

**Munshi and ors. Vs. State of Raj.**

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**SooperKanoon Citation :** [sooperkanoon.com/759195](http://sooperkanoon.com/759195)

**Court :** Rajasthan

**Decided On :** May-14-2002

**Reported in :** 2002(5)WLC605

**Judge :** Khem Chand Sharma, J.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 395 and 397

**Appeal No. :** S.B. Cr. Appeal No. 778 of 2000

**Appellant :** Munshi and ors.

**Respondent :** State of Raj.

**Advocate for Def. :** Madhav Mitra, Public Porsecutor

**Advocate for Pet/Ap. :** A.K. Sharma, Adv.

**Disposition :** Appeal partly allowed

**Judgement :**

**Khem Chand Sharma, J.**

1. The appellants have been convicted for offence under Section 395 and 397 IPC of the Indian Panel Code and have been sentenced to imprisonment for 7 years on each count.

2. The facts in brief, relevant for disposal of this criminal appeal, which are unfolded by lodging a written report, Ex. P1 on 9.4.94 by PW 1 Kumari Meenakshi Rajwat, are that in the night at about 1.0 when all family members were sleeping and the main gate of the house was closed, 4-5 persons armed with iron rods and iron pipes entered the room where her 3 brothers, namely Dilip Singh, Pradeep and Yagvendra were sleeping and started bearing them, thereby causing injuries to them. The accused also entered the room of her parents and gave them severe beating. Thereafter the miscreants entered the room of complainant and gave beating to her, Kumari Dheeraj and Sudha. The FIR further reveals that the accused persons looted the cash and ornaments from the room of complainant's father. The accused also took away with them one gun lying in her house. The language of the accused was stated to be like U.P. language. The age of accused persons was between 23-24 years and one of the accused had black beard.

3. On the above report, having registered a case under Section 395 and 397, the police proceeded with the investigation. In the course of investigation, police prepared site plan Ex. P2, got the identification of the accused done and prepared identification memos Ex. P3 to P7 and Ex. P49, seized the blood stained cloths of the injured vide memos Ex. P 8 to Ex. P10 and got the injured persons medically examined. The police arrested the accused persons and effected recoveries of the looted property.

4. Having completed investigation, the police submitted a charge sheet against 6 accused persons in the court of Chief Judicial Magistrate, Tonk. The learned Chief Judicial Magistrate having found the case exclusively triable by the court of Sessions, committed the case to the court of Sessions.

5. The case came to be tried by the Special Judge (Communal Riots Cases), Tonk. The learned trial court after hearing the arguments and considering the evidence and material collected during investigation and placed before it, framed charges against the accused persons for offence under Section 395 and 397 IPC. The accused denied the charges and claimed trial.

6. The prosecution, with a view to prove its case, examined as many as 23 witnesses and exhibited 50 documents. Thereafter the accused were examined

under Section 313 Cr.P.C. The accused in their statements denied the prosecution allegation. Accused Lallu in his statement has explained that he was not kept 'Baparda' and was shown to the witnesses while he was already in police custody in some other case. Similarly, accused Jagdish has stated that he was shown to the witnesses before the identification parade could be held. However, the accused did not examine any witness in their defence.

7. It may be stated that during cause of trial, accused Ramesh expired and accused Teja has been absconding.

8. At the conclusion of trial, the learned trial Judge found the prosecution case as alleged, correct and held the accused appellants guilty of committing offence punishable under sections 395 and 397 IPC and accordingly convicted them of the said offence and sentenced them as aforesaid. Hence the present appeal by four appellants.

9. I have heard Mr. A.K. Sharma, learned counsel for the appellants and Mr. Madhav Mitra, learned Public Prosecutor and perused the evidence and material on record.

10. The undisputed features of the prosecution case are that the incident happened at 1.00 AM in the night intervening 8/9.4.2002 (sic 1994?), of which a written report, Ex. P.1 was lodged at 2.30 PM on 9.4.2002 (sic 1994 ?) at Police Station, Dooni, district Tonk and the weapons used in the commission of crime were 'Sariya' and 'lathi'. The injuries of the injured have not been proved.

11. The only evidence available on record against the appellants is that of their identification by the witnesses who are the members of a family and were present in the house where the alleged dacoity was committed. The trial court has also arrived at the conclusion of guilt against the appellant mainly on the basis of identification of the appellants and recovery of looted property.

12. As per the prosecution case PW 1 Meenakshi, PW 2 Dheeraj, PW 3 Dilip Singh, PW 5 Mohan Singh, PW 18 Sudha and PW 19 Sumita were present in the house at the time of commission of dacoity and they have identified the accused.

In the course of decoity they have also sustained injuries.

13. On evaluating the evidence, it appears that PW1 Meenakshi, PW3 Dilip Singh and PW5 Mohan Singh have identified all accused persons, whereas PW2 Kumari Dheeraj has identified all accused except accused Jagdish. PW18 Sudha and PW19 Sumitra have identified only one accused, namely, Munshi. The question that now emerges for consideration is as to whether the conviction of the appellants can be sustained only on the basis of evidence as regards identification of the appellants by six prosecution witnesses, named above

14. To decide the question, it would be appropriate to first refer to the relevant evidence both documentary as well as oral.

15. In the report Ex.P.1, the age of the accused have been stated to be 23-24 years. As regards description of the accused, it has been stated that all were wearing trousers and shirts and one of them had small black beard. The complainant has mentioned that the accused were talking with each other in U.P. language.

16. A perusal of identification memo, Ex.P.3 shows that PW3 Dilip Singh, PW2 Kumari Dheeraj and PW 3 Kumari Meenakshi have identified accused Teja, Munshi and Balgovind. The age of accused Teja, Munshi and Balgovind as have been mentioned in the identification memo is 35, 60 and 27 years, respectively.

17. Ex. P.4 is the identification memo in respect of accused Lallu, Jagdish and Ramesh, aged 25, 28 and 22 years. PW 1 Meenakshi has identified all the three accused, whereas PW 19 Sumitra and PW 21 Yadvendra have not been able to identify any of these 2 appellants.

18. Ex. P5 is the identification memo in respect of accused Lallu aged 25 years, Jagdish aged 28 years and Ramesh aged 22 years. PW 3 Dilip Singh has identified all of them, whereas PW2 Kumari Dheeraj identified two and could not identify accused Jagdish.

19. In Ex. P6, PW 5 Mohan Singh identified accused, Teja, Munshi and Balgovind. The identification Memo, Ex.P.7 shows that PW5 Mohan Singh has identified

accused Lallu aged 25 years, accused Jagdish aged 28 years and accused Ramesh aged 22 years. The identification memo Ex. P49 shows that Sumitra and Sudha identified only Munshi, whereas Ugam Kanwar identified Teja, Munshi and Balgovind. Ugam Kanwar has not been examined in evidence by the prosecution.

20. From the evidence discussed above, it appears that PW 5 Mohan Singh identified all the accused vide identification memos Ex. P6 and P7. PW1 Meenakshi identified all accused persons vide Ex. P3 and P4. PW 3 Dilip Singh identified all accused persons vide Ex. P3 and P5, PW2 Kumari Dheeraj identified all accused persons except accused Jagdish. PW 19 Sumitra identified only accused Munshi and PW 21 Yadvendra identified none as would be evident from Ex. P.49 and Ex. P4, respectively. PW 18 Sudha identified only accused Munshi and Ugam Kanwar has identified accused Teja, Munshi, Balgovind.

21. In the identification memo, the age of accused Munshi has been shown to be 60 years. The arrest memo, Ex. P25 of accused Munshi also mentions his age as 60 years. Whereas, the FIR, Ex. P.1 shows that all the accused were in the age of 22-23 years. Accused Balgovind was arrested on 22.4.95 vide arrest memo, Ex. P26, wherein he has been stated to be Tonta (physically handicap). These two important distinguishing features viz., (i) the age of appellant Munshi being 60 years and (ii) accused Balgovind being a physically handicap do not find place in the FIR.

22. Thus, in the light of the evidence discussed above, it appears to me that the identity of accused appellants Munshi and Balgovind seems to be doubtful and the prosecution witnesses have not been able to identify them as the miscreants involved in the commission of alleged dacoity. That apart, from a perusal of documentary evidence it becomes evident that nothing has been recovered from these two appellants.

23. It also need be observed that the prosecution has not examined the medical officers in evidence to prove the injuries on the persons of injured Mohan Singh, Dilip Singh and Ms. Ugam Kanwar. It also appears from the record that the investigating agency has recovered a silver plate from the possession of appellant Munshi. However, the prosecution has neither got the identification memo of

recovery proved by Mohan Singh and Dilip Singh nor has examined the Sub Divisional Magistrate, who got the identification proceedings completed. Similarly, the report of Forensic Science Laboratory has also not been exhibited to prove the finger prints and foot prints taken from the place of incident.

24. For the reasons that identification of these two appellants is suspicious and no recovery could be effected, their conviction under Sections 395 and 397 IPC cannot be sustained and the benefit of doubt must go to them.

25. So far as appellants Jagdish and Lallu @ Rakesh are concerned, there is sufficient evidence on record to connect them with the commission of offence punishable Under Section 395 IPC. PW1 Kumari Meenakshi, PW 2 Kumari Dheeraj, PW 3 Dilip Singh and PW 5 Mohan Singh have correctly identified appellants Jagdish and Lallu that they committed dacoity in their house at 1.00 AM in the night intervening 8/9.4.95. PW1 Kumari Meenakshi has categorically stated that on hearing cries of her brothers Dilip Singh and Pradeep, when she was about to come out of her room, she found two miscreants standing outside her room and they had iron rods in their hands. Both the miscreants entered her room and one of them asked her not to raise alarm and the another started beating her. She identified these two persons as Jagdish and Lallu and stated that they had entered her room and accused Jagdish inflicted 'sariya' blow on her head. Accused Lallu inflicted a 'Sariya' blow on her sister Kumari Dheeraj. When they tried to take her to bath-room, she gave a fist blow to accused Jagdish and came running in the chowk. She stated that her sister Dheeraj also gave fist blow to accused Lallu. The statement of PW1 Meenakshi is well supported by the statements of her sister PW2 Kumari Dheeraj, brother PW3 Dilip Singh and father PW5 Mohan Singh. PW18 Sudha and PW 19 Sumitra have also correctly identified accused Jagdish and Lallu.

26. Accused appellants Jagdish and Lallu @ Rakesh were arrested on 3.4.96 and were kept 'Bapard' right from their arrest till the identification parade was held. Their identification was held on 5.4.96.i.e. on the third day of their arrest and the witness, referred to above have correctly identified them. PW 23 Ravi Kumar Gupta Additional Chief Judicial Magistrate Shambhar-lake who conducted the

identification parade has categorically stated that identification of the accused was done with care and in accordance with law. A perusal of his statement makes it evidently clear that the witness has been able to prove the identification memos Ex. P3, P4, P5, P6, P7 and P49, so far as they relate to identification of accused Jagdish and Lallu @ Rakesh.

27. That apart, it also need be observed that the possibility of the accused being shown to the witness even prior to the identification parade was held, is ruled out from a perusal of the statement of PW 20 Ashok Kumar, Investigating Officer, who has categorically stated in his cross examination that he had investigated the cases of Police Stations Mendwas and Deoli, but by that time he had no knowledge that accused were wanted in the case at hand.

28. As per the prosecution case, the accused persons had taken away with them one 12 bore gun belonging to PW5 Mohan Singh, which has been recovered by the police from the possession of accused Lallu, Ramesh and Teja in the course of investigation of a criminal case of Police Station Gandhi Park, Aligarh (U.P.). The learned trial court on the basis of evidence available on record has recorded a finding that on the day of incident, the accused persons had looted the aforesaid gun.

29. A perusal of Ex.P.38, a copy of memo of recovery of a 12 bore double barrel gun along with cartridges, makes it evidently clear that the recovery of gun has been effected from accused Ramesh, who is not before this court and this fact stands proved by the evidence of PW 20 Ashok Kumar Kulshrestha, Investigating Officer and the memo of recovery Ex. P. 38. As such it must be concluded that there is no evidence as to the recovery of aforesaid gun against the present accused appellants and the finding of the learned trial court connecting the recovery of gun with the present appellants is contrary to the evidence on record.

30. Thus, on the basis of evidence discussed above, it can be concluded that the evidence of eye witness of the incident is worthy of credence so far it relates to identification of appellants Jagdish and Lallu @ Rakesh. The prosecution has been able to prove guilt against these two appellants beyond reasonable doubt and the learned trial court has rightly arrived at a conclusion in holding appellants

Jagdish and Lallu guilty of having committed offence under Section 395 IPC

31. Coming to the conviction of appellants Jagdish and Lallu @ Rakesh for offence under Section 397 IPC, suffice it to say that, as per the prosecution case, the miscreants were armed with iron rods and lathis and they used the respective weapons in the course of commission of dacoity and caused injuries to the persons present in the house where the offence was committed. However, from the evidence on record it is evident that the injuries of the injured persons have not been proved. It is not the case of the prosecution that at the time of committing robbery or dacoity, the accused used any deadly weapon or caused grievous hurt to any person or attempted to cause death or grievous hurt to any person. Thus, in my considered view, there is no evidence to constitute offence punishable under Section 397 IPC, Therefore, the conviction of appellants Jagdish and Lallu under Section 397 IPC cannot be sustained and they deserve to be acquitted of the offence Under Section 397 IPC.

32. Coming to the question of sentence, it may be noted that from the record it appears that appellants Jagdish and Lallu have already undergone major part of the substantive sentence awarded to them and, therefore, the ends of justice would be met if they are sentenced to the term already undergone by them.

33. In the result, this appeal is partly allowed. The conviction of appellants Munshi and Balgovind @ Tonta under sections 395 and 397 IPC and the sentences awarded to them thereunder are set aside and they are acquitted of the offences charged with. The conviction of appellants Jagdish and Lallu @ Rakesh under Section 397 IPC and the sentences awarded thereunder are set aside and they are acquitted of the offence under Section 397 IPC. The conviction of appellants Jagdish and Lallu under Section 395 IPC is maintained. However, considering the fact that they have already undergone major part of their substantive sentence, they are sentenced to the period already undergone by them. All the appellants are in Jail and they be set at liberty, if not required in any other case.