

Madan Kandi Vs. State of Orissa

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Court : Orissa

Decided On : Jul-07-1995

Reported in : 1996CriLJ227

Judge : A. Pasayat, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 235(1); [Indian Penal Code \(IPC\), 1860](#) - Sections 120B, 390, 391, 392, 395 and 399

Appeal No. : Jail Criminal Revn. No. 382 of 1990

Appellant : Madan Kandi

Respondent : State of Orissa

Advocate for Def. : N. Prusty, Addl. Govt. Adv. and ;Sujata Jona, Addl. Standing Counsel

Advocate for Pet/Ap. : A.R. Dash (through Legal Aid)

Disposition : Application allowed

Judgement :

A. Pasayat, J.

1. In this appeal the order of conviction recorded and sentence awarded by the learned Chief Judicial Magistrate-cum-Assistant Sessions Judge, Puri, and

confirmed by the learned Sessions Judge, Puri is under challenge.

2. Accusations which led to the trial of petitioner Madan Kandi (hereinafter referred to as the 'accused') essentially are as follows:

On the basis of information lodged by informant Charu Chandra Biswal (PW4) that in the night of 10/11-4-1988 dacoity was committed in his house by the accused and four others, law was set into motion. The informant alleged that while he was sleeping in the inner court-yard of his house with his wife and two sons, late in the night the culprits entered inside the house, assaulted the inmates and tied hands of some of them. They were threatened with assault initially and subsequently in fact they were assaulted by knife and lathi. Out of fear, wife of the informant handed over keys to the culprits. Hearing their shouts, the informant's son Hemanta Kumar Biswal (PW 2) who was sleeping in another room came out and tried to intervene. He too was assaulted by the culprits. They broke open boxes and almirahs, and took away cash and valuable gold ornaments. On the next morning the police was informed and investigation was undertaken. On completion of investigation charge sheet was submitted. In course of investigation, four of the accused persons and some of the properties vide M.Os. I and II were identified in a Test Identification Parade in presence of the Magistrate (PW 3). One of the accused, the present petitioner while in custody gave recovery of some articles which were sold by him to the goldsmith.

3. The accused persons pleaded innocence. According to them, before the T.I. parade they were shown to the witnesses. According to the present petitioner, he was taken to Sakhigopal and the ornaments were brought from Chandanpur. He denied to have shown the houses of goldsmiths from where the alleged stolen articles were recovered.

4. Prosecution examined eight witnesses to further its version. Eighteen documents were exhibited. The properties seized and produced in Court were also marked as M.Os. I to IX. On consideration of the evidence on record, the learned Assistant Sessions Judge-cum-C.J.M., Puri found the accused-petitioner guilty while acquitting other four who faced trial along with him, under Section 235(1) of the Code of Criminal Procedure, 1973 (in short, the 'Code'). Distinguishing feature

as pointed out by learned trial Judge to convict the petitioner is that he was in possession of stolen article (M.O. I) and recovery of stolen articles (M.Os. II to VI) was made on the basis of information given by him which were sold to the goldsmiths (PWs 6 and 7). He was, therefore, found guilty, convicted for the offence punishable under Section 395, IPC and sentenced to rigorous imprisonment for seven years. Appeal before the learned Sessions Judge did not bring any relief.

5. Main plank of argument advanced by the learned counsel for accused-petitioner is that since four co-accused persons have been acquitted, there was no scope for any conviction under Section 395, IPC. Additionally it is submitted that the evidence relating to T.I. parade is shaky and no credence should have been put on it. Further it is submitted that the sentence as imposed is extremely harsh. Mr. N. Prusty, learned counsel for State on the other hand supported the judgments of the courts below.

6. For appreciating the plea relating to applicability of Section 395, I.P.C. a look at relevant provision is necessary. Section 395 provides punishment for dacoity. Dacoity is defined in Section 391. It is robbery committed by five or more persons. The essentials of the offence of dacoity are that the theft should be perpetrated by means either of actual violence or of threatened violence. The threatened violence may be implied in the conduct and character of the mob. It is not necessary that force or menace should be displayed by any overt act. A person cannot be held guilty of dacoity unless he has committed, attempted to commit or aided in committing robbery. Dacoity is perhaps the only offence which the legislature has made punishable at four stages. When five or more persons assemble for the purpose of committing a dacoity, each of them is punishable under Section 399. The definition of 'dacoity' in Section 391 shows that the other two stages, namely, the stage of attempting to commit, and the stage of actual commission of robbery, have been treated alike and come within the definition. There may well be a stage when there is only an agreement to commit dacoity. If there is proof of agreement the offence of conspiracy punishable under Section 120B is complete. Robbery is defined in Section 390, I.P.C. In all robberies there is either theft or extortion. Robbery is a special and aggravated form of either theft or extortion. Section 390

contemplates that the accused should have, from the very start, the intention to deprive the complainant of the property, and should for that purpose either hurt him or place him under wrongful restraint. The definition of robbery requires that either death or hurt or wrongful confinement is caused or it must be actually found that the victims were put in fear or instant death, instant hurt or instant wrongful confinement. Under Section 391 the number of persons committing robbery must be five or more. In the case at hand, the prosecution case is that there were five robbers. The evidence of witnesses leaves no manner of doubt that the accused was identified in the T.I. parade as he led to recovery of stolen articles. No infirmity could be shown to discard their evidence.

7. The courts below were justified in holding that the accused was guilty, but their holding that the accused committed an offence punishable under Section 395, I.P.C. cannot be maintained, as four accused have been acquitted. In view of the analysis made above, the conviction is altered to one under Section 392, I.P.C. Considering the fact that the occurrence took place more than a decade back, and keeping in view alternation of the conviction, custodial sentence is restricted to five years' rigorous imprisonment.

The revision application is allowed to the extent indicated above.