IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 780 of 2006

Sk. Hyder @ Golub Hyder
-Vs-
The State of West Bengal
With

C.R.A 503 of 2006

Md. Bablu

-Vs-

State

With

C.R.A 531 of 2006

Arshad Ali @ Munna

-Vs-

State

For the Appellant (In CRA 780/2006)	**:** Mr. Arnab Chatterjee
For the Appellants (In CRA 503/2006 & CRA 531/2006)	**:** Mr. Souvik Mitter
For the State	**:** Mr. Avishek Sinha
Heard on	**:** 21.06.2023, 01.12.2023.
Judgment on	**:** 05.12.2023.

Ananya Bandyopadhyay, J. :-

1. These appeals are preferred against the Judgment and Order of conviction dated 05.07.06 & 06.07.06 passed by Learned Additional District & Sessions Judge, 12th Court, Alipore in S.T. No. 03(02)05, arising out of Sessions Case No. 37(01) 05 for the offences punishable under Sections 395/397 of the Indian Penal Code, 1860. Appellant/Accused persons were directed to suffer

rigorous imprisonment for a period of 7 years and to pay a fine of Rs. 5,000/- in default to suffer rigorous imprisonment for 1 year under Section 395 of the Indian Penal Code 1860 and also to suffer rigorous imprisonment for 7 years and to pay a fine of Rs. 5000/- in default to suffer rigorous imprisonment for one year (1) under Section 397 of the Indian Penal code, 1860 and both the conviction and sentenced shall run concurrently.

2. The prosecution case emanated from a complaint which interalia stated on 26.08.04 in between 12.50 to 14.40 hrs near Poddar Project Textile Division, 1/1 – Taratala Road, Calcutta – 88 the accused person committed Dacoity in respect of about 2,50,000.00, one Celular Phone, cloth etc. from the possession of Mukesh Agarwal on the point of “revolver”, “bhojali” and at the time of Dacoity they have used deadly weapons i.e. revolver and bhojali. On the basis of the said written complaint lodged by Mukesh Agarwal, the Officer-in-Charge, Garden Reach Police initiated a case against the accused persons. Subsequently Dacoity and Robbery Squad, D.D. Lal Bazar took charge of investigation of this case and on completion of the investigation Charge-Sheet was submitted against the accused persons. After receiving the said Charge-Sheet, the Learned Sub-Divisional Judicial Magistrate, Alipore committed this case to the Learned Court of Sessions on 15.12.04. On 12.01.05 the case record was transferred to the Court of the Learned Sessions Judge for disposal. Ultimately on 15.02.05 charge was framed by the Learned Sessions Judge against the accused persons under Section 395/397 of the Indian

Penal Code. To which they pleaded not guilty and claimed to be tried. The prosecution in order to prove its case examined 21 witnesses and exhibited certain documents.

3. Learned Advocate for the petitioners submitted as follows :–

   i. The Learned Sessions Judge has failed to appreciate that the witnesses did not identify the accused persons.

   ii. The Learned Sessions Judge, 12th Court, Alipore did not consider the argument made on behalf of the accused person.

   iii. The Learned Trial court ought to have hold that the accused persons were not identified in T.I. parade by the P.W. 1 and 2, as such, the conviction under Section 395 of the Indian Penal Code, 1860 was illegal and liable to be set aside.

   iv. The Learned Advocate for the appellants submitted that the T.I Parade was not properly conducted, lacking legal validity as the photographs of the alleged miscreants had been shown to the complainant PW-1 and his driver PW-3, prior to the date of identification. PW-3 , the driver was not interrogated by the police and his testimony was tutored and fabricated . PW-3 had categorically mentioned that if the photographs were not shown prior to the date of identification, he would not be able to identify the miscreants and therefore the statement of PW-3 should have been rejected. It was further submitted by the Learned Advocate for the appellants that the change of the number plate of the offending vehicle was based on surmise and conjectures as the same was not supported by PW-10 who was privy to the entire incident of dacoity. Moreover, the offending weapons were not recovered allegedly to have been used during the course of commission of the alleged offence negating the essential ingredients to comprise the offence under section 397 of the Indian Penal Code. The entire episode of dacoity had been concocted as PW-1 was unable to produce any books of accounts of his income. For lack of proper evidence and failure on the part of the Learned Trial Court to assess the same, the appeal shall be allowed.

4. Learned Advocate for the State submitted as follows–

i. The Learned Advocate of the State submits that PW-10 was equally liable for the commission of the offence and should have been prosecuted and convicted. Having known the incident for a considerable period of time, he did not disclose the same either to the police or any of his family members. The change of the number plate of the offending vehicle has been proved by the evidence of PW-15 being an independent witness devoid of any personal knowledge and involvement in the instant case. The owner of the offending taxi, PW-11 had mentioned the number of his taxi as WB -04A/1200 however his taxi number WB 04/A- 4200 was to be the original registration number. Such disparity in the number plate of the offending vehicle cannot be discarded. The prosecution has been able to prove its case beyond reasonable doubt inspite of lapses in the investigation which do not affect the prosecution case since the crux of the prosecution case had been infallible as far as the commission of the offence is concerned and the ulterior motive of the perpetrators, has been proved. There the appeal shall be dismissed.

5. A circumspection of the evidence of the prosecution witnesses reveals as follows:-

6. PW-1 recounted that, on 26.8.2004, he departed from his residence at approximately 11 am in his vehicle, accompanied by PW-3 serving as the driver. Subsequently, he visited various establishments, including Alpana Dresses in Metiabruz owned by PW-12, from whom he retrieved an amount of Rs 30,000. Further stops included interaction with PW-13 to procure a bank draft of Rs 9,970 and Rs 1,250 in cash, followed by a visit to Om Trading Company owned by PW-2, where an amount of Rs 85,770 was collected. Successively, at Sakambhary Textile, under the ownership of PW-4, an amount of Rs 1,00,000 was obtained, and at Mangal Textile, owned by PW-14, Rs 15,000 was collected. The

cumulative sum of cash amassed during these transactions approximated Rs 231,000, alongside a bank draft worth Rs 9,970.

7. Subsequently, while en route back to his residence, an incident occurred near Natures Park on Taratala Road involving a yellow taxi, identified by the license plate WB-04A/4200, which overtook and halted his vehicle. Thereafter, a group of 4 or 5 individuals emerged from the taxi, vandalized the windshield of his car, and forcibly seized a bag containing the aforementioned money and bank draft. The assailants, armed with a firearm and a knife, also confiscated his phone and another bag containing clothes. During this ordeal, they similarly menaced his driver, PW-3. Following the robbery, the perpetrators fled the scene in the aforementioned taxi, prompting PW-1 to pursue them for a distance of approximately 2 to 3 kilometers, albeit unsuccessfully, as the taxi managed to evade capture. (This was corroborated by PW-3)

8. PW-1 further mentioned that he had identified the miscreants twice during the T.I parade. Prior to this identification process, the police facilitated his viewing of a selection of photographs depicting known criminals at Lalbazar. PW-1 made identifications from these images, affirming his recognition of the perpetrators before a Magistrate during the aforementioned T.I. parade.

9. Approximately an hour subsequent to the incident, PW-1 filed a complaint at the Garden Reach Police Station. The signature of PW-1 on the F.I.R was marked as Ext. 2.

10. During the cross-examination, PW-1 mentioned that the distance between Natures Park and the place of occurrence was half a

kilometer. Similarly, the distance between a nearby police outpost and the place of occurrence was also half a kilometer. Following the occurrence, PW-1 promptly informed PW-13 to halt the payment associated with the bank draft.

11. PW-2 asserted that on the day of the incident, between 11 am and 12:30 pm, PW-1 had arrived to collect an amount totaling Rs 85,770 from him.

12. PW-3, employed as a driver to PW-1, recounted that on the day of the incident, he transported PW-1 to Metiabruz. At 2:45 pm on the same day, the dacoity occurred. He recalled an instance during the incident wherein one of the miscreants had grasped his shirt; however, this specific individual was not among those presented in Court.

13. He elaborated on attending the T.I. parade twice, during which he positively identified three miscreants. Preceding his participation in the T.I. parade, the police escorted him to Lalbazar, where he was shown a series of photographs depicting known criminals. Upon viewing these images, he recognized several individuals who were later identified during the T.I. parade.

14. PW-4 affirmed that on the day of the incident, between 1 pm and 3 pm, PW-1 had visited to collect an amount of Rs 100,000 from him.

15. PW-5, serving as a Judicial Magistrate at Alipore on 15.9.2004, confirmed that she had recorded the statement provided by PW-10.

16. PW-6, serving as a Judicial Magistrate at Alipore on 18.10.2004, detailed conducting a T.I. parade on the same date at Presidency Correctional Home, involving suspects, appellant no. 3 and PW-11.

During this procedure, PW-1 positively identified suspects Mohammad Salim and Mohammad Bablu. Furthermore, PW-3 also made the same identifications during the T.I. parade. Subsequently, when PW-10 was brought in for identification, he solely identified Mohammad Balblu and did not recognize suspect Mohammad Salim.

17. The suspects, Mohammad Bablu and Mohammad Salim, alleged that PW-10 was their relative and asserted that PW-10 had falsely implicated appellant no. 3 in the case. The T.I. parade report was marked as Ext. 4.

18. PW-7, serving as the S.I. of Police attached to Rabindra Nagar P.S. on 29.8.2004, attested to have transferred the confiscated taxi to PW-20. Subsequently, PW-20 compiled a seizure list of the re-seized taxi, and the signature of PW-7 on the seizure list was marked as Ext. 5. Additionally, PW-7 noted that the aforementioned police station had previously seized the taxi as unclaimed property.

19. PW-8, serving as the Sub-Inspector of Police attached to Garden Reach P.S. on 19.10.2004, reported that on the mentioned date, PW-20 arrived at the police station to file a request for the seizure of the number plate pertaining to the confiscated taxi. Following this requisition, PW-8 proceeded to seize the rear-side number plate of the said taxi and subsequently signed the seizure list. The signature of PW-8 on the seizure list was marked as Ext. 6.

20. PW-9, serving as the Judicial Magistrate (1st Class) at the 4th Court in Alipore on 28.9.2004, conducted a T.I. parade on the

mentioned day, from 3:30 pm to 4:10 pm at Presidency Correctional Home. During this process, PW-1 positively identified all three suspects, affirming that they had forcefully taken away his bag containing Rs.2,50,000/- at gunpoint. (The amount of money is different from the amount mentioned in PW-1's deposition – Rs.2,31,000/-)

21. Subsequently, PW-3 on identifications, confirmed the involvement of the three suspects alongside two others in the robbery. PW-10 identified only two suspects, namely appellant no. 1 and appellant no. 2. Additionally, PW-10 disclosed that he had prior acquaintance with appellant no. 2. Furthermore, PW-10 revealed to PW-9 that on the day of the incident, the appellant, along with 2 or 3 other individuals, had hired his taxi, bearing the number WB-04A/1200. After hiring the taxi, they directed PW-10 to drive towards Paharpur, situated close to Natures Park, where they intercepted the victim's car and carried out the robbery. The T.I parade report prepared by PW-9 was marked as Ext. 7.

22. PW-10 stated that he had been a taxi driver by profession. He took taxi no. WB-04A/1200 on a contractual basis from 2.7.2003. He mentioned that PW-11 had been the registered owner of the taxi. He further mentioned that appellant no. 2 hired his taxi at 12pm on 26.8.2004. On appellant no. 2's instructions, PW-10 drove his taxi near Kachhi Sarak under Metiabruz P.S. at 12:30-1pm where he went to get the other passengers. After ten minutes, appellant no. 2 arrived with appellant no. 1 and appellant no. 3, stating that

two more individuals would join later. After 10/15 minutes, two other persons came but PW-10 could not identify them.

23. PW-10 narrated, upon entering the taxi, appellant no. 2 insisted on driving, while PW-10 sat beside him. The group drove towards Ramnagar More under Garden Reach P.S. and subsequently, near Natures Park, the taxi intercepted the victim's car. PW-10 witnessed the occupants of his taxi attacking the victim's car and seizing three bags before escaping in the taxi. The victim's car followed them from Paharpur Road to C.M.C Road, where the taxi evaded pursuit by entering a narrow lane. Later, near Imlitala, the miscreants forced PW-10 out of the taxi and threatened him against involving the police before absconding with the vehicle.

24. PW-10 further stated that he boarded a bus near Metiabruz P.S. and went to Sealdah. Then he boarded a local train to Ghutia Sarif Majar, two hours after the incident. He stayed there for 5/7 days, feeling disturbed, but eventually sought advice from PW-17. He went to PW-17's house on 7.9.2004 and later visited Lalbazar police station on 8.9.2004, along with PW-17 and PW-10, provided a detailed account of the incident.

25. The police seized relevant documents, including the agreement, fitness certificate, and registration certificate, marked as Ext. 8 and Mat. Ext. I. His statement before the Magistrate was recorded and marked as Ext. 3/1, 3/2, 3/3, and 3/4. Moreover, PW-10 attended the T.I. parades on 28.9.2004 and 18.10.2004, at Presidency Jail, identifying appellant no. 1, appellant no. 2, and appellant no. 3 during such proceedings.

26. During the cross-examination, PW-10 clarified that he did not attempt to reclaim his taxi or report the incident to any police station initially being greatly disturbed. He explained that it was PW-17's insistence that eventually led him to report the incident and lodge a complaint against the culprits. Regarding the moment when the miscreants were looting the victim's car and vacated his taxi, PW-10 explained that his reaction was one of confusion rather than fleeing with his own vehicle. He highlighted that the entire robbery took place swiftly within mere 30 seconds.

27. Moreover, PW-10 stressed that apart from appellant no. 2, he had never handed over control of his taxi to anyone else. He admitted to have only allowed individuals he knew well to drive the taxi, hence allowed appellant no. 2 to take the driver's seat. According to his statement, appellant no. 1 was seated in the front beside the driver, while appellant no. 3 and two other culprits occupied the back seat of the taxi.

28. PW-11, identified as the registered owner of the taxi bearing no. WB-04A/1200, confirmed that PW-10 had informed him about the involvement of his taxi in the commission of a dacoity. Subsequently, the police visited PW-11's residence and confiscated the documents pertaining to the said vehicle.

29. PW-11's signature on the seizure list was marked as Ext. 6/1, with the document labeled as Mat. Ext. II. Additionally, the number plate of the vehicle was marked as Mat. Ext. III. An agreement associated with the taxi, marked as Mat. Ext. I, was executed at

Babu Bazar, Kidderpore, bearing the signature of PW-11, marked as Mat. Ext. I/1.

30. PW-12 confirmed that on the day of the incident, between 1 pm and 1:30 pm, PW-1 had visited to collect an amount of Rs 30,000 from him.

31. PW-13, also known as Rippon Mondal, affirmed that on the day of the incident, around 11 am to 11:30 am, PW-1 had arrived to collect a bank draft worth Rs.9,970/- and cash amounting to Rs 1,250 from him.

32. PW-14 mentioned on the day of the incident, at around noon, PW-1 had visited to collect an amount of Rs.15,000/- from him.

33. PW-15, serving as the Senior Scientific Officer in the Physics Division of the Forensic Science Laboratory, West Bengal, on 17.11.2004, reported receiving a paper packet labeled as 'A'. This packet contained a registration number plate displaying the number WB-04/A-1200, with black paint on a yellow background. Additionally, a green fluorescent adhesive tape was affixed between the impression WB-04 and A-1200 on the plate. Upon examination, it was discovered that the original registration number inscribed on the plate had been manipulated and originally belonged to WB-04/A-4200. The report prepared by PW-15 was marked as Ext. 9.

34. PW-16 served as a constable of police attached to Rabindra Nagar P.S. on 27.8.2004.

35. PW-17, who was familiar with PW-10, became aware that PW-10 had gone missing. After a span of 2 to 3 days, PW-17 received a

phone call from PW-10, who informed him that he was residing at Ghutiary Mazar. Advising PW-10, PW-17 suggested that he returned home. Subsequently, when PW-10 came back after 2 days, PW-17 accompanied him to report the incident to the Anti Dacoity Section at Lalbazar.

36. PW-18, serving as A.S.I of police at Rabindra Nagar P.S, authored and signed the G.D. entry no. 1220 dated 27.8.2004. The entry was documented and marked as Ext. 10.

37. PW-19 was assigned as the S.I. of police attached to the Anti Dacoity and Robbery Squad at Lalbazar on 2.9.2004. Collaborating with S.I. Indranil Chowdhury, they travelled to Samastipur via the 'Bagh' Express. Upon arrival, they proceeded to Khanpur P.S. Following this, at 11:55 pm on 3.9.2004, they conducted a raid in Shobhan village and apprehended appellant no. 2 from the residence of his relative. Subsequently, on 5.9.2004, they handed over appellant no. 2 to PW-20.

38. PW-20, serving as the S.I. of police attached to Garden Reach P.S. on 26.8.2004, recorded the statement provided by PW-1, with his signature marked on the written complaint as Ext. 1/3. The formal F.I.R. was marked as Ext. 2/1.

39. As part of the investigation, PW-20 visited the location of the incident and produced a rough sketch map, marked as Ext. 11. Additionally, he seized the taxi involved, with the corresponding seizure list marked as Ext. 5/1. Subsequently, PW-20 issued a requisition to P.V.D Beltala, and the written response from P.V.D was marked as Ext. 12.

40. PW-21 served as the S.I. of police attached to the Anti Dacoity and Robbery Squad at Lalbazar. His signature was documented on the seizure list prepared on 8.9.2004 and the tampered number plate was marked as Ext. 8/1 and Ext. 6/2 respectively.

41. Pw 1 Mukesh Agarwal deposed to have visited certain shops namely Alpona dresses owned by Sheikh Jianal Abedin at Metiabruz. He had been to one Ripon Mondal of Metiabruz and thereafter, went to Om Trading Company owned by one Om Prakash Joshi for collecting dues. The statement of PW-1 was corroborated in this aspect with the deposition of PW- 2 Om Prakash Joshi, PW-4 Pawan Agarwal, PW-12 Jianal Abedin, PW-13 Ripon Mondal, and one Hanuman Prasad Agarwal. PW-1 further stated his inability to identify the miscreants who had taken away his bag containing cash and bank draft, mobile phone, and the bag containing samples of clothes in the Court on the date of his deposition. He deposed to have attended T.I. Parade twice in Presidency Jail and to have identified certain miscreants based on the photographs shown by the police at Lal Bazaar before he attended the T.I Parade which enabled him to identify the miscreants before the Learned Judicial Magistrate during the TI Parade. PW-1 in his testimony further stated that the taxi having number WB-04A/4200 intercepted his vehicle from the left and blocked the movement of his vehicle near Natures Park on Taratala road. Thereafter 4-5 persons alighting from the aforesaid taxi damaged the windscreen of his vehicle and snatched the bag containing the cash money and bank draft at the point of a revolver and snatched the mobile with number 32095913 and the bag

containing samples of clothes. He further deposed that at the time of snatching the bag containing money and the bank draft from him, the miscreants had threatened and intimidated his driver at the point on knife/'something like that'. At the time of snatching his bag, the miscreants threatened him with dire consequences.

42. PW -3, the driver of the vehicle which was commuted by the defacto complainant re-iterated the testimony of PW-1 in essence with regards to the occurrence of the incident however deviated on the aspect of usage of weapon by the perpetrators to intimidate PW-1 and PW-2. PW.-2 stated that Mukesh Agarwal was sitting on his left with a bag, the content of which was unknown to him. Thereafter the miscreants got down from the yellow taxi and approached their vehicle and one of those miscreants caught hold of his shirt and the other miscreants snatched away the bag of Mukesh Agarwal that is PW-1 who left the place of occurrence after boarding the yellow color taxi. Both PW-1 and PW-3 deposed to have chased the yellow color taxi to a certain distance. PW-3 deposed further to have identified the miscreants during the T.I Parade in Presidency Jail being acquainted with their photographs at the Lal Bazaar Police Station. PW-5 recorded the statement of Noor Alam under Section 164 of the CrPC. PW-6 was the Judicial Magistrate in whose presence the TI Parade was held whereby PW-1 and PW-2 had identified the appellants Mohammad Salim and Mohammad Bablu.

43. The photographs shown at the police station prior to the identification was to enable them to refresh their memories to connect their cognitive faculty with identification of the miscreants.

44. In the case of ***Raja and Ors. vs. State***[1] the following was held:-

17. In Daya Singh v. State of Haryana MANU/SC/0111/2001 : (2001) 3 SCC 468 the incident had occurred on 09.04.1988 and the Accused was arrested on 28.05.1988 and was put up for test identification on 02.06.1988. However, the Accused refused to take part in the TIP. Thereafter, the eye-witnesses, PWs 37 and 38, were examined in the trial after a lapse of seven and half years and eight years respectively from the date of occurrence. The ground regarding lapse of time between the occurrence and the actual identification in Court was dealt with by this Court as under:

11. At this stage we would first refer to the decisions upon which reliance is placed. In the case of Soni (1982) 3 SCC 368 this Court observed that a delay of 42 days in holding the identification parade throws a doubt on genuineness thereof, apart from the fact that it is difficult that after a lapse of such a long time the witnesses would be remembering facial expression of the Appellant. In the case of Mohd. Abdul Hafeez v. State of A.P. MANU/SC/0091/1982 : (1983) 1 SCC 143 the Court while dealing with a robbery case observed that as no identification parade was held, no reliance can be placed on the identification of the Accused after a lapse of four months in the Court. In the case of Hari Nath MANU/SC/0229/1987 : (1988) 1 SCC 14 the Court observed that evidence of test identification is admissible Under Section 9 of the Evidence Act. But the value of test

[1] MANU/SC/1717/2019

identification, apart from the other safeguards appropriate to a fair test of identification depends upon the promptitude in point of time with which the suspected persons are put up for test identification. If there is an unexplained and unreasonable delay in putting up the Accused persons for a test identification, the delay by itself detracts from the credibility of the test. The Court further referred to (para 9) Prof. Borchard: Convicting the Innocent on the basis of error in identification of the Accused. The learned author has observed:

The emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives not necessarily stimulated originally by the Accused personally--the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another. Thus, doubts are resolved against the Accused.

12. In AIR paras 10 and 11, the Court has observed as under: (SCC p. 21, paras 19-21)

19. The evidence of identification merely corroborates and strengthens the oral testimony in court which alone is the primary and substantive evidence as to identity. In S.K. Hasib v. State of Bihar MANU/SC/0180/1971 : (1972) 4 SCC 773 this Court observed: (SCC p. 777, para 5)

... the purpose of test identification is to test that evidence, the safe Rule being that the sworn testimony of the witness in court as to the identity of the Accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding.

20. In Rameshwar Singh v. State of J&K MANU/SC/0174/1971 : (1971) 2 SCC 715 this Court observed: [SCC p. 718, SCC (Cri.) p. 641, para 6]

... it may be remembered that the substantive evidence of a witness is his evidence in court, but when the Accused person is not previously known to the witness concerned then identification of the Accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial.

21. It is, no doubt, true that absence of corroboration by test identification may not assume any materiality if either the witness had known the Accused earlier or where the reasons for gaining an enduring impress of the identity on the mind and memory of the witness are, otherwise, brought out. It is also rightly said that:

Courts ought not to increase the difficulties by magnifying the theoretical possibilities. It is their province to deal with matters actual and material to promote order and not surrender it by *excessive theorising or by magnifying what in practice is really unimportant.*

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in Manu Sharma v. State (NCT of Delhi) MANU/SC/0268/2010 : (2010) 6 SCC 1 which was to the following effect:

252. It is also contended by the defence that since the photographs were shown to the witnesses this circumstance renders the whole evidence of identification in court as inadmissible. For this, it was pointed out that photo identification or TIP before the Magistrate, are all aides in investigation and do not form substantive evidence. Substantive evidence is the evidence of the witness in the court on oath, which can never be rendered inadmissible on this count. It is further pointed out that photo identification is not hit by Section 162 Code of Criminal Procedure as adverted to by the defence as the photographs have not been signed by the witnesses.

253. In support of his argument the Senior Counsel for Manu Sharma relies on the judgment of Kartar Singh v. State of Punjab MANU/SC/1597/1994 : (1994) 3 SCC 569 SCC at p. 711 wherein while dealing with Section 22 of TADA the Court observed that photo TIP is bad in law. It is useful to mention that the said judgment has been distinguished in Umar Abdul Sakoor Sorathia v. Narcotic Control Bureau MANU/SC/0454/1999 : (2000) 1 SCC 138, where a photo identification has been held to *be valid. The relevant extract of the said judgment is as follows: (SCC p. 143, paras 10-12)*

10. The next circumstance highlighted by the learned Counsel for the Respondent is that a photo of the Appellant was shown to Mr. Albert Mkhatshwa later and he identified that figure in the photo as the person whom he saw driving the car at the time of interception of the truck.

11. It was contended that identification by photo is inadmissible in evidence and, therefore, the same cannot be used. No legal provision has been brought to our notice which inhibits the admissibility of such evidence. However, learned Counsel invited our attention to the observations of the Constitution Bench in Kartar Singh v. State of Punjab MANU/SC/1597/1994 : (1994) 3 SCC 569 which struck down Section 22 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. By that provision the evidence of a witness regarding identification of a proclaimed offender in a terrorist case on the basis of the photograph was given the same value as the evidence of a test identification parade. This Court observed in that context: (SCC p. 711, para 361)

361. If the evidence regarding the identification on the basis of a photograph is to be held to have the same value as the evidence of a test identification parade, we feel that gross injustice to the detriment of the persons suspected may result. Therefore, we are *inclined to strike down this provision and accordingly we strike down Section 22 of the Act.*

45. In the case of ***Republic of India and Ors. vs. Rabindra Kumar Pal and Ors***.[2], the Orissa High Court held the following:-

It is well settled now that substantive evidence of a witness is his statement in the Court; but the purpose of identification is to test that evidence and the safe rule is that the sworn testimony of the witness in Court as to the identity of the accused who are strangers to the witness generally speaking, requires corroboration which should be in form of an earlier identification proceeding. (See Vaikuntam Chandrappa v. State of Andhra Pradesh MANU/SC/0224/1959 : AIR 1960 S.C. 1340). It has been held by the Supreme Court in Mohanlal Gangaram Gehani v. State of Maharashtra MANU/SC/0090/1982 : A.I.R. 1982 S.C. 839, that if a witness did not know the accused before the occurrence and no Test Identification Parade was held to test his power of identification and he was also shown by the Police before he identified the accused in Court, his evidence becomes absolutely valueless on the question of identification. Here, in the instant case before us all the eye-witnesses were shown the photographs of the miscreants and therefore, identification of the Appellants for the first time in the trial Court without being corroborated by Test Identification Parade held before a Magistrate or otherwise is absolutely without any value. Same view has been reiterated by the Supreme Court in Harinath v.

State of U.P. MANU/SC/0229/1987 : AIR 1988 S.C. 345, and State of Maharashtra v. Sukhdeo Singh 1992 Crl.L.J. 3454. Similarly, the Supreme Court held in the case of Mohd. Abdul Hafeez v. State of Andhra Pradesh MANU/SC/0091/1982 : AIR 1983 S.C. 367 that in a case of robbery, the victim identified the accused in the Court for the first time after a lapse of four months from the date of occurrence without being corroborated by Test Identification Parade. It was held by the Supreme Court in this case that no reliance could at all be placed on such evidence of Test Identification Parade. In Kanan v. State MANU/SC/0139/1979 : AIR 1979 S.C. 1127, it was held by the apex Court that evidence of a witness given in Court as to the identification may be accepted only if he identified the same persons in a previously held Test Identification Parade in jail. We have already seen while discussing the evidence of eye-witnesses that Test Identification Parade on the basis of photographs of suspects was held by the Investigating Officer. It was held by the Supreme Court in Ramkishan Mithanlal Sharma and Ors. v. State of Bombay MANU/SC/0044/1954 : AIR 1955 S.C. 104 that the Test Identification Parade can be held by panch witnesses (ordinary citizens) or by the Police or by the Magistrate. In the case of Test Identification Parade arranged by the Police and held in presence of panch witnesses only, the process of identification would be statements made by the identifying witnesses (whether it is identification of person or property) to the panch witnesses and would be outside Section

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[2] MANU/OR/0579/2005

162, Code of Criminal Procedure, provided process of identification is carried out under the supervision of the panch witness only and police have completely obliterated themselves for the parade. When identification parade is conducted wholly by the police, the evidence of identification of person or property is hit by Section 162, Code of Criminal Procedure We have seen already that C.B.I. Investigating Officer placed the photographs of the suspects mixed with photographs of Ors. before the identifying witnesses in course of investigation and on that basis, the identifying witnesses picked up some of the photographs. Therefore, this is a Test Identification Parade on the basis of photographs of suspects arranged by police and this is clearly hit by Section 162, Code of Criminal Procedure What is applicable to Test Identification Parade of suspects whenever it is held by Police will be equally applicable to Test Identification Parade held by the Police on the basis of photographs of the suspects. There is absolutely no reason to apply different standards in respect of identification organised by the Police on the basis of photographs of suspects ...... In Budhsen and Anr. v. State of U.P. MANU/SC/0103/1970 : AIR 1970 S.C. 1321, it has been held by the apex Court that evidence of the identification of the accused during trial for the first time is from its very nature inherently of weak character. It is accordingly considered a safe rule of prudence to generally look for corroboration of sworn testimony of witnesses in Courts as to the identity of the accused who are strangers to them in the form of *earlier Test Identification Parade. Here, in this case before us Test Identification Parade on the basis of photographs of the suspects was held by the Investigating Officer. As we have already held, such statement is hit by Section 162 Code of Criminal Procedure.*

…

(See Kanan and Ors. v. State of Kerala MANU/SC/0139/1979 : AIR 1979 S.C. 1127; State of U.P. v. Boota Singh AIR 1978 S.C. 1170; Chonampara Chellappan v. State of Kerala MANU/SC/0094/1979 : AIR 1979 S.C. 1761; Rameswar Singh v. State of Jammu and Kashmir MANU/SC/0174/1971 : AIR 1972 S.C. 102, and Mohd. Abdul Hafeez v. State of Andhra Pradesh MANU/SC/0091/1982 : AIR 1983 S.C. 367). Here in course of investigation photographs of the suspects were admittedly shown to the identifying witnesses by the Police. Under some what similar circumstances, the evidence of Test Identification Parade held by a Magistrate was rejected by the Supreme Court as the witnesses were not asked by the Magistrate if they had occasion to see the accused before the Test Identification Parade was held. (See Somappa Vamanappa Madar v. The State of Mysore MANU/SC/0249/1979 : AIR 1979 S.C. 1831). Here, in this case before us some suspects were placed on Test Identification Parade by a Magistrate. Out of them, the identifying witness identified only one suspect and other suspects could not be identified by him. Such evidence is also not reliable and does not inspire confidence in view of the

decision of the Supreme Court in Vaikuntam v. State MANU/SC/0224/1959 : AIR 1960 S.C. 1340 where it has been held by the Supreme Court that the identifying witness made three correct identification and six could not be identified out of the nine suspects. Such evidence of Test Identification Parade has been held to be totally unreliable.

46. In the case of ***Gireesan Nair and Ors. vs. State of Kerala***[3], the Supreme Court held the following :-

28. In cases where the witnesses have had ample opportunity to see the Accused before the identification parade is held, it may adversely affect the trial. It is the duty of the prosecution to establish before the court that right from the day of arrest, the Accused was kept "baparda" to Rule out the possibility of their face being seen while in police custody. If the witnesses had the opportunity to see the Accused before the TIP, be it in any form, i.e., physically, through photographs or via media (newspapers, television etc...), the evidence of the TIP is not admissible as a valid piece of evidence (Lal Singh and Ors. v. State of U.P.8 and Suryamoorthi and Anr. v. Govindaswamy and Ors. MANU/SC/0591/1989 : (1989) 3 SCC 24).

29. If identification in the TIP has taken place after the Accused is shown to the witnesses, then not only is the evidence of TIP inadmissible, even an identification in a court during trial is meaningless (Shaikh Umar Ahmed Shaikh and Anr. v. State of Maharashtra8). Even a TIP conducted in the presence of a police officer is inadmissible in light of Section 162 of the Code of

Criminal Procedure, 1973 (Chunthuram v. State of Chhattisgarh MANU/SC/0798/2020 : (2020) 10 SCC 733 and Ramkishan Mithanlal Sharma v. State of Bombay MANU/SC/0044/1954 : (1955) 1 SCR 903).

47. Section 134 in The Indian Evidence Act, 1872:-

134. Number of witnesses.--No particular number of witnesses shall in any case be required for the proof of any fact.

48. In ***Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat***[4], the Supreme Court, while considering the minor contradictions in the statement of the witnesses, held as under:

"5 ... ... We do not consider it appropriate or permissible to enter upon a reappraisal or re-appreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by the learned counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious:

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed in the mental screen.

(2) Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation defer from person to person. What one may notice, another may not. An object or movement might

[3] MANU/SC/1486/2022
[4] (1983) 3 SCC 217.

emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily, a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in short time span. A witness is liable to get confused or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by the counsel and out nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

49. In the case of ***Vadivelu Thevar v. State of Madras***[5], the Hon'ble Supreme Court has observed thus:

> *".......Hence, in our opinion, it is a sound and well established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:*
>
> *(1) Wholly reliable.*
>
> *(2) Wholly unreliable.*
>
> *(3) Neither wholly reliable nor wholly unreliable.*
>
> *In the first category of proof, the court should have no difficulty in coming to its conclusion either way -- it may convict or may acquit on the testimony of a (1957) SCR 981 single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial........"*

50. The principles laid down in Vadivelu Thevar case (supra) have stood the test of time and reliance upon the same has been elucidated in many other decisions like:-

51. In the case of ***Namdeo vs State Of Maharashtra***[6], the following was held:-

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[5] (1957) SCR 981
[6] (2007) 14 SCC 150

"*It is not seldom that a crime had been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. The Court also stated; There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints* *which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the (2007) 14 SCC 150 court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable.*

The abovementioned principle was also held in ***Shivaji Sahebrao Bobade v. State of Maharashtra***,[7] and ***Anil Phukan v. State of Assam***[8]

52. In the case of ***Rajiv Singh vs. State of Bihar & another***[9], the Hon'ble Supreme Court observed that:

"*67. The evidence adduced by the prosecution dominantly is circumstantial in nature with no direct proof of the perpetration of the alleged offence by the appellant. It is a trite proposition, judicially evolved, that circumstantial evidence if is to form the basis of conviction must be such so as to rule out every possible hypothesis of innocence of the accused and must without any element of doubt unerringly point to such culpability. This enunciation has stood the test of time over the years and the five golden principles propounded by this Court in Sharad*

[7] 1973 AIR 2622
[8] 1993 AIR 1462

Birdhichand Sarda vs. State of Maharashtra (1984) 4 SCC 116 (paragraph 153) which still authoritatively govern the process of appreciation of the circumstantial evidence and constitute the acid test to determine the guilt or innocence of an accused person, are quoted hereunder:

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the following observations were made: (SCC p. 807, para 19) "19. ... Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between „may be" and „must be" is long and divides vague conjectures from sure conclusions." (emphasis in original) (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis

[9] (2015) SCC Online SC 1336

except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused." The theory of "last seen together" as an incriminating factor qua the appellant is, 1 (2015) SCC Online SC 1336 thus of no avail to the prosecution having regard to the state of evidence on record."

53. In the case of the ***State of Odisha vs. Banabihari Mohapatra and Anr***[10], the Hon'ble Supreme Court observed that:

"38. It is well settled by a plethora of judicial pronouncement of this Court that suspicion, however strong cannot take the place of proof. An accused is presumed to be innocent unless proved guilty beyond reasonable doubt. This proposition has been reiterated in Sujit Biswas v. State of Assam reported in AIR 2013 SC 3817.

54. In ***Kali Ram v. State of Himachal Pradesh***[11], this Court observed:

"Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of

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[10] AIR 2021 SC 1375
[11] AIR 1973 SC 2773

the accused is sought is to be established by circumstantial evidence."

55. In the case of ***Ram Niwas vs. State of Haryana*** the Hon'ble Supreme Court[12] observed that:

"19. This Court has held that there has to be a chain of evidence so complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. It has been held that the circumstances should be of a conclusive nature and tendency. This Court has held that the circumstances should exclude every possible hypothesis except the one to be proved. It has been held that the accused „must be" and not merely „may be" guilty before a Court can convict.

20. It is settled law that the suspicion, however strong it may be, cannot take the place of proof beyond reasonable doubt. An accused cannot be convicted on the ground of suspicion, no matter how strong it is. An accused is presumed to be innocent unless proved guilty beyond a reasonable doubt."

56. In the instant case the corroboration of identification of the appellants through TIP is obliterated as the photographs were shown to PW-1 and PW-3 prior to the TIP at Lalbazar Police State.

57. The Oral Testimony in the instant case falls within the category of "neither wholly reliable nor wholly unreliable". Therefore "the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.

Secondly, the evidence of the Prosecution witnesses PW-2, PW-4, PW-13 and PW-14 who paid money to the complainant i.e.- PW-1 is corroborative in nature and reliable. The Learned Advocate for the State was doubtful of the conduct of PW-10 and claimed the lapse on the part of the prosecution to indict him.

58. However, the evidence of PW-10 cannot be discarded in entirety as his statement with regard to the taxi being utilized for the commission of offence with a manipulated number plate had been proved through the seizure of the taxi with the number plate and subsequent examination by PW-15 an independent witness. Such an act proves the ulterior motive of the perpetrators to conceal their activity deceptively and secretly. It definitely raised a suspicion as to why PW-10 did not report the incident to the police instaneously and went missing. However, his apprehension to be implicated as a part of the gang of miscreants along with sudden confusion and disturbances cannot be discredited as he could establish himself to be the driver of the offending vehicle to have been taken on contract by him from PW-11, who was proved to be the registered owner of the same.

59. Despite lapses in the investigation, the investigating team went to Samastipur and arrested appellant no. 2 and such effort in these kinds of cases cannot be ignored or neglected, since it is difficult to establish direct evidence on the basis of a momentary incident. Moreover, there was no rebuttal or plea of alibi on the part of the appellants to prove otherwise.

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[12] 2022 LiveLaw (SC) 670

60. In the above premise based on the circumstantial evidence, the prosecution has been able to prove its case.

61. The evidence of PW-1 and PW-3 establishes the occurrence of the incident and the possibility of false implication of the appellants is implausible and bizarre in absence of prior acquaintance and enmity.

62. PW -8 deposed to have obtained the number plate of a taxi in connection with Garden Reach PS. 115 of 04 and his signature on the seizure list was marked as Exhibit 6. PW-9 was the Judicial Magistrate in whose presence the T.I Parade was held on 28.09.2004 at the Presidency Correctional Home and PW-1 identified the suspects Gulad Ali Haider Mohammad Bahad alias Doma and Asjad Ali. PW- 2, too identified the suspects Gulab Haider, Muhammad Bahad allia Doma and Muhammad Salim stating that the said suspects along with the two others had broken the 'window glass of Santro car' and snatched away a bag containing money from his employer Mukesh Agarwal and they showed fire arms and fled away. Such firearms were not recovered. The deposition of PW- 10 ought to have been relied upon since he had been the eye witness and known to the perpetrators and was the driver of the disputed yellow color taxi. After the incident, PW-10 stated to have been compelled to get down from the taxi and `the five miscreants fled with the taxi. PW-11 was the owner of the vehicle having number WB 04A/1200. He had obtained the disputed vehicle on account Jimma Namma. The deposition of PW-

15 evinced the fact of tampering of the number plate of the vehicle in question.

63. In the case of ***Om Prakash and another Vs. State of Rajasthan***[13], the Hon'ble Supreme Court observed as follows:-

> *"7. It was lastly argued by the Learned Counsel that even after believing their evidence the courts below could not have convicted the appellants under Section 395 IPC as the charge of dacoity was against five named persons and out of them two were acquitted by the trial court. Neither the charge nor the finding recorded by the trial court was that accused Om Prakash, Munna, Amarjit Singh and two other unknown persons had committed dacoity. Specifically, the five named accused were alleged to have committed the offence. Two accused having been acquitted it ought to have been appreciated that only the remaining three accused had committed the said offence. Therefore, it was not proper to convict the remaining three accused under Section 395 IPC. Their conviction will have to be altered to one under Section 392 IPC.*
>
> *8. We, therefore, partly allow this appeal, set aside the conviction of the appellant from that under Section 395 IPC to Section 392 IPC and reduce their sentence from 4 years rigorous imprisonment. The accused were released on bail during the pendency of the appeal. Their bail is cancelled and they are ordered to surrender to custody to serve out the remaining sentence."*

64. In the case of ***Krishnan Lal alias Bada vs State (Delhi Administration)***[14], the Hon'ble Supreme Court held as follows:-

> *"1. The appellant was convicted under Section 27 of the Arms Act and also under Section 397 read with Section 34 of the Indian Penal Code and sentenced to suffer rigorous*

[13] 1998 SCC (Cri) 696

[14] (1982) 2 SCC 175(I)

imprisonment for one and a half years and seven years respectively. He was also directed to pay a fine of Rs 200 for the offence under Section 397 and in default to suffer rigourous imprisonment for one month.

2. Having considered the facts and circumstances of the case, we think that the second offence really falls under Section 392 of the Indian Penal Code. We alter the conviction accordingly and reduce the sentence to rigorous imprisonment for three years. The appeal is allowed to the extend indicated above."

65. In the case of ***Shri Phool Kumar Vs. Delhi Administrator***[15] the Hon'ble Supreme Court held as follows:-

*"**4.** The last submission on behalf of the appellant was that sentencing him to undergo rigorous imprisonment for seven years under Section 397 of the Penal Code was illegal and he ought to have been convicted under Section 392 simpliciter which would have enabled the Court on the facts of this case to pass a lesser sentence of imprisonment. Reliance was placed upon the majority opinion of the Full Bench of the High Court of Punjab & Haryana in the case of State v. Chand Singh [ILR (1970) 2 Punj and Har 108] . The argument was attractive at the first sight but did not stand our careful scrutiny.*

***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 under Section 392 cannot be less than seven 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

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[15] *(1975) 1 SCC 797*

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 somebody 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."

66. In the case of ***Ram Ratan Vs. State of Madhya Pradesh 2021***[16] the Hon'ble Supreme Court held as follows:-

*"**12.** Though, this remains the position, the question which needs consideration is with regard to the contention that the firearm had not been put to use and therefore the charge under Section 397 IPC is not sustainable and also the further contention that the charge under Section 397 even otherwise would not be sustainable against the appellant since there is no material or evidence to indicate that the appellant had used the firearm, even if it is held that the incident had occurred as alleged.*

***13.** For better understanding, it would be appropriate to take note of the provisions contained in Sections 392 and 397 of IPC which read as hereunder:*

*"**392. Punishment for robbery.**- 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.*

***397. Robbery, or dacoity, with attempt to cause death or grievous hurt.**- If, at the time 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."*

[16] *SCC Online SC 1279*

(Emphasis supplied)

14. *On the said aspect, it would be appropriate to take note of the decision in the case of Shri Phool Kumar v. Delhi Administration (1975) 1 SCC 797 wherein it is observed as hereunder:—*

"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 under Section 392 cannot be less than seven 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 somebody 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 PW 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."

(Emphasis supplied)

15. *Further, in Dilawar Singh v. State of Delhi (2007) 12 SCC 641, it is held as hereunder:—*

"19. The essential ingredients of Section 397 IPC are as follows:

1. the accused committed robbery.

2. while committing robbery or dacoity (i) the accused used deadly weapon (ii) to cause grievous hurt to any person (iii) attempted to cause death or grievous hurt to any person.

3. "Offender" refers to only culprit who actually used deadly weapon. When only one has used the deadly weapon, others cannot be awarded the minimum punishment. It only envisages the individual liability and not any constructive liability. Section 397 IPC is attracted only against the particular accused who uses the deadly weapon or does any of the acts mentioned in the provision. But the other accused are not vicariously liable under that section for acts of the co-accused.

21. In the instant case admittedly no injury has been inflicted. The use of weapon by offender for creating terror in mind of victim is sufficient. It need not be further shown to have been actually used for cutting, stabbing or shooting, as the case may be."

(Emphasis supplied)

16. *In the decision of Ganesan (supra) referred to by the learned counsel for the appellant, the above noted decisions of this Court has been referred and this Court has held as hereunder:—*

"12.7. Thus, as per the law laid down by this Court in the aforesaid two decisions the term 'offender' under Section 397

IPC is confined to the 'offender' who uses any deadly weapon and use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397 IPC for the imposition of minimum punishment on another offender who has not used any deadly weapon. Even there is distinction and difference between Section 397 and Section 398 IPC. The word used in Section 397 IPC is 'uses' any deadly weapon and the word used in Section 398 IPC is 'offender is armed with any deadly weapon'. Therefore, for the purpose of attracting Section 397 IPC the 'offender' who 'uses' any deadly weapon Section 397 IPC shall be attracted.

In light of the above observations and the law laid down by this Court in the aforesaid two decisions the case on behalf of the accused in the present appeals is required to be considered. Even as per the case of the prosecution and even considering the evidence on record it can be seen that the present accused A1 and A3 are not alleged to have used any weapon. The allegation of use of any weapon was against Benny and Prabhakaran. Therefore, in absence of any allegations of use of any deadly weapon by the appellants herein-Accused Nos. 1 and 3 Section 397 IPC shall not be attracted and to that extent the Learned Counsel appearing on behalf of the appellants-accused are right in submitting that they ought not to have been convicted for the offence punishable under Section 397 IPC."

17. *From the position of law as enunciated by this Court and noted above, firstly, it is clear that the use of the weapon to constitute the offence under Section 397 IPC does not require that the 'offender' should actually fire from the firearm or actually stab if it is a knife or a dagger but the mere exhibition of the same, brandishing or holding it openly to threaten and create fear or apprehension in the mind of the victim is sufficient. The other aspect is that if the charge of committing the offence is alleged against all the accused and only one among the 'offenders' had used the firearm or deadly weapon, only such of* *the 'offender' who has used the firearm or deadly weapon alone would be liable to be charged under Section 397 IPC*

67. In the case of ***Ganesan Vs. State Rep. by Station House Officer***[17] the Hon'ble Supreme Court held as follows:-

35. *To appreciate the aforesaid submissions the relevant provisions with respect to 'robbery' and 'dacoity' are required to be referred to. The relevant provisions would be Section 390 IPC to Section 398 IPC which read as under:*

*"**390. Robbery**.—In all robbery there is either theft or extortion.*

***When theft is robbery**.—Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.*

***When extortion is robbery.**—Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.*

***Explanation.**—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.*

***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 1. Subs. by Act 26 of 1955, s. 117 and the*

Sch., for "transportation for life" (w.e.f. 1-1-1956). 99 and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

***392. Punishment for robbery**.—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.*

***393. Attempt to commit robbery.—** Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.*

***394. Voluntarily causing hurt in committing robbery.—** 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 1 [imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.*

***395. Punishment for dacoity.—** Whoever commits dacoity shall be punished with 1 [imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.*

***396. Dacoity with murder**.—If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or 1 [imprisonment for life], or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.*

***397. Robbery, or dacoity**, with attempt to cause death or grievous hurt.—If, at the time of committing robbery or dacoity,*

[17] *2021 SCC Online SC 1023*

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.

***398. Attempt to commit robbery or dacoity when armed with deadly weapon**.—If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years."*

36. *As per Section 390 IPC, for 'robbery' there is either theft or extortion. When in the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint or fear of instant death or of instant hurt, or of instant wrongful restraint the theft can be said to be 'robbery'. In similar situation the 'extortion' can be said to have committed 'robbery'. As per explanation to Section 390 IPC the offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.*

37. *Section 391 IPC defines 'dacoity'. When five or more persons conjointly commit or attempt to commit a robbery, the accused then can be said to have committed the 'dacoity'.*

38. *As per Section 392 IPC 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. However, if the robbery is committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.*

39. *As per Section 393 IPC even an attempt to commit robbery is punishable with rigorous imprisonment for a term which may extend to seven years with fine. As per Section 394 IPC 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.*

40. *Section 395 IPC provides for punishment for 'dacoity'. 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.*

41. *In case of dacoity with murder if any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years with fine.*

42. *As per Section 397 IPC if at the time 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.*

43. *Similarly, if, at the time of committing robbery or dacoity the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.*

44. *On conjoint reading of the aforesaid provisions, commission of 'robbery' is sine qua non. The 'dacoity' can be said to be an exaggerated version of robbery. If five or more persons conjointly commit or attempt to commit robbery it can be said to be committing the 'dacoity'. Therefore, the only difference between the 'robbery' and the 'dacoity' would be the number of persons involved in conjointly committing or attempt to commit a 'robbery'. The punishment for 'dacoity' and 'robbery' would be the same except that in the case of 'dacoity' the punishment can be with* *imprisonment for life. However, in the case of 'dacoity with murder' the punishment can be with death also. However, in a case where 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. Learned Counsel appearing on behalf of the appellants have rightly submitted that to bring the case within Section 397 IPC, the offender who uses any deadly weapon, or causes grievous hurt to any person shall be liable for minimum punishment under Section 397 IPC.*

45. *Section 392 and Section 390 IPC are couched in different words. In Sections 390, 394, 397 and 398 IPC the word used is 'offender'. Therefore, for the purpose of Sections 390, 391, 392, 393, 394, 395, 396, 397, 398 IPC only the offender/person who committed robbery and/or voluntarily causes hurt or attempt to commit such robbery and who uses any deadly weapon or causes grievous hurt to any person, or commits to cause death or grievous death any person at the time of committing robbery or dacoity can be punished for the offences under Sections 390, 392, 393, 394, 395 and 397 and 398 IPC. For the aforesaid the accused cannot be convicted on the basis of constructive liability and only the 'offender' who 'uses any deadly weapon....' can be punished. However, so far as Section 391 IPC 'dacoity' and Section 396 IPC - 'dacoity with murder' is concerned an accused can be convicted on the basis of constructive liability, however the only requirement would be the involvement of five or more persons conjointly committing or attempting to commit a robbery - dacoity/dacoity with murder.*

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..... 20. As noted by this Court in Phool Kumar v. Delhi Admn. [(1975) 1 SCC 797 : 1975 SCC (Cri) 336 : AIR 1975 SC 905] the term "offender" under Section 397 IPC is confined to the offender who uses any deadly weapon. Use of deadly weapon by

one offender at the time of committing robbery cannot attract Section 397 IPC for the imposition of minimum punishment on another offender who had not used any deadly weapon. There is distinction between "uses" as used in Sections 397 IPC and 398 IPC. Section 397 IPC connotes something more than merely being armed with deadly weapon.

21. In the instant case admittedly no injury has been inflicted. The use of weapon by offender for creating terror in mind of victim is sufficient. It need not be further shown to have been actually used for cutting, stabbing or shooting, as the case may be. [See Ashfaq v. State (Govt. of NCT of Delhi) [(2004) 3 SCC 116 : 2004 SCC (Cri) 687 : AIR 2004 SC 1253]."

48. *Thus, as per the law laid down by this Court in the aforesaid two decisions the term 'offender' under Section 397 IPC is confined to the 'offender' who uses any deadly weapon and use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397 IPC for the imposition of minimum punishment on another offender who has not used any deadly weapon. Even there is distinction and difference between Section 397 and Section 398 IPC. The word used in Section 397 IPC is 'uses' any deadly weapon and the word used in Section 398 IPC is 'offender is armed with any deadly weapon'. Therefore, for the purpose of attracting Section 397 IPC the 'offender' who 'uses' any deadly weapon Section 397 IPC shall be attracted.*

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52. *Even otherwise there is no difference between Section 391/395 and Section 397 IPC so far as sentence/punishment except the difference in case of Section 397 IPC the punishment shall not be less than seven years. Otherwise, the 'robbery' and 'dacoity' are sine qua non. 'Dacoity' is nothing but an exaggerated version of 'robbery' with a difference in number of accused. Therefore, also even in a case where the accused is not convicted for the offence under Section 397 IPC, still he can be* *punished under Section 395 IPC and no prejudice shall be caused to him as ultimately the prosecution has to prove the 'robbery' and 'dacoity' either for the offence punishable under Section 395 IPC or under Section 397 IPC. However, to bring the case against the accused under Section 397 IPC, the prosecution has to prove one additional fact that the offender has used any deadly weapon or has caused grievous hurt to any person, or has attempted to cause death or grievous hurt to any person.*

68. The incident of offence has been established by the evidence of PW-1 and 2, the eye witnesses. Minor deviations due to lack of memory over a passage of time will not be fatal for the prosecution case. The incident of offence lingered for a very short period and to distinctly remember the faces during such momentary glimpse is not possible or even expected for anyone concerned. PW-1 and PW-3 should have been terrified instinctively at such a sudden attack and therefore to minutely recollect their faces, body and countenance cannot be expected instantaneously. However, in absence any animosity, grudge and enmity between the parties, the possibility of false implication is obliterated. PW-1 and PW-3 did not have any past history of acquaintance with the miscreants. The evidence of PW-15 establishes the criminal intent to accomplish the objective to commit the offence by tampering the number plate for the purpose of concealment and to escape. However the ingredients of Section 397 of the penal code could not be established as the weapon to have been used for inflicting injury and/or any attempt to that effect could not be established since the same was not recovered. The Section of 395 are the following-

395. Punishment for dacoity.—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.

The ingredients for the offence under Section 397 punishable under Section 395 of the IPC is 1) the accused committed robbery, 2) while committing robbery or dacoity (i) the accused used deadly weapon (ii) to cause grievous hurt to any person (iii) attempted to cause death or grievous hurt to any person; 3) "Offender" refers to only culprit who actually used deadly weapon. The ingredients to constitute an offence under Section 395 of the IPC are not proved since the Learned Trial Court had acquitted two of the accused persons. In view of the aforesaid of the citations and discussions, offence under Section 397/395 of the IPC cannot be sustained. However, under the facts and circumstances of the case, offence under Section 392 of the Indian Penal Code to have been committed has been established

69. In view of the above discussions, these appeals are partly modified.

70. The impugned judgment and order dated 05.07.06 & 06.07.06 passed by Learned Additional District & Sessions Judge, 12th Court, Alipore in S.T. No. 03(02)05, arising out of Sessions Case No. 37(01) 05 for the offences punishable under Sections 395/397 of the Indian Penal Code is set aside and modified to conviction under Section 392 of the Indian Penal Code and the sentence is reduced from seven years of rigorous imprisonment to three and half years of rigorous imprisonment.

71. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

72. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)