A AMIN KHAN

v.

STATE OF RAJASTHAN AND ORS.

(Criminal Appeal No. 385 of 2009)

FEBRUARY 25, 2009

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[DR. ARIJIT PASAYAT AND ASOK KUMAR GANGULY, JJ.]

Code of Criminal Procedure, 1973 – s. 390 – Accused C *persons assaulted one person, shot dead another and fled away with booty of Rs.1.61 lakhs – Trial under s.396 IPC and ss.3 and 35 of the Arms Act – Acquittal by trial Court – High Court, on an application by State, commiting the accused-appellants to prison after summoning them through non-* D *bailable warrants – Justification of – Held: Justified, as prima facie the evidence regarding identification made in Court and DNA test was not considered in the proper perspective by the trial Court – Under s.390, High Court has power to re-arrest the accused pending disposal of appeal against his acquittal* E *– Penal Code, 1860 – s.396 – Arms Act, 1959 – ss. 3, 35.*

According to the prosecution, the six accused persons assaulted a person and fled away with a booty of Rs.1.61 lakhs and in the process murdered the owner of a petrol pump by firing a shot at him from a 0.12 bore F **gun. The accused faced trial under s.396 IPC and ss.3 and 35 of the Arms Act, 1959, but were acquitted by the trial Court. The State filed application to commit the accused persons to prison after summoning them through non-bailable warrants. The application was allowed by the** G **High Court in respect of the two accused-appellants. Hence the present appeal.**

Dismissing the appeal, the Court

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HELD: 1. Section 390 Cr.P.C. corresponds to Section 427 of the repealed Code. In the present section the word and figure "Section 378" are substituted for the words and figures "Section 411-A sub section (2) of Section 417" in the old Section. Except for this change, no other changes are made. Under this section the High Court has the power to re-arrest the accused pending the disposal of an appeal against his acquittal. [Para 12] [354-C-D]

2. In the present case, the High Court found that prima facie the evidence regarding identification made in court and DNA test was not considered in the proper perspective by the trial Court. It was noted that the DNA report of the hair allegedly seized from the hands of the deceased prima facie established that it was of the accused-appellants who remained throughout the trial in custody. That being so, there is no infirmity in the impugned judgment of the High Court to warrant interference. [Para 13] [354-E-F]

Case Law Reference:

AIR 1957 SC 366	Relied on.	Para 4
AIR 1956 SC 460	Relied on.	Para 4
1972 (3) SCC 751	Relied on.	Para 4
AIR 1965 SC 277	Relied on.	Para 4
AIR 1954 SC 15	Relied on.	Para 4
1975 (4) SCC 511	Relied on.	Para 4
1981 (2) SCC 752	Relied on.	Para 4
2002 (6) SCC 81	Relied on.	Para 4
2003 (7) SCC 643	Relied on.	Para 4
2004 (4) SCC 158	Relied on.	Para 4

A	**2004(10) SCC 443**	**Relied on.**	**Para 4**
	2003 (12) SCC 449	**Relied on.**	**Para 4**
	2004 (10) SCC 120	**Relied on.**	**Para 4**
B	**2006 (10) SCC 601**	**Relied on.**	**Para 4**
	AIR 1974 SC 2165	**Relied on.**	**Para 6**
	AIR 1976 SC 557	**Relied on.**	**Para 6**

C CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 385 of 2009.

From the Judgment & Order dated 12.09.06 of the High Court of Judicature for Rajasthan at Jaipur in D.B. Criminal Revision No. 561/2006.

D Dr. Sushil Balwada for the Appellants.

S.R. Bajwa, Jatinder Kumar Bhatia, P.C. Jain, Puneet Jain, Pratibha Jain and Sushil Kr. Jain for the Respondent.

E The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of the Rajasthan High Court, Jaipur Bench. Six persons F faced trial for alleged commission of offences punishable under Section 396 of the Indian Penal Code, 1860 (in short the 'IPC') and Sections 3 and 35 of the Arms Act, 1959 (in short the 'Arms Act'). The learned Sessions Judge, Alwar, acquitted the accused persons of all the charges. Being aggrieved by G the finding of learned Sessions Judge the State filed an application seeking leave to appeal under Section 378 (3) of the Code of Criminal Procedure, 1973 (in short the 'Code'). On 26.5.2006 the High Court granted leave and summoned the respondents through bailable warrants. On 14.8.2006 the H State filed an application in terms of Section 390 read with

Section 482 of Code for revoking the earlier order and to commit the accused persons to prison after summoning them through non bailable warrants. A similar prayer was also made in the Revision Petition filed by widow of the deceased.

The prayers were accepted by the impugned orders.

The High Court noted that in the Test Identification Parade (in short the 'TI Parade') held on 20th and 22nd March, 2005 Banwari Lal (PW-18) had correctly identified the accused persons. He also identified the accused persons in the trial Court. The foot prints of the respondents left at the spot were taken on 23.3.2005 before the learned Additional District Magistrate, Alwar and as per the Forensic Science Laboratory report foot moulds were found to be that of the accused persons. The investigating agency also seized hair from the hands of the deceased and as per DNA report, the seized hair tallied with the hair of accused Mubin and Amin. As per the testimony of the Investigating Officer various criminal cases were pending against the accused persons.

Stand of the State as well as the petitioner in the revision petition was that the acquittal of the respondents was based on mere presumptions without considering the evidence on record and, therefore, it was liable to be set aside.

3. Learned counsel for the accused contended that the presumption as to the innocence of the accused stands fortified by their acquittal by the trial Court. It was urged that refusal of bail is never for the purpose of punishment. In view of the long period taken for disposal of appeals, it would be improper to send the accused to custody. The evidence of identification was also pointed out to be without foundation and therefore the trial Court rightly discarded it.

4. The High Court considering the rival stands passed the following order:

"On giving our thoughtful consideration to the nature of the

A accusation made against the accused respondents, the manner in which the crime is alleged to have been committed and the gravity of the offence we direct that warrant of arrest be issued against the accused respondents Mubin and Amin and they be produced B before the learned Sessions Judge, Alwar who shall commit them to prison pending the disposal of appeal. We however grant bail to accused respondents Taiyab, Ilias, Islam and Khursheed and direct on furnishing personal bond in the sum of Rs.50,000/- with one surety of the like C amount they be released on bail on the following conditions:-

(i) They will not commit any offence during the pendency of appeal.

D (ii) On the last day of each month they will appear before the SHO Police Station, MIA Alwar who shall refer their presence in the daily Rajnamcha.

5. The order is questioned by the accused persons. Two E Special Leave Petitions were filed. By order dated 21.11.2008 prayer was made for withdrawal of SLP (Crl.) No.432 of 2007. The same was dismissed as withdrawn.

6. So far as the present appeal is concerned it is submitted that the true scope and ambit of Section 390 of F Code has not been kept in view.

7. Learned counsel for the respondents on the other hand supported the judgment.

8. Section 390 of Code reads as follows:

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"Arrest of accused in appeal from acquittal- When an appeal in presented under Section 378, the High court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court H before which he is brought may commit him to prison

pending the disposal of the appeal or admit him to bail." A

9. To prove allegations of dacoity under Section 396 IPC against accused persons, the prosecution has to prove that the accused persons were five or more than five in number. On 12.3.2005 at about 08.00 P.M. in the night the accused persons assaulted the accountant Chhote Lal at Radha Kishan filling Station (Petrol Pump) and fled away jointly with the booty of Rs.1,61,800/-. B

10. In committing this plunder, one of the accused persons murdered Raj Kumar Goyal, the owner of Petrol Pump by firing a shot from the gun. C

11. It is the averment of respondents that by the eye evidence of the prosecution, it is proved that while committing dacoity, murder of Ramavtar Goel, was committed by firing a shot from a 12 bore gun by accused Mubin. D

12. It is also the averment of prosecution that the evidence also confirms commission of offence by accused persons. Foot prints and finger prints of accused persons have been taken from the spot. In this context, positive report has been received from FSL, Jaipur. Hair of accused persons left in the nails of hands of the deceased were tested with the blood sample of accused persons and positive report in relation to accused persons Mubin and Amin, was found on DNA test. Fire arms were discovered on the information of accused persons. On the information of accused Mubin one 12 bore one barrel country made gun was discovered, forensic report of cartridges obtained from the spot, and of the blood obtained from the body of the deceased, prove that this cartridge and pellets were fired from the gun of accused Mubin. It is the case of the prosecution that offence punishable under Section 396 IPC is proved beyond doubt. E F G

13. On behalf of prosecution, two eye witnesses of the happening Banwari Lal (PW 10) and Jaswant Singh (PW-19) H

A were produced.

14. In order to resolve the controversy poised for our consideration, it will be useful to have a look at Section 390 Cr.P.C. which provides thus:

B "When an appeal is presented under Section 379, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate court, and the court before which he is brought may commit him to prison pending the disposal of the appeal or admit him
C to bail."

12. Section 390 corresponds to Section 427 of the repealed Code. In the present section the word and figure "Section 378" are substituted for the words and figures "Section
D 411-A sub section (2) of Section 417" in the old Section. Except for this change, no other changes are made. Under this section the High Court has the power to re-arrest the accused pending the disposal of an appeal against his acquittal.

E 13. The High Court has found that prima facie the evidence regarding identification made in court and DNA test has not been considered in the proper perspective by the trial Court. It was noted that the DNA report of the hair allegedly seized from the hands of the deceased prima facie established that
F it was of the accused Mubin and Amin who remained throughout the trial in custody. That being so, we do not find any infirmity in the impugned judgment to warrant interference.

14. The appeal is dismissed.

G B.B.B. Appeal dismissed.