(1990) 02 AHC CK 0088

Allahabad High Court (Lucknow Bench)

Case No: Criminal Appeal No. 981 of 1982

Raja Ram		APPELLANT
	Vs	
State of Uttar Pradesh		RESPONDENT

Date of Decision: Feb. 20, 1990

Acts Referred:

- Arms Act, 1959 - Section 23(1)
- Penal Code, 1860 (IPC) - Section 302, 392, 397

Citation: (1990) 14 ACR 761

Hon'ble Judges: Palok Basu, J

Bench: Single Bench

Final Decision: Partly Allowed

Judgement

Palok Basu, J.
Rajaram has filed this appeal against his conviction u/s 392 read with Section 397 IPC and sentence of 7 years R.I. as also for offence u/s 23(1)(a) Arms Act and sentence of one yearï¿½s R I. as has been ordered by the judgement of the 8th Additional Sessions Judge, Sitapur, dated 11-11-1982 in Sessions Trial No. 183 and J84 of 1982 respectively.

2. Sri Ramakant Sharma, learned Counsel for the Appellant has placed the record before this Court and has raited two points which will be taken up hereinafter Sri S P. Misra, learned Assistant Government Advocate has been heard in opposition. The prosecution case was that Sooraj Prasad informant was sleeping with his brother Misri Lal on the roof of his house and his mother and brotherï¿½s wife were sleeping under the Chhappar, inside the house, on the night between 26/27th November 1981. Around 4:30 AM. four miscreants arrivd in the house and they caught hold of his mother and bbabhi and threatened them forcing them to divulge information about the valuables. They started collecting some articles also. A Dhibri was burning From the roof the informant and his brother heard the conversation and the noise, at which they raised alarm. Co-villagers Ram Khelawan, Ram Asrey and others arrived with lathi and torch. At this, miscreants

started running away from the house. Seeing this, Misri Lal Sï¿½arted dropping wooden pieces from the roof one of which hit the Appellant Rajaram who lived in that very village, the pistol in his pocket got accidentally fired. He was arrested after some injury which were caused to him. Country made pistol with fired catridge and two living catridges were recovered. The village Cbaukidar was called and a report of the incident was then written by one Shivlal and lodged at Police Station at 8.30 A.M. the next morning. A case was registered by PW 5 Bhoolan Singh. The informant handed over the Appellant and the articles recovered from him at the police station The other accused bad run away from the place of occurrence. Sub-Inspector Shiv Snaran Lal Dubey was present and had investigated the case who has been examined as Pw 4 He has proved the recovery memo, regarding the articles produced by the informant at the police station alongwith the Appellant and he has also proved the sanction of the District Magistrate dated 1-2-1982 regarding prosecution under the Arms Act. He filed chargesheet in the Court. Bhoolan Singh PW 5, Head Constable has proved the chik report. After due committal proceedings, the Appellant was committed to the Court of Sessions.

3. Three persons namely PW 1 Shiv Raj Prasad informant, PW 2 Ram Asrey, and PW 3 Ram Khelawan are the eye-witness of the occurrence, who deposed about the incident and the manner in which the Appellant was arrested and recovery of Arms were made from him. They have further proved the fact that the Appellant sustained injuries at the time of the incident because the wooden planks thrown from the roof had landed on him, as a resuh of which be fell down and sustained injuries.

4. The Appellant in his statement before the trial judge has denied the allegations and the recovery also and attributed his implication due to litigation between his uncle Baldeo with Vishram, uncle of the informant. He has examined DW 1 Hari Shankar a Formacist to prove his injuries. He has examined DW 2 Dr. M.C Gupta also on the same point and he has examined Manilal DW 3 to prove the alleged false implication

5. The learned Trial Judge has considered the evidence and found the prosecution case fully proved. Coasequenty, be has recorded conviction and sentence as noted above

6. From the perusal of the statement of PW 1 Sooraj Prasad it is clear that he had in fact thrown wooden pieces from roof as a result of which Appellant Rajaram sustained injuries and was arrested alongwith illicit fire arms and cartridges. His statement is fully corroborated by the statement of PW 2 Ram Asrey who is a neighbour and PW 3 Ram Khelawan who is also co-villager and lives at a little distance.

7. All the three witnesses have, however, said that the Appellant sustained injuries at the ground -- floor. No evidence is forthcoming ?bout the part or over act which may have been played by Rajaram at the time of the alleged robbery inside the house Learned Counsel for the Appellant has vehementaly argued that even if the statement of these three witnesses is taken to be true, the (act remains that it is not proved that the Appellant has used the weapon during commission of the offence of robbery and theft, in other

words, the argument is that even if Section 302 IPC may be said to have been made out, Section 397 IPC cannot be said to have been made out. Here, one fact may be mentioned. It is admitted case of the prosecu tion that there were only four persons. The applicant was arrested while three others ran away. No witness from inside the house had been examined who may have proved the participation of the Appellant and use of the weapon or causing hurt by the Appellant for the purposes of committing theft or removing the articles In this connection, a look at Section 397 IPC is neces sary :

397. Robbery or dacoity, with attempt to cause death or grievous hurt-if, at the lime 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 punished shall not be less than seven years.

8. Learned Counsel for the Appellant has relied upon three decisions.

In the case of Abdul Rashid and Others Vs. Nausher Ali, . it has been emphasized that the essence of the offence of robbery is that the offenders for the end of committing theft, or carrying away or attempting to carry away the looted property, voluntarily causes or attempts to cause to any person, death or hurt or wrongful restrain or fear of instant death or of instant hurt or of instant wrongful restrain The use of violence will not, ipso-facto convert the offence of theft into robbery unless violence is committed for one of the ends specified in Section 397.

In the case of Md. Aslam Vs. State of Bihar, it has been held that the expression ï¿½uses any deadly weaponï¿½ in Section 397 IPC connotes somethiog rrore than merely being armed with deadly weapons ..... if the offender is only found with a deadly weapon, that by itself is not enough to hold him liable for conviction.

In the case of Jang Singh and Others Vs. State of Rajasthan, , it has been held that it is incumbent on the prosecution to prove that the particular accused used the deadly weapon at the time of committing dacoity or robbery.

9. A close look at the aforesaid Section and the decisions make it obvious that the prosecution u/s 397 IPC evidence must be produced to prove that the accused went to commit the offence of theft and actually accomplished his/their purpose by brandishing the weapon or whipping it out towards the victim to keep them under threat of death or grievous hurt, where no injury is factually caused. In the instant case the three ladies living in the ground floor have not been examined, there is no evidence on record that the accused had used the pistol in any manner tor the purposes of committing theft or that he pointed out the pistol towards the women folk or that he had used the same in any manner while committing offence. Consequently, the ingredients of Seciion 397 IPC are nor made out.

10. As regards, the Charge u/s 392 IPC it must be said that it stands fully proved There is no reason to discord the testimony of the three eye witnesses noted above. The additional fact remains that all the said three witnesses belonged to the village of the Appellant and had no reason whatsoever, to implicate him falsely. The three witnesses examined by the Appellant have rightly been discarded by the trial judge and their testimony does not help the Appellants defence. Consequently, the recovery of the Country-made pistol, one fired and two living catridges from him will also have to be accepted as true. The charges u/s 392 and Section 25(1)(a) of the Arms Act stand fully proved.

11. The learned Counsel for the Appellant then argued that the Appellant had been in Jail for nearly one year six months. It is true that the Trial Judge in his judgment has himself recorded a finding while awarding sentence to the Appellant that he bad been in Jail tor more than 15 months as an undertrial. May be that the Appellant has in the meantime undergone further sentence of about three months as a convict. The appeal is of 1982 and the incident was of 1981. No useful purpose will be served, if the Appellant is asked to undergo few months more sentence as regards 392 IPC. Therefore, it is deemed fit and proper that the sentence undergone should be enough so far as the Charge u/s 302 IPC and Section 25(1)(a) Arms Act are concerned.

12. The appeal is consequently, partly allowed. The conviction of the Appellant under Seetion 397 IPC and sentence of 7 yearsï¿½ R.I. thereunder are set aside. However, his conviction u/s 392 IPC simplicitor is maintained but his sentence thereunder is reduced to the period undergone. His conviction u/s 25(1)(a) of the Arms Act is maintained but his sentence is reduced to the period already undergone. The Appellant is on bail. He need not surrender. His bail bonds are discharged.