

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A 237 of 2010

Wasim Hossain

-Vs-

The State of West Bengal

With

C.R.A. 111 of 2010

Akramul Hoda @ Mintu

-Vs-

The State of West Bengal

For the Appellant : Ms. Debadrita Mondal
(Amicus Curiae)

For the State : Mr. Pravas Bhattacharjee
Mr. Mirza Firoj Ahmed Beg

Heard on : 29.11.2023, 19.01.2024

Judgment on : 20.03.2024

Ananya Bandyopadhyay, J. :-

1. This appeal is preferred against the judgment dated 17th December, 2009 passed by the Learned Additional Sessions Judge, Fast Track Court-III, Sealdah, convicting the appellant under Sections 394/397 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 3 ½ years and to pay a fine of Rs.1,000/- each, in default, to suffer simple imprisonment for one month for the offence punishable under Section 394 of the Indian Penal Code. The appellant was further convicted under Section 397 of the Indian Penal Code and

sentenced to suffer rigorous imprisonment for 3 ½ years and to pay a fine of Rs.1,000/- each and, in default, to suffer simple imprisonment for one month for the offence punishable under Section 397 read with Section 511 of the Indian Penal Code. Both were directed to run concurrently in Sessions Case No. 8(11) of 2008 and Sessions Trial No. 2(12) of 2008.

2. The prosecution case precisely stated as follows:

On 23.08.2008 at about 01:30 hrs., two unknown youths each being armed with 'Nepala' accosted the de facto complainant Biswendu Dolui in front of 44, Dr. Sundari Mohan Avenue and robbed off the complainant's blue black colour Samsung 520-X mobile phone and cash of Rs.730/- after assaulting him with fists and blows. Over such incident, an information was lodged with Beniapur Police Station for alleged commission of offences under Sections 394/397 of the Indian Penal Code and a case being No. 270/2008 dated 23.08.2008 was started under the aforesaid Sections against unknown persons.

3. Based on the complaint, Beniapur P.S. Case No. 2 dated 23.08.08 was initiated under Sections 394/397 of the Indian Penal Code at about 02:45 hrs. on 23.08.08.
4. On completion of investigation, charge-sheet was filed by the Anti Dacoity and Robbery Squad, Lalbazar on 31.10.08 against the appellants vide Charge-sheet No. 180/08 under Sections 394/397 of the Indian Penal Code. Charges were framed against the appellants on

08.12.08 under Sections 394/397/511 of the Indian Penal Code to which the appellants pleaded not guilty and claimed to be tried.

5. The prosecution in order to prove its case cited eight witnesses and exhibited certain documents. The seized mobile and an iron-made knife had been marked as MAT Exhibits.
6. The Learned Advocate for the appellant submitted as follows:-
 - i. The Learned Trial Judge relied upon the testimony of PW1 and PW2 convicted the appellant despite discrepancies in the testimonies of the prosecution witnesses without any corroboration.
 - ii. PW-1 failed to produce any documents to show that he was present at the spot and his presence at the hospital was not established. He did not know the location of blood bank where he used to go to collect the blood for anyone of his locality which was absurd.
 - iii. The alamsats of alleged offence i.e the Samsung Mobile Phone was not shown to the De-facto Complainant PW1 or to the accompanying witness PW2 by the prosecution during Trial.
 - iv. PW-1 did not disclose the incident to any nearby person in and around Chittranjan Hospital. Independent witnesses were not cited in this case where PW1 and PW2 stated that they narrated the incident to their known persons at their work place and family.
 - v. PW-3, a seizure witness was not from the locality where from the alleged alamsats were seized in respect of the appellants.

- vi. As per witness PW5 who was Sr. Executive of Bharti Airtel Ltd. the call details of the complainant which was computerized, only three out-going calls from the said mobile no (9831199236) were recorded and he failed to produce any such documents which proved the sim card was issued to Biswendu Dolui the complainant.
- vii. PW-6 was S.I of Beniapukur P.S who at the time of incident failed to give proper details about the place where the articles were seized from. According to him the place where the articles were seized too congested but at the time of investigation crowd was not present.
- viii. G.D entry extract i.e Exhibit 13 was such a piece of evidence which showed that the investigating agency had got the information of commission of offence 24 hrs before the alleged offence and the same had been exhibited by the first investigating officer i.e PW7.
- ix. The statement of the appellant recorded by PW-8 was not in proper form since the investigating officer PW-7 failed to comply with the statutory provision while recording the statement under section 161 of Cr.P.C.
- x. The prosecution failed to examine the other seizure list witnesses namely Md. Shakil @ Bobby during entire Trial to corroborate the testimony of PW3.

- xi. The investigating agency failed to collect any injury report during investigation or failed to exhibit any injury report during Trial.
 - xii. To substantiate the ownership of alleged Samsung Mobile Phone documents were not seized by the investigating agency or that the De-facto Complainant never came forward to seek the custody of the said alleged phone by furnishing bond or zimmanma and it was also evident the I.M.I.E. number of the said alleged phone was not the same coinciding with the phone which had been exhibited through PW-3 (Seizure witness).
 - xiii. It was evident from the Exhibit 13 that certain other witnesses were examined and their statements were recorded on the alleged date and place of occurrence but those statements were not a part of charge-sheet and they were never been examined by the prosecution during Trial.
 - xiv. The prosecution failed to establish its case and the appeal shall be allowed.
7. The Learned Advocate for the State submitted that the appellants were identified in the T.I. Parade by PW-1 and PW-2. The Samsung mobile was recovered. The appellants were unknown to the defacto complainant and his companion. The prosecution has successfully proved its case and the appeal shall be allowed.
8. A circumspction of evidence of the prosecution witnesses revealed as follows:-

- i. PW-1 deposed that on 23.08.08, he along with Avishek Raha were returning from Maniktala Central Blood Bank at night. He also deposed that two unknown persons aged about 25/30 years demanded valuable articles from them in front of Premises No. 44 Doctor Sundari Mohan Avenue and slapped him and one of them placed a nepala at his neck and threatened him with dire consequences if valuables were not delivered to them. PW-1 stated the miscreants took his Samsung mobile set being No. X-520 and money bag containing Rs.730/-. He deposed that he narrated the incident before a police officer at Beniapukur P.S. at about 2:00 a.m. when Avishek Raha also arrived at Beniapukur P.S. The witness identified the accused Akramul Hoda as the person who placed a nepala at his neck and identified the accused Wasim Hossain as the other miscreant. He also identified the accused persons in jail at the time of T.I. Parade.
- ii. PW-2 deposed that Avishek Raha also deposed how the miscreants committed the robbery. The witness also identified the accused Akramul Hoda as the person who was armed with a nepala and identified the accused Wasim Hossain as the person who caught hold of him and took out the mobile phone and money bag of Biswendu Dulai. He also identified both the accused persons at the time of T.I. Parade.

- iii. PW-3 Samuel Muduly, a seizure list witness, deposed how police seized a Samsung mobile set and a nepala from the rooms of the accused persons on being led by the accused persons. He also identified his signatures in the labels and seizure list. He identified both the seized alamats marked as MAT Exhibits- I and II.
- iv. PW-4, the then Learned J.M., 2nd Court, Sealdah, held T.I. Parade on 01.08.08 at Presidency Correctional Home when the witnesses namely Biswendu Dulai and Avishek Raha identified both the accused persons.
- v. PW-5, Officer of Bharati Airtel Ltd., proved the report dated 02.09.08 issued by the Circle Nodal Officer, Bharati Airtel Ltd. in connection with mobile No.9831199236.
- vi. PW-6, S.I. of Police, deposed that he accompanied the officers of Anti Dacoity and Robbery Squad, D.D. Lalbazar on 19.09.08 when seizures were made from the rooms of the accused persons on being led by the accused persons.
- vii. PW-7 recorded the statement of Biswendu Dulai on 23.08.08 and started Beniapukur P.S. Case No. 270 dated 23.08.08. He also took up the case for investigation as per endorsement of the then O.C., Beniapukur P.S. and ultimately handed over the case to the Anti Dacoity and Robbery Squad, D.D. Lalbazar on 18.09.08.
- viii. PW-8, an Officer of Anti Dacoity and Robbery Squad, D.D. Lalbazar, deposed that he took up further investigation of the

case on 18.09.08 and arrested both the accused persons on 18.09.08. He also deposed that he took both the accused persons in police custody and on 19.09.08, he seized a Samsung mobile set from the room of the accused Akramul Hoda on the basis of his statement and he recovered a sharp cutting weapon (nepala) from the home of accused Wasim Hossain on 19.09.08 from his room on being led by him. He also deposed that both the accused persons were identified by witnesses namely Biswendu Dulai and Avisek Raha on 01.10.08 at Correctional Home at the time of T.I. Parade. He also received the reply of the Manager System Control, C.E.S.C. Ltd. through A.C.A.D.S.R., D.D. Lalbazar (Exhibit-20) from which it appeared that the power supply at Premises No. 44, Doctor Sundari Mohan Avenue and its surroundings near Ladies Park were not interrupted between 01:10 hrs. and 02:00 hrs. on 23.08.08.

9. Section 394 of the Indian Penal Code states as follows:-

“Section 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.”*

10. Section 397 of the Indian Penal Code states as follows:-

“Section 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.”

11. Section 511 of the Indian Penal Code states as follows:-

“Section 511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.—

Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.”

12. The Hon’ble Supreme Court in the case of **Aslam v. State of Rajasthan**¹ held the following:-

“10. *Section 394 describes punishment for voluntarily causing hurt in committing or attempting to commit robbery. The offence under this section is more serious offence than one under Section 392. Section 394 postulates and contemplates the causing of harm during commission of robbery or in attempting to commit robbery when such causing of hurt is hardly necessary to facilitate the commission of robbery. Section 394 applies to cases where during the course of robbery voluntary hurt is caused. Section 394 classifies two distinct class of*

¹(2008) 9 SCC 227

persons. Firstly, those who actually cause hurt and secondly, those who do not actually cause hurt but are “jointly concerned” in the commission of offence of robbery. The second class of persons may not be concerned in the causing of hurt, but they become liable independently of the knowledge of its likelihood or a reasonable belief in its probability.”

13. In **Ram Ratan v. State of M.P.**², the Hon’ble Supreme Court held the following:-

“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

²2021 SCC OnLine SC 1279

grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.”
(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."

14. The Hon'ble High Court of Calcutta in **Mohan Chetri and Ors. vs. State of West Bengal**³ held the following:-

"5. we feel, should not be accepted and consequently the offence which is proved beyond reasonable doubt in this case is one punishable under Section 394, I.P.C. The court below was therefore right in not convicting the appellants under Section 395, I.P.C. although a charge under that head was also framed. The learned trial Judge has, of course, imported Section 397, I.P.C. also along with Section 394, I.P.C. in convicting the appellants. Section 397, I.P.C. is, however, attracted only when it can be definitely established that the particular accused while committing robbery or dacoity has used any deadly weapon. In the present case, however, the evidence of PW 1 does not specifically fix up any particular appellant with the user of any deadly weapon during the commission of the robbery. The mere fact that one of the miscreants might have used a deadly weapon does not indiscriminately import Section 397, I.P.C. against all the miscreants. Section 397, I.P.C. is attracted only against the particular accused who uses the deadly weapon or does any other thing as mentioned in that section, but the other accused persons are not vicariously liable under that section for the acts of the co-accused. The position under Section 394, I.P.C. is however different. Under Section 394, I.P.C. if any accused voluntarily causes hurt in committing robbery, in that case not only he but any other person jointly concerned in committing such robbery shall also be liable to punishment under that section. In this case we have it in

evidence that during the commission of robbery one of the miscreants assaulted PW 1 and his brother-in-law. That being so, for a conviction under Section 394, I.P.C. it is not necessary to fix up the identity of the particular miscreant who made such assault and all the miscreants jointly concerned in the commission of the robbery will be liable under Section 394, I.P.C. Both the appellants were therefore rightly convicted under the said section. In the absence of any specific evidence that any of the appellants, in particular was in possession of or had used any deadly weapon during the occurrence Section 397, I.P.C., we feel, is not attracted against any of the appellants. The conviction under Section 397, I.P.C. in this case, therefore, cannot be upheld although we confirm the order of conviction so far it relates to Section 394, I.P.C.”

15. The oral as well as the documentary evidence adduced by the prosecution had been corroborative. The mobile phone possessed by the accused Akramul Hoda @ Mintu was seized. Biswendu Dulai, the victim was injured by the appellants as evident from the deposition of PW-1 and PW-2 at the time of committing the robbery causing voluntary hurt to the victim. The offending weapon was seized from the bedroom of the appellant Wasim Hossain situated at 2nd floor of Premises No. 20/1A, Jannagar Road on 19.09.08 in presence of the witnesses being led by the appellant Wasim Hossain. The seizure of the offending weapon was endorsed through a seizure list exhibited before the Court. The offending weapon was identified by PW-1 and PW-2 to have been used by the appellant at the time of committing robbery. Both the appellants were identified by PW-1 and PW-2. The T.I. Parade

report marked Exhibit-10 was aptly proved along with the statement of the appellant Wasim Hossain leading to the recovery of the offending weapon.

16. The Learned Trial Court, inter alia, held that:

“It has also been held that a Samsung Mobile set being model No. X-520 having I.M.E.I. No. 354945011342639 fitted with a Samsung battery without SIM card was seized from the room of the accused Akramul Hoda situated at the 1st floor of Premises No. 34/4B, Linton Street in pursuant to the statement of the accused Akramul Hoda dated 19.09.08 on being led by the accused Akramul Hoda in presence of witnesses. The report of Circle Nodal Officer Bharti Airtel Ltd. dated 02.09.08 (Exhibit-11) proves that Biswendu Dulai was the subscriber of Mobile No. 9831199236 and the I.M.E.I. Number on 23.08.08 of the said mobile number was 354945011342630. It is a 15 digit I.M.E.I. Number. After taking aid of www.quintillion.co.JP/3GPP/Specs/23003-790.pdf, I find sufficient reason to share with the view of the Ld. Public Prosecutor in-charge that 15 digit in a 15 digit I.M.E.I. number is a spare digit and 1st 14 digits are sufficient for recognition. Accused Akramul Hoda has failed to justify his possession of the seized mobile set. Considering the evidence on record I hold that the mobile set seized from the room of the accused Akramul Hoda in pursuant to the statement of the accused Akramul Hoda and on being led by him on 19.09.08 is the stolen mobile set of Biswendu Dulai before the commission of robbery on 23.08.08. I find that the prosecution has been able to prove

beyond all reasonable doubts that the accused Akramul Hoda possessed the mobile set with the knowledge that it was stolen property and got possession of the mobile set dishonestly.”

17. The evidence on record did not reveal the de facto complainant or his companion being PW-1 and PW-2 respectively had been subjected to an assault, injury or hurt by the appellants mere statements of being slapped by the statement of PW-1 and PW-2 would not sufficiently conclude of being voluntarily hurt by the appellants.
18. The elements to constitute an offence under Section 394 of the Indian Penal Code in absence of concrete evidence of causing voluntary hurt or attempting to cause the same being absent the appellants cannot be convicted under Section 394 of the Indian Penal Code.
19. In view of the aforesaid discussion of the ingredients to constitute the offence under Section 397 of the Indian Penal Code as well as the decisions cited above, the appellant Akramul Hoda @ Mintu had directed the offending weapon ‘nepala’ at his neck. Therefore, the other appellant Wasim Hossain cannot be vicariously reliable for the offence under Section 397 of the Indian Penal Code as discussed in the aforesaid decisions.
20. Under the facts and circumstances of the case, both the appellants are acquitted of the charge under Section 394 of the Indian Penal Code.
21. The appellant Akramul Hoda @ Mintu is convicted under Section 397 of the Indian Penal Code and appellant Wasim Hossain is acquitted of the charge under Section 397 of the Indian Penal Code.

22. Both the appellants are further convicted under Section 392 of the Indian Penal Code.
23. The impugned judgment and order is modified to the extent as stated above.
24. In view of the above discussions, the instant criminal appeals being CRA 237 of 2010 and CRA 111 of 2010 are disposed of.
25. There is no order as to costs.
26. I record my appreciation for the able assistance rendered by Learned Advocate Ms. Debadrita Mondal, as Amicus Curiae in disposing of the appeal.
27. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
28. 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.)