

(1923) 08 CAL CK 0034**Calcutta High Court****Case No:** None

Emperor APPELLANT

Vs

Ali Mirza and Others RESPONDENT

Date of Decision: Aug. 15, 1923**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 34, 397, 398

Citation: 81 Ind. Cas. 800**Hon'ble Judges:** Page, J**Bench:** Single Bench

Judgement

Page, J.

In order to determine what charges shall be left to the Jury, it is incumbent, upon me to construe Sections 397 and 398 of the Indian Penal Code. I think that it is desirable that I should state what, in my opinion, is, the meaning of these sections, not only because of the general importance of the question, but also because there is no decision as to the construction of either of these sections by the Calcutta High Court while there have been conflicting decisions in other High Courts in India.

2. The issue is whether in Sections 397 and 398 the words "the offender" and "such offender" refer to all persons who combine to commit the specified offences, or whether they refer to those persons only who are proved actually to have "used," or to have been "armed with," deadly, weapons.

3. The former view received the support of the Allahabad High Court in 1899 in the case of the Queen-Empress v. Mahabir Tiwari 21 A. 263: A.W.N. (1899) 76 : 9 Ind. Dec. 876. The decision in that case was followed in two cases by the Punjab Chief Court, Chatar Singh v. Emperor 15 P.R. 1901 Cr. and Grown v. Mohna 16 P.R. 1901 Cr. On the other hand, the latter view, was, held to denote the true meaning of these words in the Queen-Empress v. Senta 28 A. 404 n. A.W.N. (1899) 186. This case was followed in 1906 by the Allahabad High Court in the case of Emperor v. Nageshwar

28 A. 404: A.W.N. (1906) 61 : 3 Cri. L.J. 322, and also in 1911 by the Madras High Court in the case of *In re Arunachella Tevan* 13 Ind. Cas. 282 : 22 M.L.J. 186 : 11 M.L.T. 20: (1912) M.W.N. 35 : 13 Cri. L.J. 42.

4. In my opinion, the latter view is the correct one. Neither Section 397 nor Section 398 creates an offence. The effect of these sections is merely to limit the minimum of punishment which may be awarded if certain facts are proved. The Allahabad High Court in the case which was decided in, 1899, appear to have thought that it was incumbent upon them, having regard to the provisions of Section 34 of the Indian Penal, Code, to construe "offender" in Sections 397 and 398 to mean all those persons who combine to commit the specified offence in the course of which deadly weapons by one or more of such persons are used or carried. But with great respect to the learned Judges who decided that case, in my opinion, Section 34 has no materiality when the Court is construing the meaning of Sections 397 and 398. It is, of course, abundantly clear that any person who is a member of a, combination u/s 34 which commits one of the offences specified, in Section 392 or in Section 395 is equally liable, if he is present, whether he personally perpetrates an act" of violence or not Section 34, for the purpose of determining the offence which is created, is to be read with Sections 392 and 395. But, in my opinion, this section is not relevant when the Court is considering the meaning of Section 397 or Section 398. In my opinion, the intention of the Legislature in framing Sections 397 and 398, as indeed appears from the words used therein, was that, while all persons who combine to commit robbery or dacoity are liable in respect of the substantive offence, any particular offender who is proved to have used or carried a deadly weapon shall receive a punishment not less than that specified in those two sections.

5. For these reasons, in my opinion, the true construction to be put upon these sections is that which was found to be the correct construction by the Allahabad High Court in *Queen-Empress v. Senta* 28 A. 404 ; (1899) A.W.N. 186, *Emperor v. Nageshwar* 28 A. 404; A.W.N. (1906) 3 Cri. L.J. 322, and by the Madras High Court in *In re Arunachella Tevan* (6), and I am now prepared to follow the decision of the Allahabad High Court in *Queen-Empress v. Mahabir Tiwari* 21 A. 263: A.W.N. (1899) 76 : 9 Ind. Dec. 876, or the two cases decided by the Chief Court of the Punjab reported in the Punjab Records of 1901. I hold, therefore, that the terms "offender" and "such offender" in Sections 397 and 398, denote those persons only who have personally committed the acts therein described, and do not refer to other persons who in combination with such persons have committed the offences of robbery or dacoity.