(2009) 07 AHC CK 0330

Allahabad High Court

Case No: Criminal A. No. 8048 of 2008

Pappu		APPELLANT
	Vs	
State of U.P.		RESPONDENT

Date of Decision: July 30, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 395, 397

Citation: (2010) 2 ACR 1401

Hon'ble Judges: Kant Tripathi, J

Bench: Single Bench

Advocate: A.K.S. Bais and C.B. Dubey, for the Appellant; A.G.A., for the Respondent

Judgement

Shri Kant Tripathi, J.

The Appellant Pappu has preferred this appeal against the judgment and order dated 22.10.2008, passed by Sri. Navneet Kumar, Additional Sessions Judge, Fast Track Court No. 2, Bareilly in Sessions Trial No. 161 of 2003, State of U.P. v. Pappu, whereby learned Additional Sessions Judge has convicted and sentenced the Appellant u/s 395, I.P.C. to undergo rigorous imprisonment of 7 years and to pay a fine of Rs. 2,000 and in default of payment of fine to undergo additional simple imprisonment of two months. He has further convicted and sentenced the Appellant u/s 397, I.P.C. to undergo rigorous imprisonment of 7 years. Both the sentences were directed to run concurrently.

2. The relevant facts leading to this appeal are that on 4.9.2002, the bus No. UP 81 H 9120 was being taken from Bareilly Roadways Bus Station to Narora. There were total 28 passengers in the bus. When the bus reached near Kodhi Ashram at about 8.00 p.m. in the night, 5-6 miscreants, who were also travelling in the bus, tried to commit dacoity in the bus at the behest of country made pistol and looted Rs. 125 from P.W. 1 Rais (Rahees) Mian, who was also travelling in the bus. The conductor

and passengers anyhow apprehended two miscreants, namely, the Appellant Pappu and co-accused Umesh. Rest other miscreants managed their escape. P.W. 1 Rais Mian lodged the F.I.R. at the police station concerned. Another F.I.R. was also lodged by the conductor of the bus.

3. The police registered the case for investigation and on completion of the investigation, submitted charge-sheet against the Appellant Pappu, co-accused Umesh and Naresh in the Court concerned.

4. The learned Additional Sessions Judge framed the charges u/s 395/397, I.P.C. against the Appellant Pappu and co-accused Umesh and Naresh. The accused persons denied the charges and claimed to be tried.

5. It may not be out of context to mention that the cases of co-accused Umesh and Naresh were tried and decided separately vide the S.T. No. 161/2003. Consequently the Appellant Pappu was tried in this case.

6. The prosecution examined as many as 5 witnesses in support of its case. P.W. 1 Rais Mian, the complainant, was travelling as a passenger in the bus. It is said that Rs. 125 was robbed from this witness. This witness has not fully supported the prosecution case and showed his ignorance regarding the identity of the Appellant. P.W. 2 Dharam Pal Singh was the conductor and P.W. 3 Amar Singh was the driver of the bus. These two witnesses have supported the prosecution case during the trial. P.W. 4 S.I. Yashpal Singh has proved the chik report Ex. Ka-3 and copy of the G.D. Ex. Ka-4. P.W. 5 S.I. Komal Singh, who had investigated the case, proved the charge-sheet Ex. Ka-5.

7. The accused-Appellant Pappu was examined u/s 313, Code of Criminal Procedure. He has denied the allegations made against him.

8. The learned Additional Sessions Judge has believed the prosecution story and convicted and sentenced the Appellant as aforesaid.

9. I have heard the learned Counsel for the Appellant and the learned A.G.A. for the State and perused the record.

10. The learned Counsel for the Appellant pressed this appeal in regard to the quantum of sentence only and conceded that finding of guilt recorded by the learned Additional Sessions Judge is based on proper appreciation of evidence on record. The learned Counsel for the Appellant submitted that the facts proved by the prosecution witnesses do not make out any case u/s 397, I.P.C. against the Appellant. Only the offence u/s 395, I.P.C. is made out against him. In view of this matter, the learned Additional Sessions Judge was not justified in awarding the sentence u/s 397, I.P.C. against the Appellant.

11. It may not be out of context to mention that the Appellant Pappu was arrested on spot at the time of the incident. There was, therefore, no possibility of any error

on the part of the prosecution witnesses to identify the Appellant and to connect him with the instant crime. P.W. 2 Dharam Pal Singh, the conductor of the bus, as well as P.W. 3 Amar Singh, the driver of the bus, have proved the fact that the Appellant was amongst 5-6 miscreants, who were also travelling in the bus and looted Rs. 125 from the passenger P.W. 1 Rais Mian. They have further proved that one of the miscreants had put a country-made pistol on the driver of the bus and required him to stop the bus. P.W. 1 Rais Mian has supported the prosecution case to certain extent but showed his ignorance in regard to the involvement of the applicant. He has also supported the story that two of the miscreants were arrested on spot. The statement of P.W. 1 Rais Mian was recorded after about five years of the occurrence and as such a possibility cannot be ruled out that he had been won over by the Appellant. On perusal of the entire statements of P.W. 1 Rais Mian, P.W. 2 Dharam Pal Singh and P.W. 3 Amar Singh, the finding recorded by the learned Additional Sessions Judge seems to be perfectly correct. In my opinion the involvement of the Appellant in committing dacoity in the bus as alleged by the prosecution is proved beyond all reasonable doubts from the evidence on record. The finding recorded by the learned lower Court to this extent is confirmed, specially when the learned Counsel appearing for the Appellant has not disputed the finding of the guilt.

12. In regard to the quantum of punishment, it may be mentioned that the learned Additional Sessions Judge has convicted and sentenced the Appellant u/s 395, I.P.C. to undergo rigorous imprisonment of seven years and also to pay a fine of Rs. 2,000. He has further convicted and sentenced the Appellant u/s 397, I.P.C. to undergo rigorous imprisonment of seven years. In my opinion, conviction and sentence of the Appellants under both the Sections 395 and 397, I.P.C. were contrary to law. Section 395, I.P.C. deals with the punishment for the offence of dacoity, according to which, whoever commits dacoity 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. Section 397, I.P.C., on the other hand, provides that if, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempt 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. In other words, Section 397, I.P.C. provides for imposition of minimum punishment of seven years on a person who is guilty of committing the offence of robbery or dacoity by using any deadly weapon or by causing grievous hurt to any person or by attempting to cause death or grievous hurt to any person. If the offence of robbery or dacoity is committed without any deadly weapon or without causing any grievous hurt to any person or without attempting to cause death or grievous hurt to any person, it is not required to impose the minimum punishment of seven years. In that situation the Court has power to impose even the lesser punishment. Section 397, I.P.C. does not appear to be a substantive offence or a punishing section and it merely provides for the imposition of the

minimum sentence of seven years in regard to the offence of robbery or dacoity on proof of the conditions enumerated in Section 397, I.P.C. In my opinion, Section 397, I.P.C. cannot be read in isolation and has to be read and applied alongwith the punishing section of the offence of dacoity or robbery, as the case may be. In other words, if any person commits the offence of robbery or dacoity and while committing that offence he uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person, he cannot be charged as well as convicted and sentenced separately u/s 395, I.P.C. and Section 397, I.P.C. In that situation he should be charged as well as convicted and sentenced u/s 395 read with Section 397, I.P.C. and the punishment that is to be imposed on him shall not be less than seven years.

13. The learned Additional Sessions Judge has committed a manifest error of law in framing separate charges under Sections 395 and 397, I.P.C. against the Appellant and convicting and sentencing him accordingly. If the provisions of Section 397, I.P.C. were attracted against the Appellant, the learned Additional Sessions Judge should have convicted and sentenced the Appellant u/s 395 read with Section 397, I.P.C. instead of Sections 395 and 397 separately.

14. Now it is to be seen whether the conviction of the Appellant u/s 397, I.P.C. was justified. In this connection it may be mentioned that the Appellant was arrested on spot but no deadly weapon was recovered from him. There is no evidence that the miscreant who had put a country-made pistol on the driver of the bus was the Appellant Pappu. There is also no evidence that the Appellant had in his possession any country-made pistol and used the same while committing the dacoity. If some other accused had used a country made pistol, the Appellant cannot be held responsible u/s 397, I.P.C. for such use in view of the fact that the liability u/s 397, I.P.C. is individual and not constructive. In other words, the person, who uses any deadly weapon while committing the offence of dacoity or robbery, can only be held responsible u/s 397, I.P.C. and not any other person.

15. The Apex Court in the case of Shri Phool Kumar Vs. Delhi Administration, has held as follows:

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.

....

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.

16. The Apex Court has further held that the Full Bench case of State Vs. Chand Singh Mit Singh and Another, was not correctly decided.

17. In view of the fact that the Appellant was involved in committing the offence of dacoity alongwith other persons in a moving bus, which is a very serious crime, the sentence of seven years is not in any way excessive or unreasonable and seems to be perfectly justified.

18. For the reasons discussed above, the appeal is partly allowed. The judgment arid order convicting and sentencing the Appellant Pappu u/s 397, I.P.C. is set aside. The Appellant''s conviction and sentence u/s 395, I.P.C. is upheld.