

**Dilip Malik Vs. State**

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**Court :** Kolkata

**Decided On :** Mar-29-1990

**Reported in :** 1991CriLJ2171

**Judge :** A.M. Bhattacharjee and ;A.K. Nandi, JJ.

**Acts :** Arms Act - Sections 25 and 27; ;[Indian Penal Code \(IPC\), 1860](#) - Sections 307, 395, 397, 398 and 412; ;[Constitution of India](#) - Articles 12 and 21

**Appeal No. :** Criminal Revn. No. 1021 of 1982

**Appellant :** Dilip Malik

**Respondent :** State

**Judgement :**

**A.M. Bhattacharjee, J.**

1. My learned brother Nandi, J. has held in his judgment to be delivered now that there is nothing on record to justify our intervention in revision in respect of the order of conviction passed against and the sentence imposed upon the accused-petitioner under Section 395/397 of the Penal Code condemning him to suffer rigorous imprisonment for seven years. I agree with him and also share his sense of shock and dismay at the fact that by the time we could find time in 1989 to hear this Revisional application filed in this Court in 1982, the petitioner had to fully

serve out the sentence of seven years rigorous imprisonment.

2. But suppose we ruled otherwise and held that the revision was to be allowed and the orders of conviction and the resultant sentence were to be quashed Who was then to compensate the accused for all the agony and strain suffered by him under an unlawful order of conviction and sentence ?

3. It is true that under our Code of Procedure, an order of conviction and sentence are not automatically suspended during any appeal or revision against such order. It is also equally true that under our Code, setting aside of conviction and sentence by the higher Court does not, by itself, entitle the accused to any compensation. Section 250 of the Code only provides for some sort of compensation when a Magistrate discharges or acquits an accused in a case triable and tried by the Magistrate. But that is a compensation for accusation without reasonable cause. But I am on a different question, the question being when the accused had to suffer a long term imprisonment under an order of conviction, though subsequently set aside on appeal or revision, only because of the inordinate delay made by the higher Court in disposing of the proceeding pending before it, is he entitled to be compensated under the Code and, if so, by whom Even if we can extend the principles of Section 250 to acquittal by the higher Courts in appeal or revision, such acquittal may very often be on the ground that the accusation is not proved or on some other ground, and not necessarily on a finding 'that there was no reasonable ground for making the accusation' as envisaged in Section 250.

4. As pointed out by the Supreme Court in Hussainara Khatoon : 1979 CriLJ1036 , it is a crying shame, a sad reflection on our legal and Judicial system and our Institution that a criminal appeal or revision takes about seven years for disposal, when delay of even one year is bad enough. As pointed out therein further, and also in a series of later decisions, there can be no doubt that speedy, i.e. reasonably expeditious trial, and here trial would obviously mean the continuance of a criminal prosecution in all the stages, before the first as well as all successive higher Courts, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21 of the Constitution. Have we not in this case, by taking about seven years to hear and dispose of this Criminal Revision. For no

fault of the accused, or even the prosecution, denied the accused this fundamental right?

5. In Rudul Sah : 1983 CriLJ1644 , the Supreme Court came down with heavy hands and mulct the State in payment of compensation for detaining the petitioner illegally in the prison for a long number of years even after he was acquitted after a full-dressed trial. We could not do so in this case, even if we allowed the revision, as the delay has not been occasioned by the Executive Government, but is solely due to our unreasonable and unjustifiable inaction. True, so long the majority decision of the nine-Judge Bench of the Supreme Court in Naresh Sridhar Mirzakar 0044/1966 : [1966]3SCR744 would stand, the Judiciary may not be regarded to be a 'State' within the meaning of Article 12 in Part III of the Constitution. But notwithstanding this decision, can we escape condemnation if it is found that, though this Court takes pride in its role as the protector of the Fundamental Rights it can afford to deny the same with impunity and affect an accused's fundamental right to reasonably expeditious trial guaranteed under Article 21, by sheer inaction and unjustifiable inadvertence. I would accordingly direct that a copy of our judgments be placed before the Hon'ble Chief Justice for such steps as his Lordship would deem fit to take to ensure such gross dereliction of our solemn duty would not occur or recur in future.

**A.K. Nandi, J.**

6. This revision has been preferred by a convict who has unfortunately served out sentence about more than 3 years back. We are left with a duty to decide his revisional application, the benefit of which he cannot possibly reap even if our finding goes to his favour. This is an example of exemplary delay in disposal of a Criminal Case while the convict is languishing in jail in expectation of a verdict from the Court.

7. The accused was charged under Sections 25 and 27 of the Arms Act and under Sections 395, 397 and 412 I. P. C. He has been found not guilty to the charges under the Arms Act. But both the Courts below have found him guilty under Sections 395, 397 and 412 of the Penal Code. He has been sentenced to suffer

R.I. for 7 years for the offence under Sections 395 and 397 I.P.C. and further R. I. for 2 years and to a fine of Rs. 500/ - in default R.I. for 6 months for the offence Under Section 412 IPC The sentences were ordered to run concurrently.

8. The Courts found the direct participation of the accused in dacoity. The accused has been indentified by the eye-witnesses to the occurence. It has further been found that the accused was in possession of a weapon. On these findings the Courts below convicted the accused under Sections 395 & 397 I.P.C. There is no evidence against this accused that he used the weapon in his possession either by way of brandishing the same or causing any hurt to any of the inmates of the house.

9. The relevant part of Section 397 reads as follows:--

'if, at the time of committing robbery or dacoity, the offender uses any deadly weapon'. In interpreting the word 'Uses' different High Courts expressed divergent opinions. It was held by some that the mere fact of possession of a deadly weapon was sufficient to attract the penal provision of Section 397 I.P.C. The other view was that the weapon must have been used either by way of brandishing, overawing or causing hurt. Maxwell in his 'Interpretation of Statutes' has observed that if a man walks with a gun with intent to kill game, he uses the gun for the purpose without firing. The Supreme Court in Phool Kumar v. Delhi Administration : [1975]3SCR917 , quite in consonance with Maxwell, held that if an accused at the time of committing robbery carries in his hand a knife open to the view of the victims, it is sufficient to frighten or terrorise them and he can be convicted Under Section 307, Penal Code. Any other overt act such as brandishing of the knife or causing a grievous hurt with it is not necessary to bring the offender within the ambit of Section 397. This decision sets the controversy of the different High Courts at rest. Confusion possibly arose on account of user of two different expressions viz. 'Uses any deadly weapon' in Section 397 and 'is armed with any deadly weapon' in Section 398 Penal Code. Identical languages not having been used, some Courts found that possession simpliciter is not sufficient to bring the case within expression of 'Uses' as used in Section 397. In Phool Kumar's case (supra) the Supreme Court further held that different words used by legislature in

two different sections, viz. 'Uses' in 397 and 'is armed' in Section 398 bear identical meaning. The Supreme Court has found justification for the -user of two different expressions in two different sections by the legislature.

10. In the instant case, the evidence against the accused is that he was in possession of a deadly weapon, viz. a pipe gun and a sword. Therefore, the Courts below was justified in convicting the accused Under Section 397 I.P.C. despite the fact that the accused did not actively operate the weapon.

11. The conviction Under Section 395 I.P.C. is warranted by the identification evidence of different eye-witnesses. We find no scope to disturb that finding also.

12. In awarding conviction Under Section 412, I.P.C. the Courts found that the accused was apprehended at Gurup Railway Station and, on search of his person some articles of booty were recovered. In our opinion, simultaneous conviction under Sections 395 and 412 of the I.P.C. is unwarranted in the facts of the case. While the accused is convicted of having committed dacoity he cannot be further convicted Under Section 412, I.P.C. for having in his possession a part of the booty received by means of dacoity. We do not propose to lay down a blanket proposition that in no circumstances an accused can be convicted both Under Sections 395, I.P.C. and 412, I.P.C. The act of reception or retention of the booty of the dacoity must be an act independent of the act of dacoity in order to convict under both the Sections. We may say that a similar view has been correctly taken by a single Judge in Narendra Kumar v. State : AIR1956 All336 . It has held that where an accused is convicted Under Section 395, I.P.C. for committing a dacoity and it is in the course of that dacoity that the property which is found in his possession came to him, he cannot be held guilty both Under Sections 395 and 412, I.P.C. Ours is a similar case. The convict has been found guilty Under Section 395, I.P.C. But as he was found in possession of the booty at Gurup Railway Station, he has further been convicted Under Section 412, I.P.C. In our opinion, this is impermissible in law. A Division Bench of our High Court in Abdul Jabbar v. Emperor : AIR1944 Cal39 also held that it is quite meaningless to convict the accused both Under Sections 395 and 412, Penal Code. We, therefore, hold that the accused cannot be found guilty Under Section 412, I.P.C.

In that view of the matter we set aside the conviction and the sentence Under Section 412, I.P.C. If the fine of Rs. 500/- on account of this offence has been realised from the convict, the same must be refunded to him. The revisional application is thus allowed only to this extent, but fails otherwise.

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