
(2008) 03 MAD CK 0042

In the Madras High Court

Case No : Criminal R.C. No. 559 of 2006

Nattooran @ Natarajan

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 31-03-2008

Acts Referred:

Penal Code, 1860 (IPC) — Section 392, 394, 395, 397

Citation : (2008) 2 LW(Cri) 760

Hon'ble Judges : T. Sudanthiram, J

Bench : Single Bench

Advocate : P.M.Duraiswamy, for the Appellant; J.C. Durairaj, Government Advocate (Crl. Side), for the Respondent

Judgement

T. Sudanthiram, J.—The Revision petitioner was convicted by the learned Assistant Sessions Judge/Chief Judicial Magistrate, Coimbatore in

S.C. No. 62 of 2005 for an offence punishable u/s 394 read with Section 397 IPC and sentenced to undergo R.I. for a period of seven years. The

said sentence was confirmed by the learned Additional District and Sessions Judge, Fast Track Court No. III, Coimbatore in C.A. No. 60 of

2006. Aggrieved by the said conviction and sentence, the Revision Petitioner-Accused has preferred this Criminal Revision Petition.

2. Totally there were three accused. Two other accused are absconding and the case against them was spilt up and the case was tried against this

Petitioner alone.

3. On 16.02.2003 in the night at about 11.15 P.M. the absconding accused Rajan and Boopathy have entered into the house of P.W.1 at Door

No. 9-A, Anna Nagar, Ganapathy, Coimbatore under the guise of seeking employment under witness Sundaram, who died prior to the date of

trial and the accused Rajan caused injury on his right thumb with knife. Sundaram's wife Dhanalakshmi witness also died prior to the date of trial.

P.W.1 Sathish Krishnakumar and his wife P.W.2 Saraswathi were put under the fear of death by accused. Then, the Revision petitioner-accused

entered into the house and they demanded Rs. 10 lakhs and also forcibly made to deliver all the gold ornaments weighing about 47 sovereigns and

taken the silver articles worth about Rs. 1,66,000/- and cash of Rs. 5000/-.

4. In order to establish the case of the Prosecution, the Prosecution examined 12 witnesses on their side. 15 Exhibits were marked and 24 material objects were produced.

5. Both the trial court and the Appellate court considered the evidence let in by the Prosecution and found the Revision petitioner guilty of the offence u/s 394 r/w.397 IPC and convicted and sentenced him as stated above.

6. The learned Counsel for the Revision petitioner submitted that the Revision petitioner was arrested four months after the occurrence i.e. on

13.06.2003 and though the identification parade was conducted, the accused was shown to the witnesses in the police station before the test

identification parade and photo of the accused were also taken and shown to witnesses. As such there is no value for test identification parade.

7. The learned Counsel for the Revision petitioner further submitted that only the gold ingots were recovered in this case and they are not

identifiable by the witnesses and even though the ingots were recovered from P.W.8 and P.W.9, they turned hostile and also no property was

recovered from the possession of the Revision petitioner. Therefore, the conviction of the Revision petitioner is not sustainable.

8. The learned Counsel for the Revision petitioner further submitted that the conviction of the Petitioner and sentencing him u/s 397 IPC is not

maintainable since even according to the Prosecution, it was only the accused Rajan was holding the knife and he only used the knife. Even

according to the Prosecution, this Petitioner was not armed with any deadly weapon and he entered into the scene of occurrence only at a later

point of time and as such awarding of minimum sentence of seven years is not attracted against the Revision petitioner. The learned Counsel for the

Revision petitioner further submitted that the alleged injury caused on the victim is only by the other accused and not by the Petitioner.

9. The learned Government Advocate (Criminal Side) submitted that out of four witnesses with regard to the occurrence, two of the witnesses i.e.

Sundaram and his wife Dhanalakshmi died prior to the date of trial. But P.Ws.1 and 2 who were also present at the time of robbery committed by

the accused have given evidence corroborating with each other and there is no contradiction in their evidence and further their evidence is

strengthened by their identification of the Petitioner in the test identification parade.

10. The learned Government Advocate (Criminal Side) would further submit that there was no delay in conducting the identification parade after

the arrest of the accused. Even though, the properties were recovered in the form of gold ingots, the mahazar witness, P.W.6 Ganesan has

supported the prosecution case. The participation of the Petitioner at the time of the alleged occurrence is well spoken by P.Ws.1 and 2 and

therefore, even without any recovery from the possession of the Revision petitioner, the conviction of the Petitioner is maintainable.

11. The learned Government Advocate (Criminal Side) further submitted that even though the injury is not caused by this Petitioner and the injury

was caused on the victim by another accused, as per Section 394 IPC any person in committing robbery, voluntarily causes hurt, such person and

any other person jointly concerned in committing such robbery is also liable u/s 394 IPC and therefore each one of the accused are liable u/s 394

IPC.

12. This Court considered the submissions made by both sides and perused the judgment given by both courts below and also the other records.

13. P.W.1 and P.W.2 have categorically identified the Petitioner in court and about his participation in the offence by entering in to the house and

committing robbery. Though, it is contended by the learned Counsel for the Revision petitioner that the accused have informed to the learned

Magistrate that they were shown to the witnesses before conducting identification parade and their photos were also shown to them. P.W.1 and

P.W.2 have denied about being shown to them the accused prior to the test identification parade. Therefore, this Court holds that there is no

illegality in the test identification parade being conducted and further substantive evidence of identifying the Petitioner in court is sufficient to hold

that the Petitioner had entered into the house of the victim and committed robbery. Though the properties were recovered under the form of gold

ingots that may not affect the case of the prosecution.

14. Even according to the prosecution case, it was only the accused Rajan who was holding the knife and who had used the knife against the

victim Sundaram and showed the knife to others. As far as this Petitioner is concerned, he was not holding the knife.

15. The learned Counsel for the Petitioner relied upon the decision reported in Shri Phool Kumar Vs. Delhi Administration, wherein it was held as

follows:

5. Section 392 of the Penal Code provides:

Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine;

and if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years." The sentence

of imprisonment to be awarded u/s 392 cannot be less than 7 years if at the time of committing robbery the offender uses any deadly weapon or

causes grievous hurt to any person or attempts to cause death or grievous hurt to any person: vide Section 397. A difficulty arose in several High

Courts as to the meaning of the word "uses" in Section 397. The term "offender" in that section, as rightly held by several High Courts, is confined

to the offender who uses any deadly weapon. The use of a deadly weapon by one offender at the time of committing robbery cannot attract

Section 397 for the imposition of the minimum punishment on another offender who had not used any deadly weapon. In that view of the matter

use of the gun by one of the culprits whether he was accused Ram Kumar or some body else, (surely one was there who had fired three shots)

could not be and has not been the basis of sentencing the appellant with the aid of Section 397. So far as he is concerned he is said to be armed

with a knife which is also a deadly weapon. To be more precise from the evidence of P.W.16. "Phool Kumar had a knife in his hand." He was

therefore carrying a deadly weapon open to the view of the victims sufficient to frighten or terrorize them. Any other overt act, such as, brandishing

of the knife or causing of grievous hurt with it was not necessary to bring the offender within the ambit of Section 397 of the Penal Code.

As per the ratio laid down by the Apex Court, use of deadly weapon knife by the accused Rajan cannot attract u/s 397 IPC for imposition of

minimum punishment against the Petitioner herein. Further, Section 397 IPC is not a substantive offence and Section 397 IPC is only a rider to

Section 392 and 395 IPC. Section 397 IPC can be used only along with either Section 392 or Section 395 IPC.

16. As far as Section 394 IPC is concerned that itself is a substantive offence. To attract Section 394 IPC causing hurt is necessary whereas to

attract minimum sentence as per Section 397 IPC causing hurt not necessary, but as laid down by the Hon'ble Apex court in the decision cited

supra, if the weapon is carried in open to the view of the victims is sufficient to frighten or terrorize them. Section 397 IPC is attracted only in

respect of the person who uses deadly weapon.

17. Section 394 IPC reads as follows:

If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in

committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may

extend to ten years, and shall also be liable to fine.

Though the injury is caused to the victim by other accused, this petitioner is also liable u/s 394 IPC. Therefore, his conviction u/s 394 IPC is

maintainable and it is confirmed.

18. With regard to the sentence, the sentence of 7 years imposed u/s 397 IPC is set aside, since Section 397 IPC is not attracted against the

Petitioner. The learned Government Advocate (Criminal Side) also submits no other case is pending against the Petitioner as on date. The

occurrence had taken place in the year 2003 and the learned Counsel for the Petitioner also submits that the Petitioner had been in jail for one

year.

19. Considering the facts and circumstances of the case, the Petitioner is sentenced to undergo four years rigorous imprisonment u/s 394 IPC.

20. Accordingly, this Revision Petition is partly allowed.