from any perversity or illegality warranting interference by this Court.

13. As fairly submitted by the Government Pleader, in the light of the findings recorded by the learned Sessions Judge while acquitting accused Nos. 2, 3, 5 and 6 of the charges levelled against them and in the light of the finding recorded by the learned Sessions Judge that the prosecution has failed to prove the conspiracy hatched as alleged, and since even according to PWs. 1 and 2 there were only two assailants, the act of attempt to contort robbery does not constitute an attempt to commit dacoity within the meaning of Section 391 punishable u/s 395 of IPC as the number of the assailants / culprits fell short of the required number to constitute the said offence as dacoity within the meaning of Section 391 of IPC. Therefore, the conviction of the appellant for the offence u/s 395 of IPC is perverse and it cannot be sustained in law. Therefore, to that extent, the conviction recorded by the trial Court requires to be modified. The conviction recorded for the offence u/s 394 of IPC does not call for interference.

14. The offence u/s 391 of IPC is punishable with imprisonment for life or rigorous imprisonment for a period of 10 years and shall also be liable to pay fine. The learned Sessions Judge has sentenced the appellant to undergo rigorous imprisonment for 5 years and to pay fine of Rs. 2,000/-. Having regard to the offence for which the appellant has been found guilty and the punishment prescribed for the same, I am of the considered opinion that the period of imprisonment ordered by the trial Court cannot be termed as either harsh or as excessive. Therefore, the order of sentence also does not warrant interference by this Court. In view of the above, I find no merit in the appeal.

(i) Accordingly, the appeal is dismissed.

(ii) The bail and surety bonds executed by the appellant-accused are ordered to be cancelled.

(iii) The appellant is directed to surrender before the trial Court forthwith and upon such surrender, he shall be committed to prison to serve the sentence.

(iv) In case of failure to surrender, the trial Court shall take necessary steps to secure the presence of accused No. 1 and to commit him to prison.

(v) It is made clear that the appellant is entitled for set off for the period of custody already undergone as provided u/s 428 of Cr. P.C.