A GANESAN

v.

STATE REP. BY STATION HOUSE OFFICER

(Criminal Appeal No. 903 of 2021)

B OCTOBER 29, 2021

[DR. DHANANJAYA Y CHANDRACHUD AND M. R. SHAH, JJ.]

Penal Code, 1860: s.397 – Applicability of – Held: To bring the case within s.397, the offender who uses any deadly weapon, or causes grievous hurt to any person shall be liable for minimum punishment under s.397 – The term 'offender' under s.397 is confined to the 'offender' who uses any deadly weapon and use of deadly weapon by one offender at the time of committing robbery cannot attract s.397 for the imposition of minimum punishment on another offender who has not used any deadly weapon.

Penal Code, 1860: ss.391, 395, 397 – Prosecution case was that on the fateful night, A-1 to A-5, with an intention to commit robbery, proceeded in a car with knife and iron pipes and reached a place where PW-1 was coming on bicycle – A-1 remained in the car – A-2 to A-5 pushed PW-1, A-3 attacked him with iron rod on his head and one of them plucked the bag containing Rs.60,000 and 16 gram jewellery hanging on the cycle handle – When PW-2 prevented A-2 to A-5 from escaping, A-2 assaulted him on the head with the rod – All accused ran away from the place along with the bag – Charges framed against the accused except 'B' (absconded accused) who was tried separately – Trial court convicted accused under s.397 – Conviction was affirmed by appellate court and also High Court – Instant appeal filed by A-1 and A-3 – Held: The allegation of use of weapon was against A-2 and accused 'B' – Appellants (A-1 and A-3) were not alleged to have used any weapon – Therefore, in the absence of any allegations of use of any deadly weapon by the appellants, s.397 shall not be attracted and to that extent they ought not to have been convicted for the offence punishable under s.397 – As regards the offence under s.391, submission of the appellants was that even no case was made out for offence under s.391 and they cannot be punished under s.395

as what is required to be proved is involvement of five or more persons conjointly in committing the robbery and in this case only four persons were tried and the prosecution has failed to prove the involvement of five or more persons – However, as such in the FIR, there was a reference to five persons involved in committing the robbery – Even the charge-sheet was filed against five persons – However, as two accused absconded, the trial was split and three accused came to be tried – Accused 'B' was tried subsequently and one person is still absconding – Further, there were concurrent findings recorded by all the courts below that five persons were involved in committing the offence of robbery – Merely because some of the accused absconded and less than five persons came to be tried in the trial, it cannot be said that the offence under s.391 punishable under s.395 was not made out – What is required to be considered is the involvement and commission of the offence of robbery by five persons or more and not whether five or more persons were tried – Once it is found on evidence that five or more persons conjointly committed the offence of robbery or attempted to commit the robbery, a case would fall under s.391 and would fall within the definition of 'dacoity' – Therefore, in the facts and circumstances, appellants are liable to be convicted for the offence under s.391 punishable under s.395 IPC.

Penal Code, 1860: s.395 and s.397 – Essential ingredients – 'Dacoity' is nothing but an exaggerated version of 'robbery' with a difference in number of accused – Therefore, even in a case where the accused is not convicted for the offence under s.397, still he can be punished under s.395 and no prejudice shall be caused to him as ultimately the prosecution has to prove the 'robbery' and 'dacoity' either for the offence punishable under s.395 or under s.397 – However, to bring the case against the accused under s.397, the prosecution has to prove one additional fact that the offender has used any deadly weapon or has caused grievous hurt to any person, or has attempted to cause death or grievous hurt to any person.

Criminal jurisprudence: Acquittal of accused 'B' who was tried separately as he absconded after incident – Benefit of acquittal of 'B' claimed by other accused – Held: The accused are to be tried and convicted on the basis of evidence made in the trial in which

A *they are convicted – 'B' came to be tried after a period of 15 years as his trial was split as he absconded – From the acquittal order passed in the case of 'B', it appears that PW1 during the trial of 'B' turned hostile – In the case of 'B', only five witnesses came to be examined and for whatever reasons other witnesses were not*
B *examined – In this case, PW1 not only supported the case of prosecution but as many as 15 witnesses came to be examined – Therefore, merely because in the subsequent split trial, 'B' came to be acquitted, the benefit of such acquittal cannot be in favour of the appellants-accused as the prosecution was successful in proving the case against the accused.*

C **Partly allowing the appeals, the Court**

HELD: 1.1 As per Section 390 IPC, for 'robbery' there is either theft or extortion. When in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender voluntarily causes or attempts to cause to
D **any person death or hurt or wrongful restraint or fear of instant death or of instant hurt, or of instant wrongful restraint, the theft can be said to be 'robbery'. In similar situation the 'extortion' can be said to have committed 'robbery'. Section 391 IPC defines 'dacoity'. When five or more persons conjointly commit or attempt**
E **to commit a robbery, the accused then can be said to have committed the 'dacoity'. As per Section 392 IPC, whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine. [Para 12.3][534-F-G; 535-A-B]**

F **1.2 As per Section 393 IPC, even an attempt to commit robbery is punishable with rigorous imprisonment for a term which may extend to seven years with fine. As per Section 394 IPC, if any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery,**
G **shall be punished with imprisonment for life or with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine. Section 395 IPC provides for punishment for 'dacoity'. Whoever commits dacoity shall be punished with imprisonment for life or with rigorous imprisonment for a term**

H

which may extend to ten years and shall also be liable to fine. [Para 12.3][535-C-E]

1.3 In case of dacoity with murder, if any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years with fine. As per Section 397 IPC, if at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years. Similarly, if, at the time of committing 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. On conjoint reading of these provisions, commission of 'robbery' is *sine qua non*. The 'dacoity' can be said to be an exaggerated version of robbery. If five or more persons conjointly commit or attempt to commit robbery it can be said to be committing the 'dacoity'. Therefore, the only difference between the 'robbery' and the 'dacoity' would be the number of persons involved in conjointly committing or attempt to commit a 'robbery'. The punishment for 'dacoity' and 'robbery' would be the same except that in the case of 'dacoity', the punishment can be with imprisonment for life. However, in the case of 'dacoity with murder' the punishment can be with death also. However, in a case where the offender uses any deadly weapon or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person the imprisonment with which such offender shall be punished shall not be less than seven years. To bring the case within Section 397 IPC, the offender who uses any deadly weapon, or causes grievous hurt to any person shall be liable for minimum punishment under Section 397 IPC. [Paras 12.3, 12.4][535-E-H; 536-A-C]

2.1 Section 392 and Section 390 IPC are couched in different words. In Sections 390, 394, 397 and 398 IPC the word used is 'offender'. Therefore, for the purpose of Sections 390 to 398 IPC only the offender/person who committed robbery and/or voluntarily

causes hurt or attempt to commit such robbery and who uses any deadly weapon or causes grievous hurt to any person, or commits to cause death or grievous death any person at the time of committing robbery or dacoity can be punished for the offences under Sections 390, 392, 393, 394, 395, 397 and 398 IPC. The accused cannot be convicted on the basis of constructive liability and only the 'offender' who 'uses any deadly weapon….' can be punished. However, so far as Section 391 IPC 'dacoity' and Section 396 IPC – 'dacoity with murder' is concerned, an accused can be convicted on the basis of constructive liability, however the only requirement would be the involvement of five or more persons conjointly committing or attempting to commit a robbery – dacoity/ dacoity with murder. [Para 12.4][536-D-F]

2.2 The term 'offender' under Section 397 IPC is confined to the 'offender' who uses any deadly weapon and use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397 IPC for the imposition of minimum punishment on another offender who has not used any deadly weapon. Even there is distinction and difference between Section 397 and Section 398 IPC. The word used in Section 397 IPC is 'uses' any deadly weapon and the word used in Section 398 IPC is 'offender is armed with any deadly weapon'. Therefore, Section 397 IPC shall be attracted when the 'offender' 'uses' any deadly weapon Section 397 IPC. Even as per the case of the prosecution and even considering the evidence on record, it can be seen that A1 and A3 are not alleged to have used any weapon. The allegation of use of any weapon was against A-2 and 'B' . Therefore, in absence of any allegations of use of any deadly weapon by the appellants – A-1 and A-3, Section 397 IPC shall not be attracted and to that extent they ought not to have been convicted for the offence punishable under Section 397 IPC. [Para 12.7][539-F-H; 540-A-C]

Shri Phool Kumar v. Delhi Administration **(1975) 1 SCC 797 : [1975] 3 SCR 917;** *Dilawar Singh v. State of Delhi* **(2007) 12 SCC 641 – relied on.**

3.1 Now so far as the submission on behalf of the accused that the appellants – accused cannot be convicted for the offence under Section 397 IPC and that the requirement to bring the

case under Section 391 IPC punishable under Section 395 IPC namely five persons or more persons conjointly committing the robbery has not been established and proved and only four persons came to be tried and the courts below did not convict the accused for the offence under Section 391 punishable under Section 395 IPC is concerned, at the outset, it is required to be noted that as such all the accused were charged by the trial Court for the offences under Section 395 IPC as well as 397 IPC. With the aforesaid offences parties went for trial. Therefore, once a case under Section 391 IPC punishable under Section 395 IPC is made out, they can be convicted for the offence under Section 391 IPC punishable under Section 395 IPC as no prejudice shall be caused to the accused. Even otherwise, when a charge of a major offence is not made out, conviction for a minor offence even in the absence of the charge for the said minor offence can be sustained. If an accused is charged with a grave offence but the same is not established on merit or for default of technical nature, he can be convicted and punished for a minor offence without altering of a charge. [Para14][540-D-H]

Rameshbhai Mohanbhai Koli v. State of Gujarat **(2011) 11 SCC 111 : [2010] 14 SCR 1– relied on.**

3.2 Even otherwise there is no difference between Section 391/395 and Section 397 IPC so far as sentence/punishment except the difference in case of Section 397 IPC the punishment shall not be less than seven years. Otherwise, the 'robbery' and 'dacoity' are sine qua non. 'Dacoity' is nothing but an exaggerated version of 'robbery' with a difference in number of accused. Therefore, also even in a case where the accused is not convicted for the offence under Section 397 IPC, still he can be punished under Section 395 IPC and no prejudice shall be caused to him as ultimately the prosecution has to prove the 'robbery' and 'dacoity' either for the offence punishable under Section 395 IPC or under Section 397 IPC. However, to bring the case against the accused under Section 397 IPC, the prosecution has to prove one additional fact that the offender has used any deadly weapon or has caused grievous hurt to any person, or has attempted to cause death or grievous hurt to any person. Therefore, the case

is made out under Section 391 IPC read with Section 395 IPC. Despite the fact that the courts below convicted the accused under Section 397 IPC which is held to be unsustainable, in that case also if the case is made out under Section 391 IPC read with Section 395 IPC, still they can be convicted for the offence punishable under Section 391 read with Section 395 IPC even without even altering the charge. The trial court had framed the charge against the accused for the offence under Sections 395 and 397 IPC both. [Para 15][541-G-H; 542-A-D]

3.3 Now so far as the submission on behalf of the appellants – accused that even no case is made out for the offence under Section 391 IPC and they cannot be punished under Section 395 IPC as what is required to be proved is involvement of five or more persons conjointly in committing the robbery and in the present case only four persons are tried and the prosecution has failed to prove the involvement of five or more persons. However, as such in the FIR, there was a reference to five persons involved in committing the robbery. Even the charge-sheet was filed against five persons. However, as two accused absconded, the trial was split and three accused came to be tried. One accused 'B' came to be tried subsequently and one person is still absconding. Even there are concurrent findings recorded by all the courts below that five persons were involved in committing the offence of robbery. Merely because some of the accused absconded and less than five persons came to be tried in the trial, it cannot be said that the offence under Section 391 IPC punishable under Section 395 IPC is not made out. What is required to be considered is the involvement and commission of the offence of robbery by five persons or more and not whether five or more persons were tried. Once it is found on evidence that five or more persons conjointly committed the offence of robbery or attempted to commit the robbery a case would fall under Section 391 IPC and would fall within the definition of 'dacoity'. Therefore, in the facts and circumstances, the accused can be convicted for the offence under Section 391 IPC punishable under Section 395 IPC. [Para 16][542-D-H; 543-A]

3.4 Now so far as the submission on behalf of the accused that in the subsequent trial one of the accused – 'B' came to be acquitted and therefore the benefit of acquittal of 'B' must be given to the present accused and thereafter they may be acquitted is concerned the same has no substance. The accused are to be tried and convicted on the basis of evidence made in the trial in which they are convicted. It is also required to be noted that 'B' came to be tried after a period of 15 years as his trial was split as he absconded. From the judgment and order of acquittal passed in the case of 'B', it appears that PW1 during the trial in case of 'B' turned hostile. In the case of 'B' only five witnesses came to be examined and for whatever reasons other witnesses have not been examined. In the present case, PW1 not only supported the case of prosecution but as many as 15 witnesses came to be examined. Therefore, merely because in the subsequent split trial 'B' came to be acquitted the benefit of such acquittal cannot be in favour of the present appellants-accused as the prosecution has been successful in proving the case against the accused. [Para 17][543-B-E]

Amrita v. State of M.P. **(2004) 12 SCC 224;** *Gangadhar Behera v. State of Orissa* **(2002) 8 SCC 381 : [2002] 3 Suppl. SCR 183;** *Raja v. State* **(2013) 12 SCC 674 : [2013] 9 SCR 230 – relied on.**

Raj Kumar Alias Raju v. State of Uttaranchal **(2008) 11 SCC 397;** *Balbir v. State of Uttar Pradesh* **2020 SCC Online All 845;** *Mohan Singh v. State of Punjab* **AIR 1963 SC 174 : [1962] Suppl. SCR 848;** *Ram Bilas Singh & Ors. v. The State of Bihar* **[1964] 1 SCR 775;** *Manmeet Singh @ Goldie v. State of Punjab* **(2015) 7 SCC 167 : [2015] 3 SCR 773;** *Harbhajan Singh v. State of Jammu and Kashmir* **(1975) 4 SCC 480;** *Sathya Narayanan v. State rep. by Inspector of Police* **(2012) 12 SCC 627 : [2012] 10 SCR 950;** *Raju Manjhi v. State of Bihar* **(2019) 12 SCC 784;** *Rafiq Ahmad v. State of U.P.* **(2011) 8 SCC 300 : [2011] 11 SCR 907;** *Prema S. Rao v. Yadla Srinivasa Rao* **(2003) 1 SCC 217 : [2002] 3 Suppl. SCR 339 – referred to.**

Case law reference

[1975] 3 SCR 917	**relied on**	**Para 6.1**
(2007) 12 SCC 641	**relied on**	**Para 6.1**
(2008) 11 SCC 397	**referred to**	**Para 6.5**
[1962] Suppl. SCR 848	**referred to**	**Para 7**
[1964] 1 SCR 775	**referred to**	**Para 7.1**
[2015] 3 SCR 773	**referred to**	**Para 7.1**
(1975) 4 SCC 480	**referred to**	**Para 8.5**
[2012] 10 SCR 950	**referred to**	**Para 8.9**
(2019) 12 SCC 784	**referred to**	**Para 8.9**
[2011] 11 SCR 907	**referred to**	**Para 8.10**
[2002] 3 Suppl. SCR 339	**referred to**	**Para 8.10**
[2010] 14 SCR 1	**relied on**	**Para 14**
(2004) 12 SCC 224	**relied on**	**Para 17**
[2002] 3 Suppl. SCR 183	**relied on**	**Para 17**
[2013] 9 SCR 230	**relied on**	**Para 17**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 903 of 2021.

From the Judgment and Order dated 16.07.2019 of the High Court of Judicature at Madras in Criminal Appeal No.429 of 2012.

With

Criminal Appeal No.904 of 2021.

G. Sivabalamurugan, P. R. Kovilan Poongkuntran, V. Vasudevan, Mrs. Geetha Kovilan, Advs. for the Appellant.

Dr. Joseph Aristotle S., Ms. Preeti Singh, Ms. Ripul Swati Kumari, Advs. for the Respondent.

The Judgment of the Court was delivered by

M. R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned common judgment and order dated 16.07.2019 passed by the High Court of Judicature at Madras in Criminal R.C. Nos. 405 and 429 of 2012 by which the High Court has dismissed the said revision applications and has confirmed the judgment and order passed by the Learned trial Court confirmed by Learned First Appellate Tribunal – Learned Sessions Court convicting the appellants herein – original accused no.1 and accused no.4 for the offence under Section 397 IPC present appeals are preferred.

2. Criminal Appeal No.903 of 2021 has been preferred by the accused Ganesan as original accused – A1 and Criminal Appeal No.904 of 2021 has been preferred by the accused Shanmugam @ Babu – A3. At this stage, it is required to be noted that initially the charge-sheet was filed against five persons for the offences punishable under Section 395 read with Section 397 of the Indian Penal Code (hereinafter referred to as 'IPC') and Ganesan was shown as A1, one Benny who at the relevant time was absconding was shown as A2, one Prabhakaran was shown as A3, Shanmugam @ Babu was shown as A4 and one Shajahan was shown as A5. However, at the relevant time A2 - Benny and A5 - Shajahan absconded, the trial was then separated and post-trial, Ganesan was shown as A1, Prabhakaran was shown as A2 and Shanmugam was shown as A3. Benny was subsequently arrested after a period of 15 years and therefore he was tried separately and vide judgment and order dated 15.11.2018 he has been acquitted (acquittal of Benny shall be dealt with hereinafter).

3. As per the case of the prosecution, with the intention of robbery jointly by the accused – A1 to A5 at about 8:00 pm on 19.08.1996 proceeded in a car bearing No. T.N. 31 8686 from Cuddalore with knife and iron pipe and reached Panruti. A1 – Ganesan stayed in the car and sent A2 to A5. As per the plan A2 to A5 committed robbery of Rs.60,000/-. As per the case of the prosecution, PW1 – Duraisamy came with the bicycle near Vallalar Street, Panruti where they pushed him and A3 Prabhakaran attacked with iron rod on the head and right-hand finger and injured him and one among accused 2 to 5 plucked the bag hanging in the handle bar of cycle of witness Duraisamy containing Rs.60,000/- and 16 gram jewellery and ran away. As per the case of the prosecution, when the witness Palanivel prevented the accused 2 to 5 from escaping,

A2 (Benny) assaulted witness Palanivel on the head and hand with the rod he was having and tried to escape and accused 3, 4 and 5 escaped and ran away from the place along with the above-mentioned bag. After conclusion of the investigation, the investigating officer filed the charge-sheet against five accused persons for the offences punishable under Section 395 read with Section 397 IPC. Even the charges were framed against five accused persons. However, as A3 - Benny and A5 - Shajahan absconded, the trial was split and the trial proceeded against Ganesan, Prabhakaran and Shanmugam. In the trial Ganesan was shown as A1, Prabhakaran was shown as A3 and Shanmugam was shown as A4. It is reported that even Shajahan is still absconding. That the accused denied the charges and therefore they were put to trial by the Learned Magistrate. During the trial, to prove the case against the accused, the prosecution examined as many as 15 witnesses. Prosecution examined Thiru Duraisamy as PW1, complainant and the injured eye-witness Thiru Palanivel as PW2, Thiru Aravind Kumar and Thiru Ashok Kumar as PW3 and PW4 respectively. Prosecution examined Thiru Shanmugam as PW5, Doctor Thiru Elangovan as PW10 who gave treatment to PW1. Prosecution also examined the I.O. Thiru Subramanian as PW13. Through the aforesaid witnesses the prosecution also brought on record the documentary evidences. On appreciation of entire evidence on record, both, the oral as well as the documentary, the Learned trial Court vide Judgment and Order dated 13.04.2010 in S.C. No.363 of 2009 convicted the accused for the offence punishable under Section 397 IPC and sentenced them to undergo 7 years RI each and in default to further undergo one year RI.

4. Feeling aggrieved and dissatisfied with the judgment and order of conviction passed by the Learned trial Court convicting the accused for the offence punishable under Section 397 IPC and imposing the sentence of 7 years RI, accused Ganesan and Shanmugam – A1 and A3 respectively (preferred appeal bearing Criminal Appeal No.48 of 2010 before the Learned Sessions Court). That by judgment and order dated 03.01.2012, the Learned Sessions Court dismissed the said appeal and confirmed the judgment and order of conviction passed by the Learned Trial Court. The High Court by the impugned Judgment and order has confirmed the conviction under Section 397 IPC.

5. Feeling aggrieved and dissatisfied with the judgment and order passed by the High Court in dismissing the Revision Applications and

confirming the conviction under Section 397 IPC, A1 Ganesan has preferred Criminal Appeal No.903 of 2021 and A3 Shanmugam has preferred Criminal Appeal No.904 of 2021. As observed hereinabove subsequently after a period of 15 years from the occurrence of the offence original accused no.2 – Benny was apprehended and he came to be tried separately. In Sessions Case No.12 of 2018 and by its judgment and order dated 15.11.2018 he has been acquitted. Acquittal of accused Benny shall be discussed and considered hereinbelow.

6. Submissions on behalf of the Accused – Ganesan in Criminal Appeal No.903 of 2021

Learned Counsel appearing on behalf of accused - Ganesan has made the following submissions:

(1) That the FIR is clouded with suspicion. It is submitted that PW1 Duraisamy deposed that the incident took place on 19.08.1996 at about 11:00 PM and he was attacked by the accused persons and immediately he become unconscious and then he was admitted in Government Hospital and he gained conscious after one week. Contrary to the same PW13 - I.O. deposed that he reached the Government Hospital in the early morning at 2.30 AM on 20.08.1996 and recorded the statement of PW1 - Duraisamy and he reached police station at 3.00 AM and on the basis of the statement he registered Crime No.678 of 1996 under Section 394 IPC. It is submitted that even PW13 in his cross-examination admitted that in the complaint Ex.P1 neither complainant's signature nor the thumb affixation were found. It is submitted that therefore complaint Ex.P1 could not have come into existence as claimed by the prosecution and consequently the FIR registered by the IO is legally inadmissible;

(2) The identification of accused persons has not been established inasmuch as no Test Identification Parade (TIP) proceedings was conducted. It is submitted that in the present case no TIP was conducted by the police. It is submitted that even before the Learned trial Court, the prosecution witnesses very categorically stated that they could not identify the accused persons due to the reason that; (i) PW1 become unconscious after the incident; (ii)

PW2 deposed "whether I knew the accused, I did not remember as long time have passed"; (iii) PW3 deposed "Since 14 years have passed, I could not keep memory and to tell who is that person among the persons now before this Court." It is submitted that even PW3 deposed that "at the time of incident, the place of occurrence was dark and rainy"; (iv) PW4 also deposed that "because 14 years have passed, they could not be able to tell correctly".

6.1 It is submitted that even in the accident register as well PW10 – Doctor recorded that he was informed that the complainant was attacked by three unknown persons. It is submitted therefore that it creates serious doubt about the number of persons involved whether 3 or 5; Accused Ganesan did not participate in the crime as he was in the car and therefore Section 397 IPC shall not be attracted. It is submitted that even as per the case of the prosecution, the accused Ganesan was in the car and he did not come to the place of occurrence and therefore he cannot be convicted for the offence punishable under Section 397 IPC; it is submitted that it is a settled law that the term 'offender' is confined to the 'offender' who uses any deadly weapon. It is submitted that use of deadly weapon at the time of committing robbery cannot attract Section 397 IPC for the imposition of the minimum punishment on another offender who had not used any deadly weapon. Heavy reliance is placed on the decisions of this Court in **Shri Phool Kumar vs. Delhi Administration**, (1975) 1 SCC 797 (para 5 & 6) and **Dilawar Singh vs. State of Delhi,** (2007) 12 SCC 641 (para 19 to 22). It is further submitted by Learned Counsel appearing on behalf of the accused - Ganesan that as such original accused Benny has been acquitted by the Court vide judgment dated 15.11.2018. It is submitted that it is a settled law that if the allegations made against the accused and the other accused persons are one and the same then they are indivisible and inseparable in nature, the benefit of acquittal of a co-accused should be extended to the other accused persons as well. It is submitted that as per the prosecution case A1 to A5 were involved in the case. It is submitted that even the PWs could not identify and point out who beat PW1 and PW2.

6.2. It is further submitted that even otherwise the injury caused to PW1 and PW2 are simple in nature. It is submitted that as per the medical records, the injuries caused to PW1 and PW2 are simple injuries

which is evident from the testimony of PW10 – Doctor R. Elangoven. It is submitted that there is no possibility of any 'dangerous weapon' being recovered in the present case and therefore, Section 397 IPC cannot be pressed into service.

6.3 It is further submitted that according to the prosecution the number of accused persons involved in the present case was five persons. It is submitted that all the prosecution witnesses stated that number of accused persons involved was not more than 3 accused persons. It is submitted that only in a case where five or more than five persons commit or attempt to commit a robbery it would be dacoity. It is submitted that it is more of an aggravated form of robbery and generally the robber is armed with deadly weapons. It is submitted that even in the present case, even the prosecution is not sure about the number of accused persons involved in the present case, therefore the Learned trial Court framed charge under Section 397 IPC alone despite charge-sheet filed under Sections 395 and 397 IPC.

6.4 It is further submitted that even PW2 to PW4 are not reliable and trustworthy eye-witnesses. It is submitted that looking to the distance between the house and the place of occurrence, it is not possible to hear the cry of PW1 and that they reached the place of occurrence only after the offence of robbery was committed by the accused.

6.5 It is further submitted that there is an inordinate delay even in filing the charge-sheet and conducting trial. It is submitted that in the present case the charge-sheet was filed after 13 years and such a delay has not been explained by the prosecution. It is further submitted that even otherwise the accused involved were less than 5 persons and even Benny came to be acquitted by the Learned trial Court and therefore the accused herein also cannot be convicted for the offence punishable under Section 397 IPC. Reliance is placed on the decisions of this Court in **Raj Kumar Alias Raju vs. State of Uttaranchal**, (2008) 11 SCC 397 and **Balbir vs. State of Uttar Pradesh**, 2020 SCC Online All 845. It is submitted that considering the totality of the circumstances of the case, the accused is entitled to the benefit of doubt.

Making the above submissions, it is prayed to allow the appeal preferred by accused - Ganesan and to acquit him for the offence punishable under Section 397 IPC for which he has been convicted.

A 7. **Submissions on behalf of the accused Shanmugam @ Babu in Criminal Appeal No.904 of 2021**

In addition to submissions by Learned Counsel appearing on behalf of accused - Ganesan, it is submitted by Learned Counsel appearing on behalf of accused - Shanmugam that in the present case there is no B substantive charge or conviction for robbery. It is submitted that conviction of an accused can only be on substantive charge and not otherwise, in the absence of any evidence to the same. It is submitted that in the present case, the substantive charge is only under Section 395 (Dacoity) IPC and even otherwise nothing is on record that the accused - C Shanmugam gave any blow and/or use any deadly weapon and/or caused any grievous injury. The accused cannot be convicted on the basis of constructive liability for the offence punishable under Section 397 IPC. Reliance is placed on the decision of this Court in the case of **Mohan Singh vs State of Punjab**, AIR 1963 SC 174.

7.1 It is further submitted that in absence of any charge for robbery D under Sections 390/392 read with Section 378 (Theft), Section 383 (Extortion) either in the form of Charge-sheet or in the form of charges, the accused cannot be convicted for the aforesaid offences also. It is further submitted that dacoity is nothing but an exaggerated version of robbery with a difference in number of accused (five or more) which is E a sine qua non to proof of dacoity. Reliance is placed on the decisions of this Court in the case of **Ram Bilas Singh & Ors. Vs. The State of Bihar,** (1964) 1 SCR 775; **Raj Kumar @ Raju** *(Supra)* and **Manmeet Singh @ Goldie vs. State of Punjab,** (2015) 7 SCC 167. It is further submitted that even otherwise in the case of accused – Shanmugam, he has been convicted relying upon the confessional statement of co-accused F which is inadmissible in the evidence. It is submitted that confessional statement of A1 - Ganesan and A2 - Benny which are before the Police Officer are inadmissible in evidence. It is further submitted that there is no other evidence against the accused - Shanmugam except the so-called confessional statements of A1 - Ganesan and A2 - Benny. Making G the above submissions it is prayed to allow the present appeal and acquit the accused - Shanmugam for the offence punishable under Section 397 IPC for which he has been convicted.

8. Dr. Joseph Aristotle S., Learned Counsel appearing on behalf of the State of Tamil Nadu has vehemently submitted that in the facts H and circumstances of the case as such the courts below have not

committed any error in convicting Ganesan – A1 and Shanmugam @ Babu – A3.

8.1 It is submitted that in the present case the presence of the accused at the time of the commission of the offence has been established and proved by the prosecution while leading evidence both documentary and oral.

8.2 It is submitted that as such there are concurrent findings recorded by the courts below namely the Learned trial Court, the First Appellate Court and thereafter by the High Court and therefore the interference in exercise of the powers under Article 136 of the Constitution is not warranted. It is submitted that therefore, the High Court's order passed in exercise of its revisional jurisdiction does not call for any interference under Article 136 of the Constitution.

8.3 It is further submitted that the Learned trial Court, First Appellate Court and the Revisional Court as such have rightly appreciated the evidence of PW1 (complainant), PW2 (injured witness), PW10 (Doctor who treated PW1 and PW2) and PW13 (SI who registered the FIR).

8.4 It is submitted that injured eye-witnesses PW1 and PW2 were brought to the hospital by PW3 (eye-witness) at about 11.55 PM on 19.08.1996. PW10 treated PW1 and PW2 and made entries in the accident register. That on receiving information from the Government Hospital, PW13 went to hospital and recorded the statement of PW1 at 2.30 AM and came to the police to register the FIR at 3.00 AM which was marked as Ex.P1. It is submitted that as PW1's fingers of both hands had serious injuries which is corroborated by medical evidence, he was only able to affix the thumb impression on the complaint. It is submitted that discrepancy in PW1's testimony regarding him becoming unconscious immediately after he was injured may not be used against him as the said statement was made after a lapse of 14 years from the date of occurrence. It is submitted that as such on the careful reading of the evidence of PW1 it can be understood to mean PW1 went unconscious only after giving a complaint to PW13. It is submitted that as rightly appreciated by both, the trial Court and the Appellate Court, the testimonies of PW10 and PW13 are corroborated and correspond to the testimony of the prosecution witnesses. It is submitted that the ocular and the medical evidence in this case are corroborated and do not call for any adverse interference.

A 8.5 It is submitted that in the present case, failure to perform Test Identification Parade (TIP) is not fatal to prosecution's case because there is other overwhelming evidence including witness accounts of injured PW1 and PW2 pointing to the guilt of the accused. It is submitted that it is well-settled law that TIP is not a substantive piece of evidence and may only be relied upon when the substantial evidence is uncorroborated. B Identification tests are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. It is submitted that as such there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold or confers a C right upon the accused to claim a TIP. Reliance is placed on the decision of this Court in ***Harbhajan Singh vs. State of Jammu and Kashmir***, (1975) 4 SCC 480.

8.6 It is further submitted that in the present case, the prosecution has clearly established the presence of five accused. It is submitted that D even the charge-sheet was filed against the five accused persons, however two accused absconded and therefore, the trial proceeded against three accused. It is submitted that otherwise there is ample evidence to show the involvement of five accused persons and therefore Section 395 IPC will be attracted.

E 8.7 It is further submitted that in the present case the presence of A1 - Ganesan has been established by the prosecution by examining PW6, PW11 and PW14. It is submitted that vide Ex.P10, A1 was arrested on 21.08.1996.

8.8 It is further submitted that even the presence of five persons F involved in commission of the offence has been established and proved and Section 395 IPC shall be attracted.

8.9 It is submitted that although PW11 turned hostile, it is a settled principle in law that evidence of hostile witness can be relied upon to the extent it supported the case of the prosecution. Reliance is placed on the G judgment of this Court in **Sathya Narayanan vs. State rep. by Inspector of Police**, (2012) 12 SCC 627. It is submitted that during the confession of A2 before the Investigating Officer about the joint attack and stealing of the jewels and cash in which he stated that he – A2 Ganesan, Shajahan, Shanmugam and another person were there. It is submitted that based on the aforesaid confession and recovery of an iron rod and the H information obtained in the confession of A2, there were recoveries and

arrest of the other accused. In support of the submission that the confessional statement can be relied upon on certain circumstances, reliance is placed in the case of **Raju Manjhi vs. State of Bihar**, (2019) 12 SCC 784.

8.10 It is submitted that the witnesses have identified some of the accused in the court and at the same time some of the other accused have been arrested by the information obtained from confession statements. It is submitted that even otherwise, non-identification of all the accused by the witnesses would not vitiate the case of prosecution especially in cases of robbery and dacoity. It is further submitted by learned counsel for the State that as per the settled proposition of law the person charged with a heinous or grave offence can be punished for a less grave offence of cognate nature. Reliance is placed on **Rafiq Ahmad vs. State of U.P**., (2011) 8 SCC 300 and **K. Prema S. Rao vs. Yadla Srinivasa Rao**, (2003) 1 SCC 217.

It is submitted that in the present facts of the case, the charge was rightly framed for the offences under Section 395 read with Section 397 IPC and the ingredients for the offences have been proved by the prosecution beyond reasonable doubt even as otherwise in the alternative, the conviction of the accused under Section 397 IPC can be sustained.

9. Making the above submissions it is prayed to dismiss the present appeals.

10. Heard the Learned Counsels for the respective parties at length.

11. Present appeals have been preferred by the Original Accused No.1 - Ganesan and Accused No.3 - Shanmugam @ Babu challenging their conviction for the offence under Section 397 IPC. At the outset, it is required to be noted that as such there are concurrent findings recorded by the Learned trial Court, Learned Sessions Court and the High Court on presence of the accused at the time of commission of the offence and their active involvement. Their presence at the time of commission of the offence has been established and proved by the prosecution by examining the relevant witnesses during the course of trial.

11.1 PW1 – Duraisamy, PW2 – Palanivel and PW3 – Aravind Kumar are three eye-witnesses, out of which PW1 and PW2 are the injured eye-witnesses. We have gone through in detail the deposition of relevant witnesses more particularly PW1, PW2 and PW3 and even PW11 (who turned hostile) and the medical evidence and some of the

A accused identified in the Court, we are of the opinion that the presence and their participation has been established and proved by the prosecution. There are some contradictions, however on reading the entire evidence, we are of the opinion that the contradictions are not such material contradictions which affect the case of the prosecution as a whole. It is to be noted that the witnesses were examined after almost 14 years have passed and therefore there may be some contradictions. As per the settled proposition of law only those contradictions which are material contradictions may create the doubt and benefit of such material contradictions can be given to the accused.

C 12. In light of the above findings and observations now we may consider the other submissions on merits.

12.1 It is the case on behalf of the accused that their conviction for the offence under Section 397 IPC is unsustainable. It is also the case on behalf of the accused that even for the offence under Section 391 IPC punishable under Section 395 IPC involvement of five or more D persons in commission of robbery is *sine qua non*. It is the case on behalf of the accused that in the present case only three accused were tried and subsequently one another accused Benny came to be tried and therefore the condition precedent for bringing the case under Section 391 IPC (Dacoity) has not been satisfied as the involvement of five or E more persons in commission of the offence has not been established and proved and only four accused were tried. It is also the case on behalf of the accused that the courts below have materially erred in convicting the accused for the offence punishable under Section 397 IPC even as per the case of the prosecution the present appellants Accused Nos.1 and 3 did not use any deadly weapon. Relying upon the decision of this F Court in the case of **Shri Phool Kumar** (Supra) and **Dilawar Singh** (Supra), it is submitted that the accused who has not used any deadly weapon at the time of committing robbery cannot be convicted under Section 397 IPC for the imposition of the minimum punishment and the term 'offender' is confined to the offender who uses any deadly weapon G to attract Section 397 IPC for the imposition of the minimum punishment. It is also the case on behalf of the accused that one another accused Benny came to be acquitted subsequently and therefore the benefit of acquittal of Benny should go to the present appellants – accused.

12.2 To appreciate the aforesaid submissions the relevant H provisions with respect to 'robbery' and 'dacoity' are required to be

referred to. The relevant provisions would be Section 390 IPC to Section 398 IPC which read as under:

"**390. Robbery**.—In all robbery there is either theft or extortion.

When theft is robbery.—Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

When extortion is robbery.—Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

391. Dacoity.—When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present 1.Subs. by Act 26 of 1955, s. 117 and the Sch., for "transportation for life" (w.e.f. 1-1-1956). 99 and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

392. Punishment for robbery.—Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

393. Attempt to commit robbery.—Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

394. Voluntarily causing hurt in committing robbery.—If any person, in committing or in attempting to commit robbery, voluntarily

A causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with 1 [imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

B **395. Punishment for dacoity.—**Whoever commits dacoity shall be punished with 1 [imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

396. Dacoity with murder.—If any one of five or more persons,
C who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or 1 [imprisonment for life], or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

D **397. Robbery, or dacoity**, with attempt to cause death or grievous hurt.—If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall
E not be less than seven years.

398. Attempt to commit robbery or dacoity when armed with deadly weapon.—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
F not be less than seven years."

12.3 As per Section 390 IPC, for 'robbery' there is either theft or extortion. When in the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, voluntarily causes or attempts to cause to any
G person death or hurt or wrongful restraint or fear of instant death or of instant hurt, or of instant wrongful restraint the theft can be said to be 'robbery'. In similar situation the 'extortion' can be said to have committed 'robbery'. As per explanation to Section 390 IPC the offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

H

Section 391 IPC defines 'dacoity'. When five or more persons conjointly commit or attempt to commit a robbery, the accused then can be said to have committed the 'dacoity'. A

As per Section 392 IPC whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine. However, if the robbery is committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years. B

As per Section 393 IPC even an attempt to commit robbery is punishable with rigorous imprisonment for a term which may extend to seven years with fine. As per Section 394 IPC if any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life or with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine. C

Section 395 IPC provides for punishment for 'dacoity'. Whoever commits dacoity shall be punished with imprisonment for life or with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine. D

In case of dacoity with murder if any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years with fine. E

As per Section 397 IPC if at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years. F

Similarly, if, at the time of committing 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. G

12.4 On conjoint reading of the aforesaid provisions, commission of 'robbery' is *sine qua non*. The 'dacoity' can be said to be an exaggerated version of robbery. If five or more persons conjointly commit or attempt to commit robbery it can be said to be committing the 'dacoity'. H

A Therefore, the only difference between the 'robbery' and the 'dacoity' would be the number of persons involved in conjointly committing or attempt to commit a 'robbery'. The punishment for 'dacoity' and 'robbery' would be the same except that in the case of 'dacoity' the punishment can be with imprisonment for life. However, in the case of 'dacoity with murder' the punishment can be with death also. However, in a case B where the offender uses any deadly weapon or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person the imprisonment with which such offender shall be punished shall not be less than seven years. Learned Counsel appearing on behalf of the appellants have rightly submitted that to bring the case within Section C 397 IPC, the offender who uses any deadly weapon, or causes grievous hurt to any person shall be liable for minimum punishment under Section 397 IPC.

Section 392 and Section 390 IPC are couched in different words. In Sections 390, 394, 397 and 398 IPC the word used is 'offender'. D Therefore, for the purpose of Sections 390, 391, 392, 393, 394, 395, 396, 397, 398 IPC only the offender/person who committed robbery and/or voluntarily causes hurt or attempt to commit such robbery and who uses any deadly weapon or causes grievous hurt to any person, or commits to cause death or grievous death any person at the time of committing robbery or dacoity can be punished for the offences under Sections 390, E 392, 393, 394, 395 and 397 and 398 IPC. For the aforesaid the accused cannot be convicted on the basis of constructive liability and only the 'offender' who 'uses any deadly weapon….' can be punished. However, so far as Section 391 IPC 'dacoity' and Section 396 IPC – 'dacoity with murder' is concerned an accused can be convicted on the basis of F constructive liability, however the only requirement would be the involvement of five or more persons conjointly committing or attempting to commit a robbery – dacoity/dacoity with murder.

12.5 At this stage, the decision of this Court in **Shri Phool Kumar** (Supra) is required to be referred to. In the aforesaid decision this Court G has observed and considered Sections 397 and 398 IPC and on interpretation of the aforesaid provisions, it is observed and held in paragraphs 5 to 7 as under:

"5. Section 392 of the Penal Code provides:

"Whoever commits robbery shall be punished with rigorous H imprisonment for a term which may extend to ten years, and shall

also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years."

The sentence of imprisonment to be awarded under Section 392 cannot be less than seven years if at the time of committing robbery the offender uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person: *vide* Section 397. A difficulty arose in several High Courts as to the meaning of the word "uses" in Section 397. The term "offender" in that section, as rightly held by several High Courts, is confined to the offender who uses any deadly weapon. The use of a deadly weapon by one offender at the time of committing robbery cannot attract Section 397 for the imposition of the minimum punishment on another offender who had not used any deadly weapon. In that view of the matter use of the gun by one of the culprits whether he was accused Ram Kumar or somebody else, (surely one was there who had fired three shots) could not be and has not been the basis of sentencing the appellant with the aid of Section 397. So far as he is concerned he is said to be armed with a knife which is also a deadly weapon. To be more precise from the evidence of PW 16 "Phool Kumar had a knife in his hand". He was therefore carrying a deadly weapon open to the view of the victims sufficient to frighten or terrorize them. Any other overt act, such as, brandishing of the knife or causing of grievous hurt with it was not necessary to bring the offender within the ambit of Section 397 of the Penal Code.

6. Section 398 uses the expression "armed with any deadly weapon" and the minimum punishment provided therein is also seven years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. This has created an anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed in committing it attracts the minimum punishment of seven years under Section 398 if he is merely armed with any deadly weapon, while an offender so armed will not incur the liability of the minimum punishment under Section 397 if he succeeded in committing the robbery. But then, what was the purport behind the use of the different words by the Legislature in the two sections viz. "uses" in Section 397 and "is armed" in Section 398. In our judgment the

A anomaly is resolved if the two terms are given the identical meaning. There seems to be a reasonable explanation for the use of the two different expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to any fruitful use because it would have been of use only when the offender succeeded in committing the robbery.

7. If the deadly weapon is actually used by the offender in the commission of the robbery such as in causing grievous hurt, death or the like then it is clearly used. In the cases of *Chandra Nath* v. *Emperor* [AIR 1932 Oudh 103]; *Nagar Singh* v. *Emperor* [AIR 1933 Lah 35] and *Inder Singh* v. *Emperor* [AIR 1934 Lah 522] some overt act such as brandishing the weapon against another person in order to overawe him or displaying the deadly weapon to frighten his victim have been held to attract the provisions of Section 397 of the Penal Code. J.C. Shah and Vyas, JJ. of the Bombay High Court have said in the case of *Govind Dipaji More* v. *State* [AIR 1956 Bom 353] that if the knife was used for the purpose of producing such an impression upon the mind of a person that he would be compelled to part with his property, that would amount to 'using' the weapon within the meaning of Section 397.

In that case also the evidence against the appellant was that he carried a knife in his hand when he went to the shop of the victim. In our opinion this is the correct view of the law and the restricted meaning given to the word "uses" in the case of *Chand Singh* [ILR (1970) 2 Punj and Har 108] is not correct."

12.6. The aforesaid view has been subsequently reiterated by this Court in the case of **Dilawar Singh** (Supra) and in paragraphs 19 to 21 it is observed and held as under:

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

1. The accused committed robbery.

2. While committing robbery or dacoity (*i*) the 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 the other accused are not vicariously liable under that section for acts of the co-accused.

20. As noted by this Court in *Phool Kumar* v. *Delhi Admn*. [(1975) 1 SCC 797 : 1975 SCC (Cri) 336 : 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 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.

21. 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)* [(2004) 3 SCC 116 : 2004 SCC (Cri) 687 : AIR 2004 SC 1253]."

12.7. Thus, as per the law laid down by this Court in the aforesaid two decisions the term 'offender' under Section 397 IPC is confined to the 'offender' who uses any deadly weapon and use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397 IPC for the imposition of minimum punishment on another offender who has not used any deadly weapon. Even there is distinction and difference between Section 397 and Section 398 IPC. The word used in Section 397 IPC is 'uses' any deadly weapon and the word used in Section 398 IPC is 'offender is armed with any deadly weapon'. Therefore, for the purpose of attracting Section 397 IPC the 'offender' who 'uses' any deadly weapon Section 397 IPC shall be attracted.

A In light of the above observations and the law laid down by this Court in the aforesaid two decisions the case on behalf of the accused in the present appeals is required to be considered. Even as per the case of the prosecution and even considering the evidence on record it can be seen that the present accused A1 and A3 are not alleged to have used any weapon. The allegation of use of any weapon was against Benny and Prabhakaran. Therefore, in absence of any allegations of use of any deadly weapon by the appellants herein – Accused Nos.1 and 3 Section 397 IPC shall not be attracted and to that extent the Learned Counsel appearing on behalf of the appellants – accused are right in submitting that they ought not to have been convicted for the offence punishable under Section 397 IPC.

13. However, the next question which is posed for the consideration of this Court is once it is held that the accused could not have been convicted for the offence under Section 397 IPC, still their conviction and sentence can be sustained under Section 391 IPC or not.

D 14. Now so far as the submission on behalf of the accused that the appellants – accused cannot be convicted for the offence under Section 397 IPC and that the requirement to bring the case under Section 391 IPC punishable under Section 395 IPC namely five persons or more persons conjointly committing the robbery has not been established and E proved and only four persons came to be tried and the courts below did not convict the accused for the offence under Section 391 punishable under Section 395 IPC is concerned, at the outset, it is required to be noted that as such all the accused were charged by the Learned trial Court for the offences under Section 395 IPC as well as 397 IPC. With the aforesaid offences parties went for trial. Therefore, once a case F under Section 391 IPC punishable under Section 395 IPC is made out, they can be convicted for the offence under Section 391 IPC punishable under Section 395 IPC as no prejudice shall be caused to the accused. Even otherwise as held by this Court in the case of **Rameshbhai Mohanbhai Koli vs. State of Gujarat**, (2011) 11 SCC 111, when a G charge of a major offence is not made out, conviction for a minor offence even in the absence of the charge for the said minor offence can be sustained. It is observed that if an accused is charged with a grave offence but the same is not established on merit or for default of technical nature, he can be convicted and punished for a minor offence without altering of a charge. In paragraphs 31 and 43, it is observed and held as H under:

"31. With the passage of time more and more such cases came up for consideration of this Court as well as the High Courts. The development of law has not changed the basic principles which have been stated in the judgments aforereferred. Usually an offence of grave nature includes in itself the essentials of a lesser but cognate offence. In other words, there are classes of offences like offences against the human body, offences against property and offences relating to cheating, misappropriation, forgery, etc. In the normal course of events, the question of grave and less grave offences would arise in relation to the offences falling in the same class and normally may not be inter se the classes. It is expected of the prosecution to collect all evidence in accordance with law to ensure that the prosecution is able to establish the charge with which the accused is charged, beyond reasonable doubt. It is only in those cases, keeping in view the facts and circumstances of a given case and if the court is of the view that the grave offence has not been established on merits or for a default of technical nature, it may still proceed to punish the accused for an offence of a less grave nature and content.

*** *** ***

43. Having stated the above, let us now examine what kind of offences may fall in the same category except to the extent of "grave or less grave". We have already noticed that a person charged with a heinous or grave offence can be punished for a less grave offence of cognate nature whose essentials are satisfied with the evidence on record. Examples of this kind have already been noticed by us like a charge being framed under Section 302 IPC and the accused being punished under Section 304 Part I or II, as the circumstances and facts of the case may demand. Furthermore, a person who is charged with an offence under Section 326 IPC can be finally convicted for an offence of lesser gravity under Section 325 or 323 IPC, if the facts of the case so establish."

15 Even otherwise there is no difference between Section 391/ 395 and Section 397 IPC so far as sentence/punishment except the difference in case of Section 397 IPC the punishment shall not be less than seven years. Otherwise, the 'robbery' and 'dacoity' are sine qua non. 'Dacoity' is nothing but an exaggerated version of 'robbery' with a

A difference in number of accused. Therefore, also even in a case where the accused is not convicted for the offence under Section 397 IPC, still he can be punished under Section 395 IPC and no prejudice shall be caused to him as ultimately the prosecution has to prove the 'robbery' and 'dacoity' either for the offence punishable under Section 395 IPC or under Section 397 IPC. However, to bring the case against the accused B under Section 397 IPC, the prosecution has to prove one additional fact that the offender has used any deadly weapon or has caused grievous hurt to any person, or has attempted to cause death or grievous hurt to any person. Therefore, the case is made out under Section 391 IPC read with Section 395 IPC. Despite the fact that the courts below C convicted the accused under Section 397 IPC which is held to be unsustainable, in that case also if the case is made out under Section 391 IPC read with Section 395 IPC, still they can be convicted for the offence punishable under Section 391 read with Section 395 IPC even without even altering the charge. As observed hereinabove in the present case, the learned trial court framed the charge against the accused for the D offence under Sections 395 and 397 IPC both.

16. Now so far as the submission on behalf of the appellants – accused that even no case is made out for the offence under Section 391 IPC and they cannot be punished under Section 395 IPC as what is required to be proved is involvement of five or more persons conjointly E in committing the robbery and in the present case only four persons are tried and the prosecution has failed to prove the involvement of five or more persons. However, it is required to be noted that as such in the FIR there was a reference to five persons involved in committing the robbery. Even the charge-sheet was filed against five persons. However, as two F accused absconded, the trial was split and three accused came to be tried. One accused Benny came to be tried subsequently and one person is still absconding. Even there are concurrent findings recorded by all the courts below that five persons were involved in committing the offence of robbery. Merely because some of the accused absconded and less than five persons came to be tried in the trial, it cannot be said that the G offence under Section 391 IPC punishable under Section 395 IPC is not made out. What is required to be considered is the involvement and commission of the offence of robbery by five persons or more and not whether five or more persons were tried. Once it is found on evidence that five or more persons conjointly committed the offence of robbery or H attempted to commit the robbery a case would fall under Section 391

IPC and would fall within the definition of 'dacoity'. Therefore, in the facts and circumstances, the accused can be convicted for the offence under Section 391 IPC punishable under Section 395 IPC.

17. Now so far as the submission on behalf of the accused that in the subsequent trial one of the accused – Benny came to be acquitted and therefore the benefit of acquittal of Benny must be given to the present accused and thereafter they may be acquitted is concerned the same has no substance. At the outset, it is required to be noted that the accused are to be tried and convicted on the basis of evidence made in the trial in which they are convicted. It is also required to be noted that Benny came to be tried after a period of 15 years as his trial was split as he absconded. From the judgment and order of acquittal passed in the case of Benny, it appears that PW1 during the trial in case of Benny turned hostile. In the case of Benny only five witnesses came to be examined and for whatever reasons other witnesses have not been examined. In the present case PW1 not only supported the case of prosecution but as many as 15 witnesses came to be examined. Therefore, merely because in the subsequent split trial the Benny came to be acquitted the benefit of such acquittal cannot be in favour of the present appellants – accused as the prosecution has been successful in proving the case against the present accused. At this stage, the decision of this Court in the case of **Amrita vs. State of M.P.**, (2004) 12 SCC 224; **Gangadhar Behera vs. State of Orissa,** (2002) 8 SCC 381 and **Raja vs. State,** (2013) 12 SCC 674 are required to be referred to. In the case of **Amrita** (Supra), it is observed and held that mere acquittal of some of the accused on the same evidence by itself does not lead to a conclusion that all deserve to be acquitted in case appropriate reasons have been given on appreciation of evidence both in regard to acquittal and conviction of the accused. Similar view has been expressed in case of **Raja** (Supra) and **Gangadhar** (Supra). Therefore, on considering the facts narrated hereinabove which led to acquittal in case of Benny, the present accused against whom the prosecution has been successful in proving the case by leading the evidence, the appellants – accused are not to be acquitted.

18. In view of the above and for the reasons stated above, both these appeals are partly allowed so far as quashed and set aside the conviction of the appellants – accused for the offence under Section 397 IPC. The conviction of the accused for the offence punishable under Section 397 IPC is hereby set aside and the appellants – accused are

A convicted for the offences under Section 391 IPC punishable under Section 395 IPC and sentenced to undergo seven years RI and a fine of Rs.2,000/- and in default to undergo further six months RI.

Present appeals are partly allowed to the aforesaid extent only.

Devika Gujral Appeals partly allowed.