a remedy [*Cf. Sage* v. *Eicholz* (1) and section 477A of the Penal Code.]

In the result I am of opinion that this appeal should be dismissed.

Appeal No. 4 is governed by similar consideration and must also be dismissed.

SUHRAWARDY J. I agree.

B. M. S. *Appeals dismissed.*

(1) [1919] 2 K. B. 171.

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LEGAL REMEMBRANCER *v.* MANMATHA BHUSAN CHATTERJEE AND LEGAL REMEMBRANCER *v.* HRIDOY NARAIN.

ORIGINAL CRIMINAL.

Before Page J.

1923

Aug. 15.

EMPEROR

v.

ALI MIRZA.*

Dacoity—Offender armed with deadly weapon using the same or causing grievous hurt—Liability of the "offender" to minimum punishment—Penal Code (Act XLV of 1860), ss. 397 and 398.

Sections 397 and 398 of the Penal Code do not create any offence but regulate the measure of punishment when certain facts are found.

The words "*offender*" and "*such offender*" in these two sections refer only to the persons who are proved to have actually "used," or been "armed with," deadly weapons and not to the others who in combination with such persons have committed robbery or dacoity.

Section 34 of the Penal Code has no application in the construction of ss. 397 and 398, though it may be read with ss. 392 and 395 to determine the substantive offence which is created.

Queen-Empress v. *Senta* (1), *Emperor* v. *Nageshwar* (2) and *Arunachella Thevan* v. *Emperor* (3) followed.

* Fourth Original Criminal Sessions of the High Court.

(1) (1899) I. L. R. 28 All. 404, *note*. (2) (1906) I. L. R. 28 All. 404.
(3) (1911) 22 M. L. J. 186.

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Queen-Empress v. *Mahabir Tiwari* (1), *Chatar Singh* v. *Emperor of India* (2) and *Crown* v. *Mohna* (3) dissented from.

THE three accused, Ali Mirza, Mahomed Sadir and Nanda Kishore were tried at the Fourth Criminal Sessions of the High Court before Mr. Justice Page and a jury on charges under ss. $\frac{120\text{B}}{397}$, 397 and 398 of the Penal Code.

The facts of the case were as follows. On the 5th March 1923, at about 8 or 8-30 P.M., one Madan Gopal Bajpai, a collecting sircar of a Calcutta firm, was proceeding along Dharmahatta Street, with a weighman, named Hari Patra, who carried a bag containing Rs. 2,664, when they were attacked by a number of men. Hari Patra was stabbed, and the bag snatched away, after which the dacoits escaped with their plunder. On the 21st April one Nabi Buksh was arrested, and gave certain information, in consequence of which taxi car T4 was seized, and the driver Nanda Kishore arrested, and identified by Nabi Buksh on the 27th. On the 2nd May Ali Mirza, and on the 4th, Yusuf, Kedar Singh and Mahomed Sadir were arrested on the same identification. Two others, Sonaulla and Ram Protap Singh, named by Nabi Buksh, were found to be absconding. The police sent up the men so arrested to the Magistrate. Ultimately Nabi Buksh was made an approver, and the case against Yusuf and Kedar Singh was withdrawn, and the three above-named accused were committed to the High Court by the Magistrate.

The story deposed to by Nabi Buksh in the Magistrate's Court was that he with Yusuf, Ali Mirza, Sonaulla and Ram Protap went in the taxi car T4, driven by Nanda Kishore, to the back of the Mint

(1) (1899) I. L. R. 21 All. 263. (2) (1901) P. R. Cr. 39.
(3) (1901) P. R. Cr. 42.

where they were joined by Kedar Singh and Mahomed Sadir; that Yusuf was armed with a pistol, and Kedar and Mahomed with a knife each, while Sonaulla carried a pistol and knife, and Ram Protap a sword stick, but that Ali Mirza and Nanda Kishore were unarmed; that after the arrival of the party Ali Mirza got out of the taxi car, and went to the north of the Mint, and returned shortly after followed by Madan and Hari Patra; that when the latter came near the taxi car, Yusuf and Sonaulla fired over their heads, Kedar seized the bag, but Hari Patra resisted, whereupon he was stabbed twice by Sonaulla, and fell on the ground; that Yusuf then snatched away the bag, and the dacoits thereafter drove off, except Ali Mirza who got away on foot.

After the charges had been read out to the jury the learned Judge enquired of counsel for the Crown, Mr. H. M. Bose, whether, upon the evidence given in the Police Court, he maintained that the charge under s. 397 was sustainable against the accused, and the charge under s. 398 against Ali Mirza and Nanda Kishore.

Mr. H. M. Bose, for the Crown. "Such offender" in s. 397, read with s. 34, includes any person taking part in the dacoity though he did not himself use any deadly weapon, or cause grievous hurt: *Queen-Empress* v. *Mahabir Tiwari* (1), which was followed in *Chatar Singh* v. *Emperor* (2) and *Crown* v. *Mohna* (3). The rulings are conflicting. In *Queen-Empress* v. *Senta* (4), which was followed in *Emperor* v. *Nageshwar* (5), it was held that s. 397 did not create a substantive offence, that the charge should be laid under s. 392 or s. 395 and not under s. 397, and that s. 34 can only be

(1) (1899) I. L. R. 21 All. 263.
(2) (1901) P. R. Cr. 39.
(3) (1901) P. R. Cr. 42.
(4) (1899) I. L. R. 28 All. 404, *note*.
(5) (1906) I. L. R. 28 All. 404.

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read with ss. 392 and 395 to determine liability thereunder. The Madras High Court has taken the same view in *Arunachella Thevan* v. *Emperor* (1).

At the close of the prosecution Page J. asked *Mr. Bose* if he had anything further to add, and the latter replied in the negative. *Mr. Mingail*, counsel for Nanda Kishore was also asked if he wished to say anything, and gave a similar answer. The learned Judge then delivered the following ruling.

PAGE J. In order to determine what charges shall be left to the jury it is incumbent upon me to construe sections 397 and 398 of the Indian Penal Code. I think that it is desirable that I should state what, in my opinion, is the meaning of these sections, not only because of the general importance of the question, but also because there is no decision as to the construction of either of these sections by the Calcutta High Court, while there have been conflicting decisions in other High Courts in India.

The issue is whether in sections 397 and 398 the words "the offender" and "such offender" refer to all persons who combine to commit the specified offences, or whether they refer to those persons only who are proved actually to have "used", or to have been "armed with," deadly weapons.

The former view received the support of the Allahabad High Court in 1899 in the case of the *Queen-Empress* v. *Mahabir Tiwari* (2). The decision in that case was followed in two cases by the Punjab Chief Court, *Chatar Singh* v. *Emperor of India* (3) and *Crown* v. *Mohna* (4). On the other hand, the latter view was held to denote the true meaning of these words in the *Queen-Empress* v. *Senta* (5). This

(1) (1911) 22 M. L. J. 186.
(2) (1899) I. L. R. 21 All. 263.
(3) (1901) P. R. Cr. 39.
(4) (1901) P. R. Cr. 42.
(5) (1899) I. L. R. 28 All. 404, *note*.

case was followed in 1906 by the Allahabad High Court in the case of *Emperor* v. *Nageshwar* (1) and also in 1911 by the Madras High Court in the case of *Arunachella Thevan* v. *Emperor* (2).

In my opinion, the latter view is the correct one. Neither section 397 nor section 398 creates an offence. The effect of these sections is merely to limit the minimum of punishment which may be awarded if certain facts are proved. The Allahabad High Court, in the case which was decided in 1899, appear to have thought that it was incumbent upon them, having regard to the provisions of section 34 of the Indian Penal Code, to construe "offender" in sections 397 and 398 to mean all those persons who combine to commit the specified offence in the course of which deadly weapons by one or more of such persons are used or carried. But with great respect to the learned Judges who decided that case, in my opinion, section 34 has no materiality when the Court is construing the meaning of sections 397 and 398. It is, of course, abundantly clear that any person who is a member of a combination under section 34 which commits one of the offences specified in section 392 or in section 395 is equally liable, if he is present, whether he personally perpetrates an act of violence or not. Section 34, for the purpose of determining the offence which is created, is to be read with sections 392 and 395. But, in my opinion, this section is not relevant when the Court is considering the meaning of section 397 or section 398. In my opinion, the intention of the Legislature in framing sections 397 and 398, as indeed appears from the words used therein, was that, while all persons who combine to commit robbery or dacoity are liable in respect of the substantive offence, any particular offender who is proved to have used or

(1) (1906) I. L. R. 28 All. 404. (2) (1911) 22 M. L. J. 186.

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carried a deadly weapon shall receive a punishment not less than that specified in those two sections.

For these reasons, in my opinion, the true construction to be put upon these sections is that which was found to be the correct construction by the Allahabad High Court in *Queen-Empress* v. *Senta*(1), *Emperor* v. *Nageshwar* (2) and by the Madras High Court in *Arunachella Thevan* v. *Emperor* (3), and I am not prepared to follow the decision of the Allahabad High Court in *Queen-Empress* v. *Mahabir Tiwari* (4) or the two cases decided by the Chief Court of the Punjab reported in the Punjab Records of 1901. I hold, therefore, that the terms "offender" and "such offender" in sections 397 and 398, denote those persons only who have personally committed the acts therein described, and do not refer to other persons who in combination with such persons have committed the offences of robbery or dacoity.

E. H. M.

(1) (1899) I. L. R. 28 All. 404, *note*.
(2) (1906) I. L. R. 28 All. 404.
(3) (1911) 22 M. L. J. 186.
(4) (1899) I. L. R. 21 All. 263.