# Asgar And Anr. vs State Of Rajasthan on 31 January, 2003

## Equivalent citations: 2003CRILJ1997, RLW2003(2)RAJ1209, 2003(2)WLC53

JUDGMENT

Bansal, J.

1. This appeal is directed against the judgment dated October 18, 1984 passed by learned Additional Sessions Judge No. 2, Bharatpur whereby he convicted and sentenced the appellants Asgar and Mazid as under :-

> Asgar and Mazid each u/Sec. 399 IPC One year's rigorous imprisonment with a fine of Rs. 100/- and in default of payment of fine to further undergo one month's rigorous imprisonment.
>
> u/Sec. 402 IPC One year's rigorous imprisonment with a fine of Rs. 100/- and in default of payment of fine to further undergo one month's rigorous imprisonment.

2. Both the substantive sentences were ordered to run concurrently.

3. According to prosecution, both the appellants alongwith co- accused Munna who has absconded during trial, were arrested by the SHO, P.S. Kumher (Distt. Bharatpur) PW-6 Narain Sahai and his party from Kundewali Dharamshala Situated in Kurnher town on 29.3.82 at about 2:00 A.M. and one axe, two kattas (country made pistol) and three hand grenades were also seized from the accused. It was alleged by the prosecution that the accused were making preparation to commit dacoity in the house of Harcharan Lal and they assembled in Dharamshala for the purpose of committing dacoily, it was also alleged by the prosecution that on seeing the police, the remaining accused fled away and could not be arrested. A case was registered under Sections 399 and 402 IPC and 3/25 The Arms Act by the SHO, Narain Sahai. FIR is Ex.P.10. During investigation no other accused was arrested. On completion of investigation, a chargesheet was laid against the appellants and the accused Munna in the Court of Judicial Magistrate No. 1, Bharatpur who committed the case to the Court of learned Sessions Judge, Bharatpur. The file was received by Additional Sessions Judge No. 2, Bharatpur on transfer and he framed charges under Sections 399 and 402 IPC against the appellants and co-accused Munna. Both the appellants and the co- accused Munna pleaded not guilty and claimed to be tried.

4. The prosecution examined as many as seven witnesses in support of its case. In their statements recorded under Section 313 Cr.P.C., both the appellants stated that after reaching Kurnher to purchase catties they had gone to the house of Munna's brother-in-law but it was found locked and thereafter they reached at the temple. When they were sleeping the police came there, arrested them and took them to the police station. In defence DW-1 Jagdish Prasad Sharma was examined. As

stated above, during trial co-accused Munna absconded.

5. Learned Additional Sessions Judge after hearing the final submissions made by learned counsel for the accused-appellants and learned Public Prosecutor, convicted and sentenced the appellants as indicated here-in-above.

6. I have heard learned counsel for the appellants, learned Public Prosecutor and have also perused the record of the trial Court as well as the impugned judgment.

7. Learned counsel for the appellants has contended that the prosecution has failed to prove both the charges framed against the appellants and they have wrongly been convicted by the trial Court. Learned counsel has submitted that from the evidence adduced by the prosecution, it is not proved that the appellants were the members of the assembly consisting of five or more persons and, therefore, the appellants cannot be held guilty under Section 402 IPC. It has also been contended by learned counsel for the appellants that the prosecution has also failed to prove that five or more persons were making preparation to commit dacoity or robbery was to be committed by five or more persons and in these circumstances no offence under Section 399 IPC is also made out against the appellants. Therefore, the appellants are entitled to be acquitted from both the charges and their appeal deserves to be allowed. Learned Public Prosecutor has supported the impugned judgment.

8. I have given my thoughtful consideration to the submissions made by learned counsel. Dacoity has been defined by Section 391 IPC which reads as under ;-

> "391. Dacoity.- When five or more person 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 and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity."

Sections 399 and 302 IPC read as under :-

> "399. Making preparation to commit dacoity- Whoever makes, any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

> "402. Assembling for purpose of committing dacoity.- Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine."

9. From the above-quoted Sections, it is clear that in order to establish an offence punishable under Section 399 IPC some act amounting to preparation must be proved and what must be proved further is an act for which preparation was being made was a dacoity, that is to say, robbery to be committed by five or more persons. The prosecution has to establish under Section 402 IPC that

there had been an assembly of five or more persons constituted for the purpose of committing dacoity and that the accused persons were members of that assembly. If there is no clear and acceptable evidence of any assemblage of the appellants with three or mare persons for the purpose of committing dac.oity then the appellants cannot be held liable under Section 402 IPC.

10. In Karam Dass v. State, AIR 1952 Punjab 249, the Punjab High Court held that :-

> "To bring the case within Section 399 of the Code, it is not necessary that persons shown to be making the preparations should be five or more in number. It is, however, necessary for the prosecution to prove that the raid for which the persons prosecuted were making preparation was to be committed by five or more persons, for otherwise it would not be dacoity but merely robbery, and mere preparation for committing robbery, unless it ends in an actual attempt, is not punishable by law."

11. In the case on band three accused persons including both the appellants were arrested by the police. 11 was also stated in the FIR Ex.P.10 that some accused persons fled away taking benefit of darkness but their exact number was not mentioned in FIR Ex.P. 10. Even in chargesheet it was not stated that on investigation it was found that on seeing the police party two or more than two accused persons fled away from away from Dharamshala, in my opinion the prosecution has failed to prove that five or more than five persons had assembled in a Dharamshala of Kumher town for the purpose of committing dacoity. The prosecution has also failed to prove that five or more than five persons including the appellants were found making preparation to commit dacoity or the robbery for which the appellants were making preparation was to be committed by five or more persons. Seven witnesses in all have been examined by the prosecution. PW.1 Mansingh and PW.7 Kailash Chand Meena are the formal witnesses and they were not the members of the police party who had made the arrest of the appellants and co-accused Munna. PW-2 Shyamlal, Head Constable has stated in his statement recorded during trial that the appellants Mazid and Asgar and co-accused Munna were arrested. In his examination-in-chief, he has further stated that the remaining accused fled away. In cross examination he has stated that he cannot tell the exact number of persons who had fled away from Dharamshala. PW.3 Gopalram, Head Constable has stated that there were four or five accused including the appellants and Munna. From the statement of Gopalram it cannot be said with certainty that five or more than five accused persons were found in the aforesaid Dharamshala by the SHO, PS Kumher PW.6 Narain Sahai and his party and three accused persons including the appellants were arrested and two or more than two accused persons fled away. PW.4 Radheylal and PW.5 Gheesa who are independent witnesses have categorically stated that there were only three accused persons in Dharamshala and all of them were arrested by the police. They have also stated that they did not see anybody fleeing away from that place. Both these witnesses have not been declared hostile by the prosecution and in view of that, their evidence cannot be discarded. PW.6 Narain Sahai, SHO has not stated the exact number of accused persons including both the appellants and Munna who are alleged to have assembled in a Dharamshala for committing dacoity. Looking to such type of evidence adduced by the prosecution. I have come to the conclusion that the prosecution has failed to prove that the appellants Mazid and Asgar were the members of an assembly of five or more persons constituted for the purpose of committing dacoity and five or more persons were making preparation to commit dacoity. The prosecution has also

failed to prove that the robbery for which the appellants were allegedly making preparation was to be committed by five or more persons, therefore, they cannot be held guilty under Section 399 and 402 IPC and their onvietion recorded by the learned Additional Sessions Judge cannot be maintained.

12. In the result, the appeal of the appellants Asgar and Mazid is allowed. While setting aside the judgment and order dated October 18, 1984 passed by learned Additional Sessions Judge No. 2, Bharatpur, they are acquitted of the charges under Sections 399 and 402 IPC. They are on bail, their bail bonds stand cancelled. Amount of fine, if deposited by the appellants, shall be refunded to them.