

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRA-D No. 466-DB of 2010 (O&M)

Date of decision : August 05, 2016

Neeraj Bhatnagar

.....Appellant

Versus

State of Haryana

....Respondent

**CORAM:- HON'BLE MR. JUSTICE S.S. SARON
HON'BLE MRS. JUSTICE LISA GILL**

Present: Mr. R.S. Dhull, Advocate
for the appellant.

Mr. Surender Singh Pannu, DAG, Haryana.

LISA GILL, J.

Appellant – Neeraj Bhatnagar has preferred this appeal impugning judgment and order dated 28.01.2010 passed by learned Additional Sessions Judge-I, Panchkula whereby the appellant has been convicted for the offences punishable under Sections 395, 397, 398 IPC and Section 25(1-B) of the Arms Act. He has been sentenced to undergo rigorous imprisonment for life, besides, pay a fine of ₹5000/- and in default thereof undergo rigorous imprisonment for five years for the offence under Section 395 IPC; to undergo rigorous imprisonment for ten years, besides, pay a fine of ₹5000/-

and in default thereof undergo rigorous imprisonment for 2½ years for the offence punishable under Sections 397 and 398 IPC and to undergo rigorous imprisonment for three years, besides, pay a fine of ₹3000/- and in default thereof undergo rigorous imprisonment for nine months for the offence punishable under Section 25(I-B) of the Arms Act.

Brief facts of the case as per the prosecution version are that FIR No. 51 dated 28.03.2009 (Ex. PA/2) was registered on the submission of complaint dated 28.03.2009 (Ex. PA) by the complainant – Vinod Kumar Jain PW1. It was disclosed by the complainant – Vinod Kumar Jain that he supplied Vita milk from Booth No. 12, Sector 18, Panchkula. The shopkeepers to whom he supplied milk made payments at the above said booth. When Vinod Kumar Jain was compiling the accounts on 28.03.2009 at about 12.45 noon, three young boys arrived, out of whom two came inside the shop. One of them stood on the complainant's left side, another in front of him and the third one waited at the gate of the shop. The boy standing on the left side of the complainant pushed the complainant's chair and the boy standing in front of the complainant took out a country made pistol from his right pocket and while pointing it towards the complainant asked him to hand over all the cash etc. The complainant suddenly got up and caught hold of the boy holding the pistol and raised an alarm. The boy caught by the complainant, hit the complainant on his head and forehead three or four times with the pistol he was holding in his hand due to which the complainant suffered injuries. In the meantime, the other boy lifted

the small black handbag lying on the table containing ₹1000/- and other documents. The third boy standing at the gate asked all of them to flee as public was approaching. Two of the boys managed to run away alongwith the small handbag but the boy (the present appellant – Neeraj) holding a pistol, whom the complainant had caught hold of, was apprehended with the help of other people just outside the complainant's shop. The public which gathered at the spot started beating the boy. In the meantime the police arrived at the spot and took the boy away. The cash lying in the drawer of the complainant's table was saved. The complainant was admitted in the Civil Hospital, Sector 6, Panchkula where he was medically treated. Four injuries were found present on the complainant as per medico legal report (Ex. PB), which are as under:-

1. Lacerated wound was on left eyebrow at middle, size about 2cmx0.5cm, fresh bleeding was present. X-ray skull and surgeon opinion was advised.
2. Lacerated wound was on left face, 2.5 cm lateral to eye, size about 1cmx0.5cm. Fresh bleeding was present. Surgeon opinion was advised.
3. Lacerated wound was on left parietal area, size about 3cmx0.5cm. Fresh bleeding was present. Surgeon was advised.
4. Lacerated wound was present on left parietal area size about 2.5cmx0.5cm about 1.5cm lateral to injury no. 3. X-ray and surgeon opinion was advised.

The country made pistol (Ex. P1) alongwith five live cartridges from the right pocket of the appellant – Neeraj were taken

in custody. Sketch (Ex. PE/1) was prepared. Scaled site plan (Ex. PK) was prepared. Disclosure statement (Ex. PF) was suffered by the appellant on 28.03.2009. Further investigation was then handed over to SI Lakhmi Chand, PW11. Disclosure statement Ex. PC was suffered by the appellant on 30.03.2009 in which it was revealed that he purchased a country made pistol on 27.03.2000 and he along with Raj Kumar, Vikas alias Vicky and Ranjit planned to commit a dacoity at the milk shop in Sector 18, Panchkula. All four of them proceeded to the house of another accused Asha at Mauli Jagran. Thereafter all five of them planned to commit dacoity at the milk booth shop. The appellant revealed his complicity in the commission of the offence along with the abovesaid four persons. Thereafter Asha was arrested on 03.04.2009. Accused Ranjit arrived at Asha's house on a motorcycle No. PB-27A-0077 and he was also arrested. On interrogation, Ranjit suffered a disclosure statement Ex. PH on 04.04.2009 and he got recovered a motorcycle No. PB-65G-9563 from Asha's house which was allegedly stolen by him and co-accused Raj Kumar and Vikas.

On completion of investigation, challan/report under Section 173 Cr.P.C. was presented against three accused i.e. appellant – Neeraj, Asha and Ranjit. The other two accused namely Raj Kumar and Vikas @ Vicky who had accompanied the appellant to the complainant's shop could not be apprehended. Consequently, they were declared proclaimed offenders. The prosecution examined 12 witnesses to prove its case. The accused in their statements

under Section 313 Cr.P.C. denied all the incriminating evidence put to them, while pleading innocence and false implication. No evidence was led by them in defence.

Learned trial Court on considering the facts and circumstances of the case as well as the evidence on record acquitted the accused Asha and Ranjit, holding that the prosecution was unable to prove the charges against them. It was observed that the prosecution was unable to produce any evidence to prove the complicity of the accused – Asha or Ranjit in the commission of the offence. The present appellant, Neeraj Bhatnagar was, however, convicted and sentenced as detailed above.

A valiant attempt was made by learned counsel to argue that the appellant is entitled to be acquitted of the charges against him as no test identification parade was carried out, thus, his identity was not established. Furthermore, no independent witness from amongst the members of the public who allegedly gathered at the spot has been examined. The prosecution has not examined the witnesses to the recovery of the pistol and cartridges, which lends a fatal blow to the prosecution version. In the alternate, it is submitted that in any case conviction of the appellant under Section 395 IPC is not sustainable as the offence of dacoity is not proved. The co-accused Asha and Ranjit have been acquitted of the charges against them. Therefore, one of the essential ingredient for proving the commission of offence of dacoity is conspicuous by its absence as the number of accused is less than five. It is, thus, prayed that,

alternatively, conviction of the appellant be converted to a conviction under Section 392 IPC instead of that under Section 395 IPC.

Learned counsel for the State per contra submits that the prosecution has successfully proved its case against the appellant and acquittal of two of the co-accused is not sufficient to absolve the appellant of the offence under Section 395 IPC. There is sufficient evidence on record to prove that there were five persons involved in the commission of the offence, two of the accused being proclaimed offenders.

We have heard learned counsel for the parties and have carefully gone through the record.

There is no doubt regarding the complicity of the present appellant in the incident in question. He was apprehended on the spot by the complainant with the help of other members of the public and the appellant was handed over to PW12 ASI Gurdev Singh. A country made pistol alongwith five live cartridges was also recovered from his possession at the spot. Complainant – Vinod Kumar Jain, PW1 has clearly deposed that the appellant – Neeraj pointed his country made pistol towards him and threatened the complainant to hand over all the valuables lying in the shop. When the complainant tried to apprehend the appellant, the complainant was hit on his head and forehead three or four times by the appellant with the country made pistol he was carrying. The fact that no fire was shot does not absolve the appellant from the offences punishable under Sections 397 and 398 IPC. This is especially so, in view of the medical

evidence on record, which proves the injuries caused to the complainant. It is also proved on record that two of the appellant's companions managed to flee from the spot alongwith the bag containing cash belonging to the complainant.

Contention of the learned counsel for the appellant that the identity of the appellant was not established is devoid of any merit in the face of the appellant having been apprehended on the spot itself by the complainant and other members of the public. The custody of the appellant was handed over to PW12, Gurdev Singh on the spot. The complainant has fully supported the prosecution version to the hilt on all aspects while giving a clear and consistent narration of the events as they unfolded. The complainant's version is duly corroborated by the medical evidence on record. Non-examination of Vikas Jindal and Sukhwinder Singh in whose presence the pistol and five live cartridges were recovered from the appellant is not fatal to the prosecution case in the present factual scenario. There is nothing on record to cast a shadow of doubt on the complainant's testimony which inspires complete confidence. The complainant admittedly had no axe to grind against the appellant, who was a stranger to him. PW12 Gurdev Singh has specifically deposed that a country made pistol Ex.P1 was recovered from the right dub of the appellant and five live cartridges from the right pocket of the appellant's trouser. It is rightly observed by the learned trial Court that it is the quality and not the quantity of the evidence which is important.

However, there is force in the submission of learned counsel for the appellant that in the present factual matrix, the appellant cannot be convicted for the offence of dacoity punishable under Section 395 IPC. Section 391 IPC which defines dacoity reads as under:-

391. Dacoity.-- When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit “dacoity”.

Unlawful Assembly as defined in Section 149 IPC reads as under:-

141. Unlawful assembly.—An assembly of five or more persons is designated an “unlawful assembly”, if the common object of the persons composing that assembly is—

- First.- To overawe by criminal force, or show of criminal force, [the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or
- Second.- To resist the execution of any law, or of any legal process; or
- Third.- To commit any mischief or criminal trespass, or other offence; or
- Fourth- By means of criminal force, or show of criminal force, to any person, to take or

obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth.- By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

The Hon'ble Supreme Court in **Raj Kumar @ Raju versus State of Uttaranchal 2008 (11) SCC 709** has held as under:-

“It is thus clear that for recording conviction of an offence of dacoity, there must be five or more persons. In absence of such finding, an accused cannot be convicted for an offence of dacoity. In a given case, however, it may happen that there may be five or more persons and the factum of five or more persons is either not disputed or is clearly established, but the Court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not be able to convict them and order their acquittal observing that their identity is not established. In such case, conviction of less than five persons - or even one - can stand. But in absence of such finding, less than five persons cannot be convicted for an offence of dacoity”.

Similarly, in **Musakhan and others versus State of**

Maharashtra 1977 (1) SCC 733, the Hon'ble Supreme Court held that the offence under Section 395 IPC would come into play only when the act of dacoity was proved to be committed by five or more persons jointly.

In the instant case, the co-accused Asha and Ranjit have been acquitted by the learned trial Court on the ground that the prosecution failed to prove the charges against them. The factum of involvement of five or more persons in the commission of the offence is not proved. It is specifically observed that in respect to the accused Ranjit not a single incriminating word has been uttered by any of the witnesses including the complainant. Therefore, to connect Ranjit to the offence in question on the basis of disclosure statement Ex. PC suffered by the appellant – Neeraj was unjustified and not made out. Neither was Ranjit identified as one of the persons accompanying the appellant at the time of the incident. Reliance on the recovery of a motorcycle from Ranjit has been rightly negated as it is not the case of the prosecution that the said motorcycle was used in the commission of the offence. It is observed that the co-accused Asha has been acquitted for complete lack of evidence against her. Her visit to the shop of the complainant 2/3 minutes prior to the occurrence has rightly been ignored by the learned trial Court. There is no evidence on record to connect her with the crime. It is a matter of record that no appeal has been preferred against the acquittal of Asha and Ranjit. In the said circumstances, conviction of the appellant – Neeraj cannot be sustained under Section 395 IPC as

the essential ingredients thereof are clearly missing. Conviction of the appellant under Section 149 IPC also cannot be sustained. However, the appellant is proved to be guilty of the offence punishable under Section 392 IPC. It is amply proved by the evidence on record that the appellant is guilty of robbery as defined in section 390 as well as the commission of offences under Sections 397 and 398 IPC besides under Section 25(1-B) of the Arms Act.

Consequently, the decision of the learned trial Court convicting the appellant – Neeeraj Bhatnagar for the offences under Sections 397 and 398 read with Section 149 IPC is modified by convicting him for the offences under Section 397 and 398 IPC simplicitor i.e. not with the aid of Section 149 IPC; besides, modifying the offence under Section 395 IPC to that under Section 392 IPC. The conviction for the offence under Section 25 (1-B) of the Arms Act, however, is maintained.

Accordingly, the appellant is sentenced to ten years of rigorous imprisonment, besides, pay a fine of ₹5000/- and in default thereof undergo rigorous imprisonment for one year for the offence under Section 392 IPC. He shall also undergo rigorous imprisonment for ten years, besides, pay a fine of ₹5000/- and in default thereof undergo imprisonment for one year for the offence under Section 397 IPC. He shall also undergo rigorous imprisonment for ten years, besides, pay a fine of ₹5,000/- and in default thereof undergo rigorous imprisonment of one year for the offence under Section 398 IPC. He shall also undergo rigorous imprisonment for three years for the offences under Section 25 (1-B) of the Arms Act and pay a fine of

₹3000/- and in default thereof undergo rigorous imprisonment for nine months. All the substantive sentences of imprisonment shall run concurrently.

With the modification of the convictions and sentences of the appellant, the appeal stands disposed of.

	(S.S. Saron) Judge	(Lisa Gill) Judge
August 05, 2016		
rts		

Whether speaking/reasoned :	Yes/No
Whether reportable :	Yes/No