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There is no evidence to show that the said narrow strip of land and the *nali* (drain) form part of the road. There is also no reliable evidence to show that the zamindars dedicated the whole of the *patri* land to the public for the *pukka* road mentioned above. They still hold their market there and realised the market dues. Under these circumstances the contention advanced by the defendants' learned counsel in this Court must be overruled.

Raza, J.

In my opinion the learned Munsif has given good reasons for granting the injunction prayed for.

The result is that appeal No. 13 is dismissed with costs.

Appeal No. 14 is allowed. The decree of the lower appellate court is set aside so far as the order relating to injunction is concerned. The plaintiffs' prayer for injunction is granted. Thus the decree of the first court is restored. The appellants will get their costs from the respondents in this Court and also in the lower appellate court so far as their appeals relating to injunction are concerned. I do not interfere with the order of the learned Munsif as to costs in the first court.

APPELLATE CRIMINAL

Before Mr. Justice Bisheshwar Nath Srivastava.

CHANDRA NATH (APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT).*

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Indian Penal Code (Act XLV of 1860), *sections* 392, 397 *and* 398—*Interpretation—Sections* 392, 397 *and* 398, *Indian Penal Code, scope and interpretation of—Words "uses any deadly weapon" in section* 397, *meaning of—Section* 398, *Indian Penal Code, if applicable to a case where dacoity is an accomplished fact—Criminal Procedure Code (Act V of* 1898), *sections* 236 *and* 237—*Offences under sections* 398 *and* 392, *Indian Penal Code, if cognate offences—Conviction under section* 398, *if can be converted to one under section* 392, *Indian Penal Code.*

It would be putting a much too narrow interpretation upon the words "uses any deadly weapon" in section 397 of

*Criminal Appeal No. 309 of 1931, against the order of Pandit Raghubar Dayal Shukla, Sessions Judge of Rae Bareli, dated the 18th of September, 1931.

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the Indian Penal Code to say that a person does not use a revolver unless he fires it. These words are wide enough to include a case in which a person levels his revolver against another person in order to overawe him.

There can be no doubt that section 398, Indian Penal Code, can regulate the punishment only in cases of an attempt to commit robbery as distinguished from a case in which the offender has accomplished his purpose and robbery has actually been committed.

Section 392, Indian Penal Code, no doubt allows the court discretion as regards the minimum punishment to be awarded, but when the offence is attended with circumstances which would make the attempt to commit it punishable with the minimum sentence of seven years, it would not be a proper exercise of discretion to award a lesser sentence when the offence has been accomplished.

As the offences under sections 398 and 392, Indian Penal Code, are cognate offences, therefore section 237 read with section 236 of the Code of Criminal Procedure justifies the conviction under section 398 being altered to one under section 392, Indian Penal Code.

Dr. *J. N. Misra* and Mr. *Kanhaiya Lal*, for the appellant.

The Government Advocate (Mr. *G. H. Thomas*) and Mr. *Ali Mohammad*, for the Crown.

SRIVASTAVA, J. :—These are appeals by Chandra Nath and Bansidhar against the order dated the 18th of September, 1931, of the learned Sessions Judge of Rae Bareli convicting Chandra Nath under section 398 and Bansidhar under section 397 of the Indian Penal Code, and sentencing them to seven and ten years' rigorous imprisonment respectively.

The case for the prosecution which has been accepted by the learned Sessions Judge is that on the 15th of July, 1931, Suraj Prasad, mail runner, was carrying the mail from Malikmau Chaubara to Gurbuxganj when in the *dhak* jungle near a culvert on the public road he saw the two accused standing, one on each side of the road. Bansidhar at the point of a revolver asked Suraj Prasad to give up the mail bag and in the meantime Chandra Nath tripped him from behind. Bansidhar then took up the mail bag and spear from Suraj Prasad and made away with

them followed by Chandra Nath. Suraj Prasad chased both the accused shouting that they had robbed him of his mail bag and spear. Two persons Durga Darzi and Bulaki Pasi on hearing the shouts of Suraj Prasad joined him in the chase. At a place near the east of village Korihar, Ghani and Sattar chaukidars on hearing the alarm came up from the opposite direction and brought the accused to bay. Ghani and Durga caught hold of Bansidhar while Chandra Nath was secured by Sattar and Bulaki. As Bansidhar had thrown away the mail bag and spear on the way, Suraj Prasad accompanied by Ghani chaukidar and some of the other pursuers went out in search of them. They found both these articles lying in the drain of a field at a distance of about half a mile from Korihar. Then they came back to the place where the accused had been left in the custody of Sattar and the other villagers and made a search of the persons of the accused. It may be noted that Bansidhar was wearing a shirt and shorts and Chandra Nath a red shirt and a *dhoti*. They recovered a mask from the pocket of Bansidhar's shirt and underneath the shirt they found a dagger attached to a leather strap slung round the accused's shoulder. In the right pocket of the shorts was found a country revolver and in the left pocket a small bundle containing three packets of gun-powder, one packet of crushed chillies and a little tin box full of shots and percussion caps. They also found another mask in the pocket of Chandra Nath's shirt and recovered a dagger which was concealed in the folds of his *dhoti* under his shirt. The two chaukidars took the accused and the articles recovered from them including the mail bag and the spear to the police station at Gurbuxganj. Suraj Prasad lodged the first information report which was recorded at about 6 p.m. It should be mentioned that when the mail bag was recovered from the drain of the field, as stated above, its seals were found broken and the mouth open. The police Sub-Inspector on

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making inquiries from the Sub-Postmaster of Gurbuxganj found that the contents of the bag were intact and nothing was found missing.

The defence of Bansidhar was that he was on his way to Rae Bareli when he came across Suraj Prasad whom he found opening the mail bag near the culvert. He took Suraj Prasad to task and was therefore chased by him with a spear and got arrested near village Korihar. He alleged that the mail bag and the spear had been thrown somewhere on the way by Suraj Prasad himself. He denied that the mask, dagger and revolver and the ammunition were his or recovered from his person. He did not produce any evidence in his defence.

The other accused Chandra Nath pleaded that he had gone to village Korihar on the morning of the 15th of July to demand price of cloth sold by him to Sheo Kumar and Gur Prasad and that he was arrested simply because he told the chaukidars that he knew Bansidhar. He also denied that he had anything to do with the mask and dagger or that they were found on his person. He examined two witnesses in support of his defence.

The learned Sessions Judge relying on the evidence of P. W. 1 Gajadhar, P. W. 2 Sheo Prasad, P. W. 3 Abdul Qadir, Sub-Inspector, P. W. 5 Suraj Prasad, P. W. 6 Durga, P. W. 7 Bulaki and P. W. 8 Ghani held that the prosecution story had been amply proved by the evidence of these witnesses. He was convinced that the incriminating articles of which mention has been made above were recovered from the possession of both the accused. He rejected the evidence of the two witnesses produced by Chandra Nath in his defence as unworthy of credit. The conclusion reached by him was that as Bansidhar had levelled his revolver against the mail runner in order to frighten him to deliver up the mail bag he was guilty of an offence under section 397 of the Indian Penal Code. As regards Chandra

Nath he held that as this accused kept his dagger concealed and did not make any display of it to overawe the mail runner, his case was covered by section 398 of the Indian Penal Code. He accordingly convicted Bansidhar under section 397 and Chandra Nath under section 398 of the Indian Penal Code and sentenced them as stated above.

The learned counsel for Bansidhar contended in the first place that the case for the prosecution was false and the evidence produced in support of it was unreliable. The main ground urged in support of this contention was that the plan of the locality, exhibit 1 prepared by the Sub-Inspector, shows that Durga P. W. 6 and Bulaki P. W. 7 joined the chase at spots between the drain where the mail bag and the spear were found lying and the place where the appellants were arrested by Ghani and Sattar chaukidars and therefore it was impossible for Durga and Bulaki to have seen Bansidhar running with the mail bag as deposed by them. The learned Sessions Judge was of opinion that the sketch map did not correctly mark the spots at which these witnesses joined the chase and that it could not be relied on as against the sworn testimony of witnesses whom there is no reason to discredit. It might also be observed that the mail bag was recovered after a lapse of some time since its being thrown away by Bansidhar. One cannot therefore be sure that it had not been handled by some unknown person or persons during this interval and was recovered at the very spot at which it had been thrown.

Another point sought to be made on behalf of the appellant was that the seals of the mail bag were found broken when it was recovered lying in the drain. It was argued that Bansidhar had no time to break open the seals and that this fact supported Bansidhar's version that Suraj Prasad himself had opened the mail bag. I agree with the learned Sessions Judge that no importance can be attached to this circumstance as

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we do not know who had access to the bag during the interval when it remained lying in the field.

I have carefully examined the prosecution evidence. The accused have absolutely failed to suggest any motive for the prosecution witnesses to falsely implicate them. Beyond a mere denial the accused have given no explanation of the incriminating articles, the masks, the daggers and revolver found on their person. I have no hesitation in agreeing with the learned Sessions Judge that no ground has been made out for discrediting the testimony of the prosecution witnesses.

It was also contended that Bansidhar did not use any deadly weapon at the time of committing the robbery and therefore his conviction under section 397 of the Indian Penal Code is not correct. The statement of Suraj Prasad, which I can see no reason to disbelieve, is that the accused Bansidhar demanded the surrender of the mail bag at the point of a revolver. The words used in section 397 are "uses any deadly weapon". It would be putting a much too narrow interpretation upon these words to say that a person does not use a revolver unless he fires it. I am inclined to say that the words are wide enough to include a case like the present in which a person levels his revolver against another person in order to overawe him. I must therefore reject this contention.

Lastly, I was asked to reduce the sentence of ten years' rigorous imprisonment passed against Bansidhar on the ground of its being excessive. It was pointed out that no hurt was caused to any person and nothing was found missing from the mail bag. In my opinion the accused can hardly claim any credit for the contents of the mail bag not having been tampered with. They only seek to make a virtue of necessity. The case is one of a daring daylight robbery on the highway. The accused were fortunately baulked in their design on account of being pursued by Suraj Prasad who happened to be reinforced by the other persons

who joined him in the chase. He was admittedly a teacher in a District Board school and appears to have been the evil genius of the other accused Chandra Nath who is a mere lad of fifteen and is responsible for ruining the life of this youth. I do not think his appeal for reduction of sentence is entitled to any consideration. I accordingly uphold his conviction and sentence.

Next as regards Chandra Nath. It was contended that the chaukidars Ghani and Sattar tied all the incriminating articles said to have been recovered from both the accused in one bundle and that they took the accused to the thana. It was suggested that all the articles were recovered from the possession of Bansidhar and that nothing incriminating was found in the possession of Chandra Nath. I find myself wholly unable to accept this suggestion. The evidence of the prosecution witnesses who were present at the time when the accused were searched is quite clear and definite on this point, and as I have said I can see no reason to discredit this evidence.

Reliance was also placed on the evidence of the two defence witnesses who deposed to the presence of Chandra Nath in village Korihar since the morning of the date of the occurrence. Both of them were unsummoned witnesses and one has only to read their evidence to reject it as untrustworthy. The two persons Sheo Kumar and Gur Prasad to whom Chandra Nath is said to have gone in order to demand price of the cloth have not been examined. I agree with the learned Sessions Judge that no reliance can be placed on the evidence of these witnesses for the defence.

Lastly, it was argued with great force that even if it is held that Chandra Nath was armed with a deadly weapon, his conviction under section 398 was bad in law and that he could be convicted only under section 392.. It was further urged that as section 392 does not prescribe any minimum sentence, in view of his youth and the minor part played by him in the

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commission of the offence he should be dealt with leniently. Section 392 of the Indian Penal Code prescribes the punishment in a case of simple robbery and section 393 prescribes the punishment for a case of attempt to commit robbery. Sections 397 and 398 deal with the same offences when their commission has been attended with certain aggravating circumstances. In such cases these sections prescribe the minimum punishment which can be imposed on the offender. Section 398 runs as follows:—

> If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

The argument for the appellant is that this section is applicable only to a case of an attempt to commit robbery and has no application to a case like the present in which the robbery has actually been committed. In my opinion the argument is correct. The opening words of section 392 are "whoever commits robbery". Section 397 opens with the words "if at the time of committing robbery or dacoity". When we compare these words with the opening words of section 398, there can be no doubt that this section can regulate the punishment only in cases of an attempt to commit robbery as distinguished from a case in which the offender has accomplished his purpose and robbery has actually been committed. This construction no doubt leads to this anomaly that whereas the legislature has prescribed a minimum punishment of seven years in cases of an attempt to commit robbery by an offender who is armed with a deadly weapon, yet there is no such minimum punishment prescribed when the offence has been completed by the same offender. In the latter case where the offender is armed with a deadly weapon but has not used it, he can be dealt with only under section 392 and it is possible for him to get off with a smaller punishment than if he had stopped short

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with an attempt to commit the offence. I can only make note of this anomaly. It is for the Legislature to remove it. But the fact that such an anomaly arises cannot justify my interpreting section 398 against the clear language of the section so as to make it applicable to a case in which an offence of robbery or dacoity is an accomplished fact. However I am of opinion that as in cases where the offender is armed with a deadly weapon, the Legislature has prescribed the minimum sentence of seven years for an offence of an attempt to commit a robbery, it would not be proper to inflict a lesser punishment if the offender is found guilty of robbery. Section 392 provides that in cases of simple robbery the punishment may be for a term which may extend to ten years. It no doubt allows the court discretion as regards the minimum punishment to be awarded, but when the offence is attended with circumstances which would make the attempt to commit it punishable with the minimum sentence of seven years, it would not be a proper exercise of discretion to award a lesser sentence when the offence has been accomplished. As the offences under sections 398 and 392 are cognate offences, therefore section 237 read with section 236 of the Code of Criminal Procedure justifies the conviction under section 398 being altered to one under section 392. I accordingly set aside the conviction under section 398 and convict Chandra Nath accused under section 392 of the Indian Penal Code and sentence him to seven years' rigorous imprisonment under that section.

The result is that I dismiss the appeal of Bansidhar and uphold his conviction and sentence. In the case of Chandra Nath, his conviction is altered into one under section 392 and he is sentenced to seven years' rigorous imprisonment under that section.

Appeal dismissed.