DILAWAR SINGH A

v.

STATE OF DELHI

SEPTEMBER 5, 2007

[DR. ARIJIT PASAYAT AND D.K. JAIN, JJ.] B

Penal Code, 1860: s.397—Offence under—Injury not inflicted by accused—Hence, offence under s.397 not established.

Criminal trial: Delay in lodging FIR—Effect—Held: Fatal to prosecution C *case if not satisfactorily explained.*

Code of Criminal Procedure, 1973 : s.210—Object of—Discussed.

Prosecution case was that on 8.8.1984 at 9.30 P.M. the appellant, R and D **3 persons who were Sikhs entered into the temple where complainant-PW-1 pujari of the temple was doing meditation. They tied PW-1 with a rope and ran away containing the donation box with cash of about Rs.5000/-. Appellant was carrying a knife, R was having a lathi and one of the other 3 was having a revolver. PW-1 cried for held whereafter two local person came to the temple and saw 5 persons running. Both of them identified appellant and R. On** E **9.8.1984, PW-1 made a written complaint to the Prime Minister, police official but to no avail. Thereafter, the complaint was filed on 31.8.1984. Trial Court convicted appellant under ss.452, 392, 397 IPC. The appeal before the High Court was dismissed on the ground that PW-1's evidence was clear and cogent.**

In appeal to this Court, appellant contended that the alleged incident F **took place on 8.8.1984 and the complaint was lodged on 31.8.1984; that except a bare statement that representations were made to various persons, no material in that regard was adduced. Further, the modalities to be adopted when the police does not register the FIR are indicated in s.154 (3) Cr.P.C. Admittedly, that has not been done. In any event, the ingredients of s.397 IPC** G **have not been established.**

Allowing the appeal, the Court

HELD: 1.1. The evidence of PW1 is the only material on which the

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A conviction has been recorded. In court, his statement was that accused appellant and 'R' were holding knives and other Sikh accused were holding lathi. But in the complaint it was stated that 'R' was carrying a lathi and one of the accused Sikh was holding a revolver. It was accepted that no injury was inflicted on the complainant by any of the accused.

[Para 6] [699-G, H; 700-A]

B

2.1. In criminal trial, the Court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the C unsoiled and untarnished version of the case to be presented before the Court at the earliest instance. That is why if there is delay in either coming before the police or before the Court, the Courts always view the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case.

[Para 8] [700-C]

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Thulia Kali v. *The State of Tamil Nadu,* AIR (1973) SC 501 and *Ram Jag and Ors.* v. *The State of U.P.,* AIR (1974) SC 606, relied on.

2.2. The complainant has attempted to explain the delay by stating that the matter was reported to the police but the police did not take any action. E Such statement can hardly be taken to have explained the delay. It is the simplest of things to contend that the police, though report had been lodged with it, had not taken any steps. But it has to be established by calling for the necessary records from the police to substantiate that in fact a report with the police had been lodged and that the police failed to take up the case. The F principle has been statutorily recognised in s.210 Cr.P.C. which enjoins upon the Magistrate, when it is made to appear before him either during the inquiry or the trial of a complaint, that a complaint before the police is pending investigation in the same matter, he is to stop the proceeding in the complaint case and is to call for a report from the police. After the report is received from the police, he is to take up the matter together and if cognizance has G been taken on the police report, he is to try the complaint case along with the G.R. Case as if both the cases are instituted upon police report. The aim of the provision is to safeguard the interest of the accused from unnecessary harassment. The provisions of s.210 Cr.P.C, are mandatory in nature. It may be true that non-compliance of the provisions of s.210, Cr.P.C., is not *ipso facto* fatal to the prosecution because of the provision of s.465 Cr.P.C., unless H error, omission or irregularity has also caused the failure of justice and in

determining the fact whether there is a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. But even applying the very same principles it is seen that in fact the appellant was in fact prejudiced because of the non-production of the records from the police. A

[Para 9] [700-A, H; 701-A, B, C] B

Khedu Mohton and Ors. v. *State of Bihar,* AIR (1971) SC 66 ; *Suresh Chand Jain* v. *State of M.P. and Anr.,* [2001] 2 SCC 628; *Gopal Das Sindhi and Ors.* v. *State of Assam and Anr.,* AIR (1961) SC 986; *Narayandas Bhagwandas Madhavdas* v. *The State of West Bengal,* AIR (1959) SC 1118 and *Mohd. Yousuf* v. *Afaq Jahan (Smt.) and Anr.,* [2006] 1 SCC 627, relied on. C

2.1. The essential ingredients of s.397 IPC are as follows: (1) Accused committed robbery. (2) While committing robbery or dacoity (i) accused used deadly weapon (ii) to cause grievous hurt to any person (iii) attempted to cause death or grievous hurt to any person. (3) "Offender" refers to only culprit who actually used deadly weapon. When only one has used the deadly weapon, others cannot be awarded the minimum punishment. It only envisages the individual liability and not any constructive liability. S.397 IPC is attracted only against the particular accused who uses the deadly weapon or does any of the acts mentioned in the provision. Other accused are not vicariously liable under that Section for acts of co-accused. There is distinction between 'uses' as used in ss. 397 IPC and 398 IPC. S. 397 IPC connotes something more than merely being armed with deadly weapon. D E

[Paras 22 and 23] [709-F, G, H; 710-A, B]

Phool Kumar v. *Delhi Administration,* AIR (1975) SC 905, relied on.

2.2. In the instant case admittedly no injury has been inflicted. The use of weapon by offender for creating terror in mind of victim is sufficient. It need not be further shown to have been actually used for cutting, stabbing or shooting, as the case may be. Therefore, the offence under s. 397 IPC has clearly not been established. In addition, the ingredients necessary for offence punishable under ss. 392 and 452 have not been established in view of the highly inconsistent version of the complainant PW-1. F G

[Para 24 and 25] [710-C, D]

Ashfaq v. *State (Govt. of NCT of Delhi),* AIR (2004) SC 1253, relied on.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 491 of 2002. H

A From the final Judgment and Order dated 04.10.2001 of the High Court of Delhi at New Delhi in Criminal Appeal No. 186 of 1996.

Rajeev Sharma and Naresh Kumar for the Appellant.

Nagendra Rai, M. Yunus Malik, Ashok Bhan and D.S. Mahra for the B Respondent.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Challenge in this appeal is to the judgment of the learned Single Judge, Delhi High Court, dismissing the appeal filed by C the appellant and affirming his conviction for offences punishable under Sections 452, 392 and 397 of the Indian Penal Code, 1860 (in short the 'IPC') and sentencing him to undergo one year, two years and seven years rigorous imprisonment respectively with fine in each case with default stipulation. The sentences were directed to run concurrently.

D 2. Prosecution version in a nutshell is as follows:

Complaint was filed by Balwant Singh (hereinafter referred to as the Complainant-PW1) alleging as follows:

On 8.8.1984 he was sitting at Kali Mata Ka Mandir, Udaseen Ashram E at Village Taharpur, Shahdara, Delhi. He acts as a priest in the temple. Donations were collected from various persons to build the temple and he was maintaining the temple. He was residing at the temple and performing regular puja. On 8.8.1984 at about 9.30 p.m., after performing evening puja and aarti and after having dinner he was doing meditation when five persons including two F accused persons namely the present appellant and one Ram Saran and three persons who were Sikhs and whose names he did not know but could identify them, entered into the temple, tied him with a rope and ran away with the donation box with cash of about Rs.5,000/-. Appellant was carrying a knife, Ram Saran was having a lathi and one of the three others who was a Sikh was having a revolver. After some time two local persons namely Kanwar G Singh and Dr. Salekh Chand came to the temple and they also saw five persons running towards Gagan Cinema. Both of them identified the appellant and Ram Saran; they untied the rope and cried for help. After hearing their cry several local residents gathered at the temple and the complainant narrated the whole incident to them. Complainant along with Kanwar Singh and Dr. Salekh Chand and others went to lodge report at the police station, Seema H

Puri. But the duty officer did not listen to him and the local residents and directed them to go away. On 9.8.1984 complainant made a written complaint to the Prime Minister, police officials but to no avail. Therefore, the complaint was filed on 31.8.1984. After going through the evidence, the learned Magistrate came to the conclusion that there was material to proceed against the appellant, Ram Saran and the three others. He committed the case in the Court of Sessions as offence relatable to Section 395 IPC is exclusively triable by that Court. Accused Dilawar Singh pleaded innocence. Ram Saran died during the proceedings and the charges against him were dropped. Except PW-1, no other witness was examined. It was stated by the prosecution that Dr. Salesh Chand, Kanwar Singh and others could not be traced despite the liberty granted to the prosecution. The trial court found that the delay in making a grievance has been explained and complainant's version was acceptable.

3. The appeal before the High Court was dismissed by the impugned judgment on the ground that PW1's evidence was clear and cogent.

4. In support of the appeal learned counsel for the appellant submitted that the alleged incident took place on 8.8.1984 and the complaint was lodged on 31.8.1984. Except a bare statement to the effect that representations were made to various persons but no material in that regard was adduced. Further, the modalities to be adopted when the police does not register the FIR are indicated in Section 154 (3) of the Code of Criminal Procedure, 1973 (in short the 'Cr.P.C.'). Admittedly, that has not been done. It has also not been explained as to how and why the Prime Minister of the country was moved. Even no material has been adduced to show that any such complaint was made either to the Prime Minister or the Police Official claimed. In any event, no advocate was engaged for the accused who did not have the means to engage a lawyer and therefore the mandate of Section 304 Cr.P.C. has been clearly violated. In any event, the ingredients of Section 397 IPC have not been established.

5. Learned counsel for the respondent on the other hand submitted that mere delay in lodging the complaint does not in any way affect the credibility of PW1's version.

6. The evidence of PW1 is the only material on which the conviction has been recorded. In court his statement was that accused appellant and Ram Saran were holding knives and other Sikh accused were holding lathi. But in the complaint it was stated that Ram Saran was carrying a lathi and one of the accused Sikh was holding a revolver. It was accepted that no injury

A was inflicted on the complainant by any of the accused.

7. The effect of not adducing material to show that in fact the grievance was made before the police and the FIR was not recorded has been considered by this court in several cases. Section 304 Cr.P.C. mandates that when the accused is not represented, the Court has to appoint a counsel so that the B accused does not go undefended.

8. In criminal trial one of the cardinal principles for the Court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the C chance of the unsoiled and untarnished version of the case to be presented before the Court at the earliest instance. That is why if there is delay in either coming before the police or before the Court, the Courts always view the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case. D In *Thulia Kali* v. *The State of Tamil Nadu,* AIR (1973) SC 501, it was held that the delay in lodging the first information report quite often results in embellishment as a result of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, but also danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. In *Ram Jag and Ors.* v. *The* E *State of U.P.,* AIR (1974) SC 606 the position was explained that whether the delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case must depend upon a variety of factors which would vary from case to case. Even a long delay can be condoned if the witnesses have no motive for implicating the accused and/or when plausible explanation is F offered for the same. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness or authenticity of the version of the prosecution.

9. The complainant has attempted to explain the delay by stating that the matter was reported to the police but the police did not take any action. G Such statement can hardly be taken to have explained the delay. It is the simplest of things to contend that the police, though report had been lodged with it, had not taken any steps. But it has to be established by calling for the necessary records from the police to substantiate that in fact a report with the police had been lodged and that the police failed to take up the case. The principle has been statutorily recognised in Section 210 of the Cr.P.C. which H

enjoins upon the Magistrate, when it is made to appear before him either during the inquiry or the trial of a complaint, that a complaint before the police is pending investigation in the same matter, he is to stop the proceeding in the complaint case and is to call for a report from the police. After the report is received from the police, he is to take up the matter together and if cognizance has been taken on the police report, he is to try the complaint case along with the G.R. Case as if both the cases are instituted upon police report. The aim of the provision is to safeguard the interest of the accused from unnecessary harassment. The provisions of Section 210, Cr.P.C, are mandatory in nature. It may be true that non-compliance of the provisions of Section 210, Cr.P.C., is not *ipso facto* fatal to the prosecution because of the provision of Section 465 Cr. P.C., unless error, omission or irregularity has also caused the failure of justice and in determining the fact whether there is a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. But even applying the very same principles it is seen that in fact the appellant was in fact prejudiced because of the non-production of the records from the police. Delay in filing the complaint because of police inaction has to be explained by calling for the records from the police was explained by this Court in *Khedu Mohton and Ors.* v. *State of Bihar,* AIR (1971) SC 66. Where the Court took exception to the fact that the complaint lodged with the police had not been summoned or proved, no satisfactory proof of any such complaint had been adduced before the Court, and none of the documents as would have become available under Sec. 173, Cr. P.C., had also been brought on record.

10. When information is given at the police station, normally two courses are open. A station diary entry can be made or the FIR registered. In case there is any deviation, recourse to Section 154(3) has to be made. If that does not yield any result a complaint can be filed.

11. Section 156 reads as follows:

"156. Police officer's power to investigate cognizable cases. - (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

A (3) Any Magistrate empowered under Section 190 may order such an investigation as above mentioned."

12. Section 156 falling within Chapter XII, deals with powers of police officers to investigate cognizable offences. Investigation envisaged in Section 202 contained in Chapter XV is different from the investigation contemplated B under Section 156 of the Cr.P.C..

13. Chapter XII of the Cr.P.C. contains provisions relating to "information to the police and their powers to investigate", whereas Chapter XV, which contains Section 202, deals with provisions relating to the steps which a Magistrate has to adopt while and after taking cognizance of any offence on C a complaint. Provisions of the above two chapters deal with two different facets altogether, though there could be a common factor i.e. complaint filed by a person. Section 156, falling within Chapter XII deals with powers of the police officers to investigate cognizable offences. True, Section 202, which falls under Chapter XV, also refers to the power of a Magistrate to "direct an D investigation by a police officer". But the investigation envisaged in Section 202 is different from the investigation contemplated in Section 156 of the Cr.P.C..

14. The various steps to be adopted for investigation under Section 156 of the Cr.P.C. have been elaborated in Chapter XII of the Cr.P.C.. Such E investigation would start with making the entry in a book to be kept by the officer in charge of a police station, of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end up only with the report filed by the police as indicated in Section 173 of the Cr.P.C. The investigation contemplated in that chapter can be commenced by the police even without the order of a Magistrate. But that F does not mean that when a Magistrate orders an investigation under Section 156(3) it would be a different kind of investigation. Such investigation must also end up only with the report contemplated in Section 173 of the Cr.P.C. But the significant point to be noticed is, when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance of the G offence.

15. But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Cr.P.C. A reading of Section 202(1) of the Cr.P.C. makes the position clear that the H investigation referred to therein is of a limited nature. The Magistrate can

direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202(1) i.e.

> "or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding".

16. This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.

17. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of Cr.P.C. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all, registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of Cr.P.C. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Cr.P.C. that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Cr.P.C. only thereafter.

18. The above position was highlighted in *Suresh Chand Jain* v. *State of M.P. and Anr.*, [2001] 2 SCC 628.

19. In *Gopal Das Sindhi and Ors.* v. *State of Assam and Anr.*, AIR (1961) SC 986 it was observed as follows:

> "When the complaint was received by Mr. Thomas on August 3, 1957, his order, which we have already quoted, clearly indicates that he did not take cognizance of the offences mentioned in the complaint but had sent the complaint under Section 156(3) of the Cr.P.C. to the Officer Incharge of Police Station Gauhati for investigation. Section 156(3) states "Any Magistrate empowered under section 190 may

A order such investigation as above-mentioned". Mr. Thomas was certainly a Magistrate empowered to take cognizance under Section 190 and he was empowered to take cognizance of an offence upon receiving a complaint. He, however, decided not to take cognizance but to send the complaint to the police for investigation as Sections 147, 342 and 448 were cognizable offences. It was, however, urged that
B once a complaint was filed the Magistrate was bound to take cognizance and proceed under Chapter XVI of the Cr.P.C. It is clear, however, that Chapter XVI would come into play only if the Magistrate had taken cognizance of an offence on the complaint filed before him, because Section 200 states that a Magistrate taking cognizance of an offence
C on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate. If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses
D present at the time of the filing of the complaint. We cannot read the provisions of Section 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word 'may' in Section 190 to mean 'must'. The reason is
E obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under Section 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with the police. On the other hand, there may be occasions when the Magistrate may exercise his
F discretion and take cognizance of a cognizable offence. If he does so then he would have to proceed in the manner provided by Chapter XVI of the Cr.P.C. Numerous cases were cited before us in support of the submissions made on behalf of the appellants. Certain submissions were also made as to what is meant by "taking cognizance." It is
G unnecessary to refer to the cases cited. The following observations of Mr. Justice Das Gupta in the case of *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Abani Kumar Banerjee,* AIR (1950) Cal 437

> "What is taking cognizance has not been defined in the Criminal
H Procedure Code and I have no desire to attempt to define it. It

seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence under Section 190(1)(a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter- proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence".

were approved by this Court in *R.R. Chari* v. *State of Uttar Pradesh,* [1951] SCR 312. It would be clear from the observations of Mr. Justice Das Gupta that when a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chapter XVI but for taking action of some other kind, e.g., ordering investigation under Section 156(3) or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of any offence. The observations of Mr. Justice Das Gupta above referred to were also approved by this Court in the case of *Narayandas Bhagwandas Madhavdas* v. *State of West Bengal,* AIR (1959) SC 1118. It will be clear, therefore, that in the present case neither the Additional District Magistrate nor Mr. Thomas applied his mind to the complaint filed on August 3, 1957, with a view to taking cognizance of an offence. The Additional District Magistrate passed on the complaint to Mr. Thomas to deal with it. Mr. Thomas seeing that cognizable offences were mentioned in the complaint did not apply his mind to it with a view to taking cognizance of any offence; on the contrary in his opinion it was a matter to be investigated by the police under Section 156(3) of the Cr.P.C.. The action of Mr. Thomas comes within the observations of Mr. Justice Das Gupta. In these circumstances, we do not think that the first contention on behalf of the appellants has any substance."

20. In *Narayandas Bhagwandas Madhavdas* v. *The State of West Bengal,* AIR (1959) SC 1118 it was observed as under:

"On 19.9.1952, the appellant appeared before the Additional District

A Magistrate who recorded the following order:-

> "He is to give bail of Rs.50,000 with ten sureties of Rs. 5,000 each. Seen Police report. Time allowed till 19th November, 1952, for completing investigation."

B On 19.11.952, on perusal of the police report the Magistrate allowed further time for investigation until January 2, 1953, and on that date time was further extended to February 2, 1953. In the meantime, on January 27, 1953, Inspector Mitra had been authorized under s.23(3)(b) of the Foreign Exchange Regulation Act to file a complaint. Accordingly, a complaint was filed on February 2, 1953. The Additional C District Magistrate thereon recorded the following order:

> "Seen the complaint filed to day against the accused Narayandas Bhagwandas Madhavdas under section 8(2) of the Foreign Exchange Regulation Act read with section 23B thereof read with Section 19 of the Sea Customs Act and Notification No. F.E.R.A. D 105/51 dated the 27th February, 1951, as amended, issued by the Reserve Bank of India under Section 8(2) of the Foreign Exchange Regulation Act. Seen the letter of authority. To Sri M. H. Sinha, S. D.M. (Sadar), Magistrate 1st class (spl. empowered) for favour of disposal according to law. Accused to appear before him."

E Accordingly, on the same date Mr. Sinha then recorded the following order:-

> "Accused present. Petition filed for reduction of bail. Considering all facts, bail granted for Rs.25,000 with 5 sureties.
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> To 26.3.1952 and 27.3.1952 for evidence."

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It is clear from these orders that on 19.91952, the Additional District Magistrate had not taken cognizance of the offence because he had allowed the police time till November 19, 1952, for completing the investigation. By his subsequent orders time for investigation was further extended until February 2, 1953. On what date the complaint G was filed and the order of the Additional District Magistrate clearly indicated that he took cognizance of the offence and sent the case for trial to Mr. Sinha. It would also appear from the order of Mr. Sinha that if the Additional District Magistrate did not take cognizance, he certainly did because he considered whether the bail should be reduced and H fixed the 26th and 27th of March, for evidence. It was, however,

argued that when Mitra applied for a search warrant on September, 16, 1952, the Additional District Magistrate had recorded an order thereon, "Permitted. Issue search warrant." It was on this date that the Additional District Magistrate took cognizance of the offence. We cannot agree with this submission because the petition of Inspector Mitra clearly states that "As this is non-cognizable offence, I pray that you will kindly permit me to investigate the case under section 155 Cr.P.C." That is to say, that the Additional District Magistrate was not being asked to take cognizance of the offence. He was merely requested to grant permission to the police officer to investigate a non-cognizable offence. The petition requesting the Additional District Magistrate to issue a warrant of arrest and his order directing the issue of such a warrant cannot also be regarded as orders which indicate that the Additional District Magistrate thereby took cognizance of the offence. It was clearly stated in the petition that for the purposes of investigation his presence was necessary. The step taken by Inspector Mitra was merely a step in the investigation of the case. He had not himself the power to make an arrest having regard to the provisions of s. 155(3) of the Code of Criminal Procedure. In order to facilitate his investigation it was necessary for him to arrest the appellant and that he could not do without a warrant of arrest from the Additional District Magistrate. As already stated, the order of the Additional District Magistrate of September 19, 1952, makes it quite clear that he was still regarding the matter as one under investigation. It could not be said with any good reason that the Additional District Magistrate had either on September 16, or at any subsequent date upto February 2, 1953, applied his mind to the case with a view to issuing a process against the appellant. The appellant had appeared before the Magistrate on February 2, 1953, and the question of issuing summons to him did not arise. The Additional District Magistrate, however, must be regarded as having taken cognizance on this date because he sent the case to Mr. Sinha for trial. There was no legal bar to the Additional District Magistrate taking cognizance of the offence on February 2, 1953, as on that date Inspector Mitra's complaint was one which he was authorized to make by the Reserve Bank under s. 23(3)(b) of the Foreign Exchange Regulation Act. It is thus clear to us that on a proper reading of the various orders made by the Additional District Magistrate no cognizance of the offence was taken until February 2, 1953. The argument that he took cognizance of the offence on September 16, 1952, is without foundation. The orders passed by the Additional

A District Magistrate on September 16, 1952, September 19, 1952, November 19, 1952, and January 2, 1953, were orders passed while the investigation by the police into a non-cognizable offence was in progress. If at the end of the investigation no complaint had been filed against the appellant the police could have under the provisions of s. 169 of the Cr.P.C. released him on his executing a bond with or B without sureties to appear if and when so requ..ed before the Additional District Magistrate empowered to take cognizance of the offence on a police report and to try the accused or commit him for trial. The Magistrate would not be required to pass any further orders in the matter. If, on the other hand, after completing the investigation a C complaint was filed, as in this case, it would be the duty of the Additional District Magistrate then to enquire whether the complaint had been filed with the requisite authority of the Reserve Bank as required by s. 23(3)(b) of the Foreign Exchange Regulation Act. It is only at this stage that the Additional District Magistrate would be called upon to make up his mind whether he would take cognizance D of the offence. If the complaint was filed with the authority of the Reserve Bank, as aforesaid, there would be no legal bar to the Magistrate taking cognizance. On the other hand, if there was no proper authorization to file the complaint as required by s. 23 the Magistrate concerned would be prohibited from taking cognizance. In E the present case, as the requisite authority had been granted by the Reserve Bank on January 27, 1953, to file a complaint, the complaint filed on February 2, was one which complied with the provisions of s. 23 of the Foreign Exchange Regulation Act and the Additional District Magistrate could take cognizance of the offence which, indeed, he did on that date. The following observation by Das Gupta, J., in F the case of Superintendent and Remembrancer of Legal Affairs, *West Bengal* v. *Abani Kumar Banerji,* A.I.R. (1950) Cal. 437] was approved by this Court in the case of *R. R. Chari* v. *The State of Uttar Pradesh,* [1951] S.C.R. 312]:-

> "What is taking cognizance has not been defined in the Criminal G Procedure Code. and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence under section 190(1)(a) Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but must have done so H for the purpose of proceeding in a particular way as indicated in

the subsequent provisions of this Chapter - proceeding under section 200 and thereafter sending it for inquiry and report under section 202. When the magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

It is, however, argued that in Chari's case this Court was dealing with a matter which came under the Prevention of Corruption Act. It seems to us, however, that that makes no difference. It is the principle which was enunciated by Das Gupta, J., which was approved. As to when cognizance is taken of an offence will depend upon the facts and circumstances of each case and it is impossible to attempt to define what is meant by taking cognizance. Issuing of a search warrant for the purpose of an investigation or of a warrant of arrest for that purpose cannot by themselves be regarded as acts by which cognizance was taken of an offence. Obviously, it is only when a Magistrate applies his mind for the purpose of proceeding under s. 200 and subsequent sections of Chapter XVI of the Code of Criminal Procedure or under s. 204 of Chapter XVII of the Code that it can be positively stated that he had applied his mind and therefore had taken cognizance."

21. These aspects were highlighted in *Mohd. Yousuf* v. *Afaq Jahan (Smt.) and Anr.*, [2006] 1 SCC 627.

22. The essential ingredients of Section 397 IPC are as follows:

1. Accused committed robbery.

2. While committing robbery or dacoity (i) accused used deadly weapon (ii) to cause grievous hurt to any person (iii) attempted to cause death or grievous hurt to any person.

3. "Offender" refers to only culprit who actually used deadly weapon. When only one has used the deadly weapon, others cannot be awarded the minimum punishment. It only envisages the individual liability and not any constructive liability. Section 397 IPC is attracted only against the particular accused who uses the deadly weapon or does any of the acts mentioned in the provision. But

A other accused are not vicariously liable under that Section for acts of co-accused.

23. As noted by this court in *Phool Kumar* v. *Delhi Administration,* AIR (1975) SC 905, the term "offender" under Section 397 IPC is confined to the offender who uses any deadly weapon. Use of deadly weapon by one B offender at the time of committing robbery cannot attract Section 397 IPC for the imposition of minimum punishment on another offender who had not used any deadly weapon. There is distinction between 'uses' as used in Sections 397 IPC and 398 IPC. Section 397 IPC connotes something more than merely being armed with deadly weapon.

C 24. In the instant case admittedly no injury has been inflicted. The use of weapon by offender for creating terror in mind of victim is sufficient. It need not be further shown to have been actually used for cutting, stabbing or shooting, as the case may be. (See: *Ashfaq* v. *State (Govt. of NCT of Delhi),* AIR (2004) SC 1253).

D 25. Therefore, the offence under Section 397 IPC has clearly not been established. In addition, the ingredients necessary for offence punishable under Sections 392 and 452 have not been established in view of the highly inconsistent version of the complainant PW 1.

E 26. The conviction needs to be set aside and the appeal deserves to be allowed, which we direct. It would be appropriate to note that courts while dealing with accused persons during trial, when they are not represented by counsel, to keep in view the mandate of Section 304 Cr. PC.

27. Appeal is allowed.

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D.G. Appeal allowed.