

**Varia Vs. State of Rajasthan**

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**Court :** Rajasthan

**Decided On :** Oct-01-1985

**Reported in :** 1985WLN(UC)543

**Judge :** Sobhag Mal Jain, J.

**Appeal No. :** S.B. Criminal Appeal No. 213 of 1985

**Appellant :** Varia

**Respondent :** State of Rajasthan

**Advocate for Pet/Ap. :** Mr. Doongar Singh

**Judgement :**

**Sobhag Mal Jain, J.**

1. This appeal is directed against the judgment dated the 12th July, 1985 of the Sessions Judge, Jalore, convicting and sentencing the appellant for the offence under Section 395 IPC to 6 years rigorous imprisonment and a fine of Rs. 200/-, in default of payment of fine to one month's simple imprisonment, under Section 458 IPC to four years rigorous imprisonment and a fine of Rs. 200/- in default of payment of fine to one month's simple imprisonment and under Section 324 IPC to one year's rigorous imprisonment. All the substantive sentences have been directed to run concurrently.

2. The case relates to the incident which took place on the intervening night of November 27 and 28, 1983 at the Sanchore Automobile Petrol Pump belonging to Shri Mishrimal of Sanchore and also at the octroi outpost of Sanchore. It is alleged that on the night of incident, at about 1.30 a.m., seven persons came to the Petrol Pump with axe, knife and lathies. Four of them entered the cabin by breaking open the glasses of the cabin and the three others remained outside. Pratap Singh, who was sleeping in the cabin, woke up by the noise but was assaulted, the dacoits then took away cash amounting to Rs. 3,356.00p., golden murkies which Pratap Singh was wearing, a RICO watch and a two band Philips Transistor (Radio). After committing the dacoity at the petrol pump they proceeded towards the octroi outpost and took away a sum of Rs. 2939/- from there. Shrimanlal Nakedar was at the outpost at that time.

3. A First Information Report of the occurrence was lodged by Mishri Lal the owner of the petrol pump at the Police Station, Sancoore at 2.50 a.m. the same night on which a case under Sections 395, 456, 147, 148, 149 and 427 IPC was registered. Shri Swaroop Singh, SHO, Sanchore, arranged a chase and by following the foot prints and other information reached Dhanera in Gujarat and arrested accused-appellant Varia on November 28. 1983 at 5 p m. at the border of Khagal. At the time of arrest a Philips Transistor was also recovered from the possession of the accused. In the course of investigation chance finger prints were raised from the place of incident which were sent for analysis and comparison. Pratapsingh produced the licence of the Radio-Transistor to the police. A test identification parade was conducted by Shri S.D. Bhaskar, Assistant Collector and Magistrate, Sanchore on December 15, 1983, where the witnesses Pratap Singh and Shrimanlal correctly identified the appellant. During investigation it transpired that besides the appellant, others namely, Pratap, Ishwar Sonia alias Chandan and Navla were also involved in the dacoity. They were arrested. On the information and at the instance of Pratap golden murkies and on the information and at the instance of Navla a RICO watch, were recovered. Two separate challans were filed against the accused. At first a challan against accused Varia was filed and he was committed to the Court of Sessions and a trial against him started. The other accused were arrested subsequently and a separate challan was filed against them. They too were committed to the Court of Sessions. By the order dated the

19th November, 1984, the learned Sessions Judge consolidated the case and held a common trial of all the accused, namely, Varia, Chandan, Pratap, Mavla and Ishwar. All the accused were charged and tried for the offences under Sections 395, 458, 324 and 323 IPC.

4. The accused in their statements, recorded under Section 313 Cr.PC denied the prosecution allegations. They alleged that they were shown to the witnesses while in police custody. They denied the recovery and stated that they were innocent.

5. After trial, the Sessions Judge, by his judgment dated 12th July, 1985, convicted the accused appellant Varia for the offences under Sections 395, 458 and 324 IPC and sentenced him as aforesaid. He, however, acquitted other four co-accused, namely, Pratap, Ishwar, Mavla, and Chandan of all the charges levelled against them. The learned Sessions Judge held that a dacoity took place on the intervening night of 27th and 28th November, 1983 at the Automobile Petrol Pump, Sanchoe and also the octroi outpost. A sum of Rs. 3356.76 P., Murkies, RICO watch and a two band Transistor (Radio) were taken away from the petrol-pump and a sum of Rs. 2939/- was taken away from the octroi outpost. The learned Sessions Judge has relied upon the following circumstances against the appellant:

(1) that he was arrested the following day at 5 p.m. as a result of hot pursuit by the police ;

(2) that at the time of correct a Philips-Transistor (Radio) Article 3 was recovered from his possession and this transistor was the one which was taken away from the Petrol-pump on the night of incident ;

(3) that it was Varia accused who inflicted injuries on Pratap Singh ;

(4) that finger prints were found on the glass pieces in the cabin of the petrol-pump which on comparison tallied with the finger prints of accused Varia ; and

(5) that the witnesses Pratap Singh and Sriman Lal correctly identified the accused both in the test parade and in the court during trial.

On the basis of these circumstances, the learned Sessions Judge held that the offences under Sections 395, 458 and 324 IPC were fully made out against the appellant. Aggrieved by this the appellant has filed the present appeal in this court.

6. I have heard Mr. Doongar Singh counsel for the appellant and the Public Prosecutor for the State.

7. Dealing with the circumstances of identification first, Mr. Doongar Singh has contended that the findings of the learned Sessions Judge are based on the mis-reading of the statements of Pratap Singh and Sriman Lal. Mr. Doongar Singh has argued that these witnesses failed to state in the Court that the appellant was the person who participated in the dacoity. The statements of Pratap Singh, PW 2, and Sriman Lal, PW 3, were read over to me. Thus, the witnesses have not, in so many words, stated that it was the present appellant who had participated in the dacoity. However, the statement of the witnesses, when read as a whole, clearly show that the narrative told by them related wholly to the incident of dacoity which took place on the intervening night of November 27 and 28, 1983, and it was in that context that the witnesses have stated that the appellant present in the court was also identified by them in the test parade held earlier. The tenor of evidence and the sequence in which the witnesses identified the accused unmistakably show that the identification of the accused by the witnesses in court was in relation to his being a participant in the incident of dacoity. There is no doubt that the witnesses Pratap Singh and Sriman Lal correctly identified the appellant both during the trial in Court as also in the test identification parade held by Shri S.D. Bhaskar, Assistant Collector, and Executive Magistrate on December 15, 1983. In my view, therefore, the learned Sessions Judge rightly held that the circumstances of identification was a material piece of evidence against the appellant.

8. Coming next to the circumstance of finger prints of the appellant on the glass pieces at the petrol-pump learned counsel for the appellant has urged that the prosecution has failed to establish this circumstance against the accused. There is confusion in the evidence of the prosecution as to the raising of the finger prints from the petrol pump. As per the statement of PW 10, Swaroop Singh, Station House Officer, the finger prints from the glass pieces were detected, raised and

properly sealed by him on November 28th itself where as the evidence of PW 8 Sardar Khan, a trained officer in the office of Superintendent of Police Jalore on finger prints and foot prints show that it was he who found the glass pieces scattered in the cabin on November 30, 1983 and it was from these glass pieces that he raised the chance finger prints. The learned Public Prosecutor was unable to explain this discrepancy. Who, out of the two, should be believed 7 There is obviously room for doubt and the benefit of the same must go to the accused. This circumstance need, therefore, be kept out of consideration while dealing the case against the appellant.

9. The most important circumstance against the accused is the recovery of the Radio Transistor from his possession on November 28, 1983 at 5.00 p.m. at the time of his arrest. The licence of this Radio-Transistor was in the name of Om Prakash son of Mangilal. The licence has been exhibited as P/6. Pratap Singh has stated that he purchased the Transistor from Mangilal and it was he who produced the licence to the police. This clearly establishes that the Radio-Transistor which was recovered from the possession of the appellant Varia at the time of his arrest on 28th November, 1983 belong to Pratap Singh PW 2 and was removed during the course of dacoity. The appellant was found to be in possession of the Radio-transistor, a part of the stolen property, so soon after the dacoity that a presumption under Section 114 of the Act can safely be drawn against him that he had himself removed the same.

10. Thus the circumstances which are established against the appellant are that he was arrested the very next day of the dacoity and at that time he was in possession of a Radio-transistor, which was one of the articles, removed by the dacoits during the course of the dacoity. This radio-transistor was registered in the name of Om Prakash but had been purchased by Pratap Singh. Another circumstance established against the appellant was that he was correctly identified by Pratap Singh and Sriman Lal, both during the trial as well as in the test identification parade. These circumstances prove that the appellant was the person who participated in the incident which took place at the petrol-pump and the octroi outpost at Sanchore on the night intervening 27th and 28th February, 1983.

11. The next question for consideration is, what offence is made out against the appellant. The learned Sessions Judge has convicted him for the offence under Sections 395, 458 & 324 IPC. As regards the offence under Section 324 IPC is concerned, the learned Sessions Judge has said:

izrkiflag lkh Mcyw- 2 ds vuqlkj 1lds eqag ij dqYgkM+h ds pksV vfHkqDr ckfj;k us ekjh Fkh A

The statement of Pratapsingh has been read over to me & the inference drawn by the learned Sessions Judge is not borne at from his testimony. The witness has not connected the accused with the axe injury on his face. His conviction for the offence under Section 324 IPC cannot, therefore, be maintained. As regards the offence under Section 395 IPC. Mr. Doongar Singh, counsel for the appellant has argued that out of the five accused put up for trial four already stand acquitted. The charge against the accused Varia was that he committed the dacoity conjointly with the other co-accused, namely, Chandan, Pratap, Mavla, Ishwar and Bamraj. In the charge no other named or un-named person was mentioned. The learned Sessions Judge has acquitted Chandan, Pratap. Mavla, and Ishwar. In these circumstances the conviction of the appellant alone for the offence under Section 395 IPC is not sustainable. There is substance in the contention of the counsel for the appellant. The offence of dacoity punishable under Section 395 IPC is defined in Section 391 IPC which reads thus:

391. Dacoity--When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number or persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit 'dacoity'.

12. A reading of the above section shows that to bring the offence within the purview of dacoity, the prosecution has to prove that the number of persons who took part in the robbery or dacoity was five or more, if the number is reduced to less than five the provisions of Section 391 would not be attracted. Out of the five accused tried by the learned Sessions Judge four stand acquitted. The learned Sessions Judge has not given a finding that five or more persons were involved in

the incident. In the charge framed against the appellant the names of five others, namely, Pratap, Ishwar, Chandan, Bemraj and Mavla were given and no other named or un-named person was mentioned. It would not be possible now to hold that the appellant was involved in the incident conjointly with those not named in the charge. The result is that his conviction for the offence under Section 395 IPC cannot be maintained. His act would however, fall within the ambit of Section 390 punishable under Section 392 IPC.

13. As regards the offence under Section 458 IPC is concerned no serious argument assailing the same has been advanced. I am also of the view that the facts established against the appellant fully makes out a case under Section 458 IPC and his conviction for this offence does not call for any interference.

14. In the result, the appeal is partly allowed. The conviction and sentence passed against the appellant for the offence under Section 324 IPC is set aside. His conviction for the offence under Section 395 IPC is altered to one under Section 392 IPC and his sentence is reduced from 6 years rigorous imprisonment to years'3 rigorous imprisonment. The sentence of fine of Rs. 200/-for this offence is however, maintained, in default of payment of fine he would undergo one month's simple imprisonment. The conviction of the appellant for the offence under Section 458 IPC is maintained but the sentence of four years' rigorous imprisonment, is reduced to three years' rigorous imprisonment but the fine of Rs. 200/- is maintained, in default of payment of fine he will undergo one month's simple imprisonment. The substantive sentence awarded to the appellant for the offences under Section 392 and 458 IPC shall run concurrently. The period of detention undergone by him during investigation, inquiry or trial shall be set off against the term of imprisonment imposed on him, according to the provisions of Section 428 Cr.PC. The direction of the learned Sessions Judge as regards the delivery of the property to Pratap Singh is maintained.