Section-397 IPC is not a Substantive Offence:- How & When to Invoke the Provision:

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It is not uncommon to come across judgments passed in district courts in which accused is convicted and sentenced separately for offences under Section-392 and 397 of IPC. Similarly, even charges under both the provisions are framed against an accused in a given case. Even further, one may find that for more accused persons, the courts have invoked the concept of common intention prescribed in Section-34 IPC with Section-397 IPC.

2. Present paper is humble attempt to understand the nature and scope of Section-397 IPC. Before proceeding any further, it would be appropriate to note the Section-397 which reads as under:

> "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 not be less than seven years".

3. It is easily seen that the expression "at the time of committing robbery or dacoity" has two commas (,) which are placed prior to and after the expression. This clearly indicates that the said expression is a super-imposition and even without it, entire sentence could have been made and properly written. We will therefore classify the aforesaid provision in following manner:

- If 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,
- The aforesaid activities shall be conditioned by the timing that is to say "at the time of committing robbery or dacoity".

4. It is clear from the aforesaid that if the offender does any of the activities i.e. 1) uses any deadly weapon, 2) causes grievous hurt, 3) attempts to cause grievous hurt, 4) attempts to cause death, he will fall under the trappings of Section-397 IPC. However, his activities (any of the

aforesaid) must have been done during a particular time period i.e. at the time of committing robbery or dacoity.

Individualistic character of the provision:

5. Significantly, the section has used a clear expression "the offender". This is clearly a singular indication towards a particular culprit. The latter part of the provision provides about minimum sentencing and has used an expression "such offender". Both the expressions i.e. "the offender" and "such offender" have to be read simultaneously. Therefore, it becomes clear that he who had done the particular activity will become liable for minimum punishment and none else.

6. Hon'ble Supreme Court in **Phool Kumar vs Delhi Administration** dated 13.03.1975 has observed- "*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*".

Use of common intention:

7. As seen aforesaid, the provision is individualistic in nature and refers to a particular culprit. In such circumstances, it would be difficult to invoke the concept of common intention.

8. Hon'ble Supreme Court in **Ashfaq vs State** (Govt. Of Nct Of Delhi) dated 10.12.2003 has observed- "*For that reason, no doubt the provision postulates only the individual act of the accused to be relevant to attract Section 397 IPC and thereby inevitably negates the use of the principle of constructive or vicarious liability engrafted in Section 34 IPC*".

9. It would however be interesting to note the manifestation of the causing of grievous hurt or attempting to cause death or grievous hurt. It can be discussed in following manner:

Attempt to cause death:

10. The provision interestingly nowhere talks about the concept of murder. When it uses "attempt to cause death" it does not contemplate a confined description of "attempt to cause murder". Death is more general and universal term than the term "murder" as defined in the IPC. It is therefore clear that whether or not the act attributed to a culprit falls within the ambit of Section-

307 (i.e. attempt to murder), he may still fall within the contemplation of "attempt to cause death" available in Section-397 IPC.

11. The legislative intention becomes very clear once we go through the Section-396 IPC. This section punishes aggravated form of dacoity and has specifically used the expression "murder". Meaning thereby that all persons involved in the dacoity shall be liable for punishment u/s-396 once any one commits murder while committing dacoity. In addition, the person who commits the murder shall also be liable for punishment u/s-302 IPC. Ingredients of offence of murder as defined in Section-300 IPC have to be established if a charge under Section-396 is to be sustained.

12. However, the same is not the case with Section-397 IPC as it has not used the expression "murder" in contradiction with Section-396. The legislative intention is very clear. As such, any type of attempt to death will be sufficient to attract Section-397 IPC. Attempt to death talked about in Section-397 will cover in its fold every attempt to murder, attempt to culpable homicide or any other attempt which might have resulted in death of the person concerned.

Grievous hurt or its attempt:

13. We know that the term grievous hurt is defined in Section-320 IPC and provides for 8 items which may be described as a grievous hurt. Since once defined a term has to have the same meaning throughout the IPC, we have to read the same definition in Section-397 also. Therefore, we will have no concern with the gravity of injury or its dangerous consequence as normally indicated in the medical reports. Only if the injury falls within the ambit of defined 8 items that the situation will attract the Section-397.

14. What is however interesting is that the term grievous hurt should not be confused with the punishing provision available in Section-325 IPC. This is an species of grievous hurt as it is restricted and punishes only the grievous hurt which was caused voluntarily. Section-397 however nowhere uses the term voluntarily causing grievous hurt. It is therefore clear that in a given situation Section-325 may or not get attracted but still Section-397 may get attracted on account of the injury falling within any of the 8 descriptions provided in Section-320.

15. We may understand the difference once we go through the following provisions:

> 321. Voluntarily causing hurt.- Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is

likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said “voluntarily to cause hurt”.

322. Voluntarily causing grievous hurt.- Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said “voluntarily to cause grievous hurt”.

Explanation.- A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt, if intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

325. Punishment for voluntarily causing grievous hurt.- Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

16. It is seen that firstly a hurt becomes voluntarily caused hurt. Then it becomes voluntarily caused grievous hurt. The explanation further puts stringent condition that the person should not only cause but his intention/knowledge should also be clearly established about the grievous hurt. It is only then that he will be punishable under Section-325. In contrast however Section-397 does not use “voluntarily”. It simply uses causing grievous hurt or attempting to cause grievous hurt. The legislative intention further becomes clear when we read Section-394 IPC. This section specifically uses “voluntarily causes hurt”.

Use of deadly weapon:

17. What is the meaning of “use” and what type of weapons can be treated as deadly for the Section-397 is a very significant question.

18. Hon’ble Supreme Court in **Phool Kumar vs Delhi Administration** dated 13.03.1975 has observed- “*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 P.W. 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. section 398 uses the expression "armed with any deadly weapon" and the minimum punishment provided therein is also 7 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 7 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 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. 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".

19. What is therefore essential to satisfy the word "Uses" for the purposes of section 397 IPC is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of victim and not that it should be further shown to have been actually used for cutting, stabbing, shooting, as the case may be.

20. We may now see the actual meaning of the word "deadly weapon" used in the section. IPC does not define this expression. We may therefore give it its general meaning.

21. Deadly weapon has not been defined under the Indian Penal Code and as defined in Black's Law Dictionary at Page 1731 it means: "*deadly weapon. (16c) Any firearm or other device, instrument, material, or substance that, from the manner in which it is used or is intended to be*

used, is calculated or likely to produce death. In some states, the definition encompasses the likelihood of causing either death or serious physical injury".

22. Hon'ble Supreme Court in Mathai vs State dated 12.01.2005 in a slightly different context has observed as "*The expression "any instrument which used as a weapon of offence is likely to cause death" has to be gauged taking note of the heading of the Section. What would constitute a 'dangerous weapon' would depend upon the facts of each case and no generalization can be made..... At this juncture, it would be relevant to note that in some provisions e.g. Sections 324 and 326 expression "dangerous weapon" is used. In some other more serious offences the expression used is "deadly weapon" (e.g. Sections 397 and 398). The facts involved in a particular case, depending upon various factors like size, sharpness, would throw light on the question whether the weapon was a dangerous or deadly weapon or not. That would determine whether in the case Section 325 or Section 326 would be applicable*".

23. Therefore what can be a deadly weapon has to be decided in accordance with the obtaining factual situation of a given case. However, it is clear that deadly weapon should be something more than a dangerous weapon. These two expressions have been used in different provisions and therefore it can hardly be accepted that they shall be of same or one meaning.

Substantive offence:

24. A bare look at the provision shows that it only curtails the discretion of the court in the matter of sentencing by providing that the imprisonment shall not be less than 7 years. However, it nowhere provides as to what shall be the imprisonment. It has used the expression "the imprisonment with which such offender shall be punished". It clearly shows that there has already been an "imprisonment" with which the offender shall be punished. But the entire text of Section-397 nowhere talks about the said imprisonment. We have therefore to accept that the said imprisonment has been provided somewhere else to which the section is referring.

25. Section-397 has used certain terms. Now, death, grievous hurt or its attempt are not punishable it their literal sense under any of the provisions of IPC. Their species though are punishable in the form of murder, culpable homicide or attempt, voluntarily or negligently/rashly causing grievous hurt. Out of several terms used in Section-397 only committing of robbery or dacoity is punishable as offence under IPC in the strict sense. It is therefore clear that the "imprisonment" already referred in the Section-397 to which the offender shall be punished is only

to be found in reference to the commission of robbery or dacoity. Punishment of these activities are provided in Section-392, 394, 395 IPC.

26. Punishment will therefore always be in terms of Section-392, 394, 395 IPC according to the situation of a particular case. But whenever Section-397 is invoked in respect of any of the accused, he only shall have the minimum prescription. It is not unusual. There are several offences for which the legislature has provided minimum prescription either in the main provision itself or through a proviso or through an explanation. Section-397 apparently acts as a proviso and nothing else.

27. One may ask as to why the relevant sections themselves did not provide for a minimum prescription. Answers may be multiple. Exact intention of the Legislature may not be ascertained in precise manner. However, it is clear that since the minimum prescription was to govern several sections, the legislature might have thought to provide it in one separate provision instead of enacting same thing in each section.

28. This is not the solitary instance. We know that Section-27 of Evidence Act is enacted as a separate section but in reality it works only as a proviso to Section-25 & 26. Even further, Section-108 though enacted as a separate section, actually works as a proviso to Section-107 Evidence Act. It would be of some interest that initially the word “provided” was not in Section-108 but latteron it was inserted through an amendment. This certainly could have been done with a view to avoid any confusion about the nature of Section-108.

29. We have seen that Section-397 works only as a proviso to Section-392, 394, 395 IPC though enacted as a separate section. As such, we can say that Section-397 does not provide for a substantive offence.

30. It is not as if the present paper is the first in time for taking such a view. Constitutional courts have also taken the same view. Some of the instances may be noted as under:

31. Hon’ble Supreme Court in **Ashfaq vs State (Govt. Of Nct Of Delhi)** dated 10.12.2003 has observed- “*The provisions of Section 397, does not create any new substantive offence as such but merely serves as complementary to Section 392 and Section 395 by regulating the punishment already provided for dacoity by fixing a minimum term of imprisonment when the dacoity committed was found attendant upon certain aggravating circumstances viz., use of a deadly weapon, or causing of grievous hurt or attempting to cause death or grievous hurt*”.

32. Hon'ble High Court of Delhi has also held that Section-397 does not provide for a substantive offence vide **Jai Prakash vs State** dated 19.03.1981 observing as "*Before I proposed to determine that question I may make it clear that Section 397 I.P.G. does not make any act an offence. It only provides minimum punishment for some offences under certain circumstances i.e. when deadly weapon is used or grievous hurt is caused or attempt to cause death or grievous hurt is made. The learned Additional Sessions Judge was under a wrong impression that Section 397 independently makes any act an offence. Substantive offence for which Section 397 provides minimum punishment are robbery and dacoity when deadly weapon is used or grievous hurt is caused etc*" and also **Firoz vs the State** dated 22.05.2014 observing as "*The provisions of Section 397 IPC do not create any new substantive offence as such. Section 397 IPC simply prescribes a minimum sentence for the offence of robbery / dacoity under the aggravating circumstances. It regulates only the substantive sentence which cannot be less than seven years*".

33. In view of the aforesaid, it becomes clear that Section-397 is neither a substantive offence nor provides for any independent punishment in itself. As such, there cannot be a separate charge for this section and even there cannot be a separate conviction/sentence for this section. The question then is to how one may invoke this provision in a given fact situation. In my opinion, since this would attract a detailed discussion on how to frame charges and how to sentence an accused, the issue should be dealt with in a separate paper specially devoted for charge and sentencing. Presently, the discussion stands concluded.

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