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Court : Delhi

Decided On : Oct-20-1981

Reported in : 1982CriLJ449; 21(1982)DLT26

Judge : Charanjit Talwar, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 402

Appeal No. : Criminal Revision Appeal No. 192 of 1981

Appellant : Anwar

Respondent : State (Delhi Administration)

Advocate for Pet/Ap. : B.K. Naseem and; D.R. Sethi, Advs

Judgement :

Charanjit Talwar, J.

(1) The petitioner, Anwar, is seeking quashing of the charge framed against him under Section 399 read with Section 402 of the Indian Penal Code (herein called 'the Code'). This charge along with the charge under the Arms Act was framed by Mr. J.D. K a pur, Additional Sessions Judge, Delhi, after hearing the parties on 18th May,1891.

(2) In brief the prosecution case is that an Inspector of the Crime Branch, Delhi, received secret information that some armed dacoits belonging to Uttar Pradesh were going to assemble in a Gumti (wooden hut) of Burmah Shell Railway Siding, Jamuna Bridge, Delhi, at about 9 p.m. on 10th May, 1977, for the purpose of committing a dacoity .1 The Inspector formed a raiding party in which two public witnesses were associated. The party proceeded towards that Gumti and on the way another public witness was joined in the raiding party. That hut was surrounded by the raiding party. Some of its members including the Inspector without arousing any suspicion were able to reach the eastern window of the Gumti. They heard one of the dacoits while addressing one of his companions as Sukhpal questioning whether he (Sukhpal) being a new entrant would deceive them. At that Sukhpal replied that he was a 'mard' (he-man) and that he had come fully prepared. The members of the raiding party further heard a question being asked to another companion, namely, Puran, whether he had brought the 'kutta' (country-made pistol). Puran replied in affirmative. Thereafter, the raiding party entered the Gumti and apprehended the persons present inside it. The petitioner herein was one of them. From his custody a country made pistol and six cartridges were recovered. A country-made rifle was recovered from co-accused Sukhpal. Another country-made pistol was recovered from Puran; a knife was recovered from co-accused Ghanshyam; a torch was recovered from co-accused Jassan Alam and a lathi from Qayum accused. Another arm known as 'Subblo' was recovered from co-accused Sukha.

(3) The case of the petitioner is that even if all the allegations as contained in the report under Section 173, Code of Criminal Procedure and those contained in the statements recorded under Section 161 of the said Code are admitted to be true, no case is made out against the petitioner under Sections 399 and 402 of the Code.

(4) To appreciate the contention urged by Mr. Naseem, learned counsel for the petitioner, it is necessary to keep in view the provisions of Section 399 and 402 of the Code, for which the petitioner along with others been charged.

(5) Section 399 reads, 'who ever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.'

(6) Ordinarily, preparation to commit a crime is no offence. However, preparation to commit an offence is made punishable under three sections of the Code. Apart from Section 399, the other sections are Section 122 (preparation to wage war against the Government of India) and Section 126 (making preparation to commit depredation on territories of any power at peace with the Government of India). Preparation to commit a crime follows after intention to do it has been conceived. Thereafter an attempt to commit it is made. Thus, three stages precede before a crime is committed : first, intention to commit it, secondly, preparation to commit and thirdly, attempt to commit it.

(7) Under Section 399 of the Code even the second stage, viz., preparation to commit the crime of dacoity has been made into an offence. The prosecution has to prove that the act of the accused amounted to preparation and that it was preparation to commit dacoity . In order to constitute preparation it is not necessary for the prosecution to show that an ever act towards the commission of the dacoity had been committed by the accused. All that is required is that the accused should have done some-act to get ready for committing dacoity.

(8) Section 402 of the Code provides, 'Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.' This offence has three ingredients, namely, first, assembly of five or more persons; secondly, they had assembled for the purpose of committing dacoity and thirdly, that the accused was one of such persons. For the purpose of committing dacoity mere assembly of five or more persons including the accused without proof of other preparation is punishable under this Section.

(9) It is well settled that 'a person may not be guilty of dacoity yet guilty of preparation and not guilty of preparation and yet guilty of assembly.' Five or more persons meeting for common purpose to commit dacoity, though they have not

proceeded even one step forward towards the accomplishment of their object, are subjected to the severe punishment for a term extending to seven years under this section. These are the principles which have to be kept in view while proceeding to judgment in the present case.

(10) Mr. Naseem has submitted that the facts which have been brought out in the report under Section 173 of the Code of Criminal Procedure do not constitute offences under Sections 399 and 402 of the Code. The said facts are : (1) assembly of seven persons including the petitioner at about 9 p.m., (2) they had assembled in the Gumti of Burmah Shell Railway Siding Jamuna Bridge, (3) all of them belonged to various places in Uttar Pradesh, (4) some of them were possessed of unlicensed arms; Anwar, the petitioner, had a country-made pistol and six live cartridges which were concealed in his hand bag, (5) that there was an assurance by co-accused Sukholal to the other members of the gang that although he was a new entrant yet he was a Mard and had come fully prepared, (6) that co-accused Puran had replied in the affirmative when he was asked by the gang leader whether he had brought the kutta (country made pistol), (7) one of the co-accused Jassan Alam had a torch with him and (8) that all the members of the gang were apprehended by the raiding party headed by Inspector Shamsheer Singh.

(11) In support of the contention that the above facts even if assumed to be true do not prima facie make out the said offence, Mr. Naseem mainly relied upon the decision of the Supreme Court in *Ohatari Yadav others v. State of Bihar*, : 1979 CriLJ1090 . In the said case it was held by the Supreme Court that on the mere fact that eight persons were found in the school premises which was quite close to the market at 1 a.m. and that some of them were armed with guns the conviction under Sections 399 and 402 of the Code was not sustainable. In the said case on facts it was found that the place where those eight persons had assembled was a conspicuous place. Hence, it was difficult to believe that they would assemble there with the intention of taking such a grave risk of committing a dacoity. The trial court in that case had sentenced the accused after drawing inference merely from the fact that they had assembled at 1 a.m. at a lonely place and could not give any Explanation for their presence at that odd hour of the night. The

conviction had been affirmed by the High Court. It was held by the Supreme Court that 'The mere fact that those persons were found at 1 a.m. does not, by itself, prove that the appellants had assembled for the purpose of committing dacoity or for making preparations to accomplish that object,

(12) It is thus clear that in the above cited case apart from assembly of eight persons, some of whom had arms, there was no other evidence established by the prosecution to bring home the guilt to the appellants.

(13) In the present case it is yet to be established whether the Gumti in question where in the gang had assembled is a conspicuous and a public place. It is not advisable at this stage to weight the facts, enumerated above which emerges from the report under Section 173 of the Code of Criminal Procedure. I feel that going into details in that regard may prejudice either of the parties but it should be understood that nothing stated in this judgment on merits of this case should be construed as a finding of fact.

(14) Another distinguishing feature, to my mind, apart from the alleged secluded place, from where the gang was apprehended, is the inference to be drawn from the talk, amongst the members of the assembled gang, which was heard by the members of the raiding party. At this stage it cannot be held that the petitioner herein, who was armed with a pistol and six cartridges, had gone to the Gumti at 9 p.m. on an innocent purpose. The rendezvous was with some purpose. Can it be held at this stage that the act of the assembly of the members of the gang, most of whom were armed, in the Gumti would not amount to 'any preparation' within the ambit of Section 399 of the Code The Supreme Court in Malkiat Singh and another v. The State of Punjab, : 1970 CriLJ750 , while distinguishing between the preparation for committing an offence and an attempt to commit the offence, held, 'The preparation consists in devising or arranging the means or measures necessary for the commission of the offence.'

(15) In the facts and circumstances of the present case prima facie it cannot be held that the members of the gang including the petitioner herein Had not assembled at the place in question for devising or arranging the means or measures necessary for the commission of a dacoity. To come to this finding, I

have ignored from consideration the secret information regarding the assembly of the accused who are alleged to be notorious dacoits hailing from different places in Uttar Pradesh, as obviously that information is inadmissible in evidence.

(16) thereforee, the contention of Mr. Naseem that the facts enumerated above even if fully accepted do not show that the petitioner committed the offence, has to be rejected. On the record there is sufficient material for proceedings with the trial against the petitioner under Sections 399 and 402 of the Indian Penal Code.

(17) The petition is accordingly dismissed. The record be sent back immediately.

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