SUPREME COURT OF INDIA

Shyam Behari

Vs.

State of U.P.

Crl.A.No.72 of 1956

(S. R. Das, C.J.I., N. H. Bhagwati, S. J. Imam, S. K. Das and P. Govinda Menon, JJ.)

05.10.1956

JUDGEMENT

BHAGWATI, J.:

1. The appellant had been charged inter alia with having committed an offence under section 396, Indian Penal Code in that he on 10/11th day of September, 1954, about two or three gharis before sunrise in village Banni Purwa, hamlet of Banni, police station Kotwali, Kheri, along with other persons committed dacoity in the house of Mendai and that in the commission of such dacoity, murder was committed by one of the members. The learned Sessions Judge found that the appellant, and the others, had entered the house of Mendai with intent to commit a robbery but were foiled in the attempt owing to Mendai and Ganga having raised a hue and cry. The residents of Banni Purwa and the adjoining 'abadi' of village Banni arrived on the scene and the appellant and his companions, without collecting any booty, ran away from the house of Mendai. They were chased by Mendai and Ganga and when they were crossing the ditch of Pipra Farm, Mendai caught hold of one dacoit. Another dacoit who was identified by several witnesses as the appellant thereupon fired a pistol shot which hit Mendai and Mendai fell to the ground and was removed to the hospital where he died. The further movement of the appellant thereafter need not be recounted here. The learned Sessions Judge as also the High Court recorded concurrent findings of fact that the appellant shot and killed Mendai to secure the release of one of his companions and also to ensure their safe retreat.

2. These concurrent findings of fact ware enough to dispose of the appeal of the appellant before the High Court. He, however, raised a question of law, viz., that he may be guilty under section 395 but not under section 396, Indian Penal Code because any murder committed by the dacoits during their fight when they were running away without any booty could not be treated as murder committed in the commission of the dacoity. A distinction was sought to be drawn between a case where the dacoits were escaping with the booty and the case where the dacoits were running away without any booty. It was argued that it would be an offence of dacoity with murder when the dacoits, after committing robbery, were running away with the booty and in order to escape with the booty they committed the murder and that it would not be a dacoity with murder when dacoits had no booty with them but in order to avoid being caught they committed the murder. The High Court negatived this contention and held that section 396, Indian Penal Code would be attracted even where an attempt had been made to commit dacoity and a murder was committed when the dacoits were trying to make a safe retreat. The conviction of the appellant under section 396, Indian Penal Code was therefore confirmed along with the sentence of death passed upon him by the learned Sessions Judge. On an application made by the appellant for Leave to Appeal to this Court, the High Court

granted to him the necessary certificate under Art. 134 (1) (c) of the Constitution.

3. Section 396, Indian Penal Code provides that

"if any one of five of 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, and shall also be liable to fine".

Dacoity is defined in section 391, Indian Penal as under :-

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

4. The essential ingredients of the offence of dacoity, therefore, are that five or more persons should be concerned in the commission of the offence and they should either commit or attempt to commit a robbery.

5. There was, in the circumstances of the present case an attempt to commit robbery by the appellant and his companions though in fact no robbery was committed by reason of the. hue and cry raised by Mendai and Ganga. The dacoits took to their heels without collecting any booty when they found that the villagers from Banni Purwa and Banni came immediately to the aid of Mendai and Ganga. The offence of dacoity was, therefore, completed the moment they took to their heels without any booty. There was an attempt to commit a robbery though it was foiled as stated above; nonetheless the dacoits would have been guilty and could have been punished for the offence under section 395, Indian Penal Code which prescribes the punishment for dacoity.

6. The prosecution, however, contended that the appellant was guilty not only of the offence under section 395 Indian Penal Code but also under section 396, Indian Penal Code because, the appellant and his companions were conjointly committing the dacoity and the appellant who was the one of the members committed the murder of Mendai in so committing the dacoity. If the transaction which commenced with the entry of the appellant and his companions in the house of Mendai continued right up to the time that the appellant shot at Mendai while crossing the ditch of the Pipra Farm the murder of Mendai committed by the appellant could certainly be said to have been committed by the appellant in so committing the dacoity. It was, however, contended on behalf of the appellant that the transaction of dacoity was completed the moment the dacoits took to their heels without any booty and the murder of Mendai committed by the appellant, was another transaction which was dissociated from that transaction of dacoity. The murder of Mendai accordingly was committed by the appellant not in committing the dacoity but independently of the transaction of dacoity when the dacoits were running away for safety and had proceeded a considerable distance from the house of Mendai where the dacoity had been committed.

7. On a plain reading of section 391, Indian Penal Code it would appear that in order that a dacoity can be said to have been committed it is necessary that five or more persons conjointly commit a robbery or attempt to commit a robbery. If a robbery was committed, the dacoits would have the booty with them but if the matter rested only with an attempt to commit a robbery there would be no question of the dacoits having any booty with them. It is necessary in this context to note the

definition of robbery given in section 390, Indian Penal Code and it is laid down there that

"theft is 'robbery' if, in order to the committing the theft, or in committing the theft, or in carrying away or attempting to cam away property obtained by theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongly restrain, or fear of instant death or of instant hurt, or of instant wrongful restraints."

There, was in the circumstances of the present case a clear attempt at robbery but it did not comprise the carrying away or attempting to carry away property obtained by theft. No theft was committed nor were the dacoits engaged in carrying away the property obtained by theft so that the transaction of dacoity stopped short at the mere attempt to commit robbery. If the transaction of dacoity was to extend up to the ditch of the Pipra Farm there should have been the carrying away or an attempt to carry away the property obtained by theft, which could not there unless and until the booty had been collected by the dacoits at the house of Mendai and they were running away for safety along with booty. If the appellant had shot at Mendai while he and his companions were thus the unning away with the booty the murder of Mendai could certainly be said to have been committed in the commission of the dacoity.

8. The prosecution, however, relied upon the decision of the Allahabad High Court in Sirajuddin v. state, AIR 1951 All 834 (A) and Kaley V. The State, (S) AIR 1955 All 420 (B) as also the decisions of the Calcutta High Court in Monoranjan Bhattacharjya V. Emperor, AIR 1932 Cal 818 (FB) (C) and the Bombay High Court in Queen-Empress v. Sakharam Khandu, 2 Bom LR 325 (D) in support of its contention that even though the dacoits were running away without collective any booty and one of them committed murder in order to ensure their safe retreat that murder could be said to have been committed in committing the dacoity. The appellant, on the other hand, relied upon the decision of the Allahabad High Court in Emperor V. Chandar, 1906 All WN 47: 3 Cri LJ 294 (E).

9. The case of Emperor v. Chandar (E) no doubt lends support to the contention of the appellant. The dacoits in that cast were not carrying off any property. Yet the offence of dacoity is defined in section 395, Indian Penal Code was held to have been completed by them, an attempt to commit robery by the gang being clearly proved. It was, however, found that the attempt to commit robbery was frustrated by arrival of the villagers and at the time when the deceased was killed the dacoits were bent upon escaping from the village and had abandoned their intention to rob. The Court was therefore of the opinion that, in the facts of the case before it, it could not be held that there had been murder "in so committing the dacoity and the conviction under section 396 could not be sustained." The conviction under section 396, Indian Penal Code, was accordingly set aside and the findings was altered to one under section 395, Indian Penal Code. In so far, however, there was evidence on record which, if proved, would justify a charge against the appellant of an offence under section 302, Indian Penal Code, for which offence he had not yet been tried, the Court thought it just and proper that he should be tried for that offence and a direction was accordingly given that the appellant be committed to the court of the Magistrate having jurisdiction, to stand trial at the court of sessions on the charge of murder.

10. In AIR 1951 All 834(A) also, the dacoits were running away without collecting any booty by reason of the villagers having put up a bold front. The court there held that the question whether murder was committed by the dacoit while committing dacoity was a pure question of fact and of degree, not to be determined by any general rule, but by the special circumstance of each case. On

the facts and circumstances of the case the Court, however, came to the conclusion that there was nothing to show that the murder was so dissociated by time or space from the dacoity that it could be held that one chapter had closed and a now chapter had begun. The Court having held that the transaction of dacoity was continuing right up to the moment when the murder was committed, the case fell within section 396, Indian Penal Code. This decision thus turned on the facts of the case and could not be relied upon as laying down any general proposition that even though the dacoits were running away without collecting any booty they could be charged with having committed the murder in the commission of the dacoity.

11. (S) AIR 1955 All 420 (B) was a case where the dacoits were running away with the booty. The only importances of that decision is that the case of 1906 All WN 47: 3 Cri LJ 294 (E) was considered by the learned Judges there and they pointed out that the law in that case appeared to have been laid down rather "too widely."

12. (S) AIR 1932 Cal 818 (FB) (C) also laid down the test whether the transaction of dacoity was complete and another transaction and a separate one had begun. If it could be predicated on the fact of a particular case that the murder was committed after the transaction of dacoity was complete and another and a separate transaction had begun, such murder would not fall within the purview of section 396, Indian Penal Code. Even though in that case there were indications to show that the dacoits had abandoned the booty before the murder was committed, the ratio decidendi of the case was, as noted above, the demarcation which was made between the completion of the transaction of dacoity on the one hand and beginning of another and a separate transaction in the case of which latter transaction only the murder was committed.

13. 2 Bom LR 325 (D) turned on the question whether the retreat was so separated by time or space from the offence which was the common object of the assembly as not to form part of it. That was held to be a pure question of fact and of degree not to be determined by any general rule but by the special circumstances of each case. On the facts and circumstances of that case, the Court held that there was no such separation, that the retreat was an essential part of the common criminal purpose and that it was the continuation of the actual dacoity while the dacoits were still acting in concert, and was so closely and necessarily connected with the actual demand of 'khand' that it must be taken that the murder was committed in prosecution of the common object of the assembly.

14. There is, therefore, considerable force in the contention urged on behalf of the appellant before us that, In the facts and circumstances of the present case, the transaction of dacoity had ended the moment the dacoits took to their heels and another and a separate transaction took place when the appellant shot at Mendai while crossing the ditch of the Pipra Farm and that, therefore, the appellant could not be convicted of having committed the offence under section 396, Indian Penal Code. Learned counsel for the appellant strenuously contented that the conviction of the appellant under section 396, Indian Penal Code should be quashed and that on the concurrent findings of fact recorded by both the Courts below the conviction should be altered to one under section 395, Indian Penal Code.

15. It is, however, unnecessary to do so because in the facts and circumstances of the present case the appellant is liable to be convicted of the offence under section 302, Indian Penal Code without anything more. The charge under section 396, Indian Penal Code comprised of two ingredients :- (1) The commission of the dacoity, and (2) the commission of the murder in so committing the dacoity. The first ingredient was proved without any doubt and was not challenged by the learned counsel for the appellant, The second ingredient also was proved in any event as regards the, commission of

the murder because the attention of the accused was focussed not only on the commission of the offence while committing the dacoity but also on the individual part which he took in the commission of that murder. So far as he was concerned, he knew from the charge which was framed against him that he was sought to be made responsible not only for the commission of the dacoity but also for the commission of the murder in committing such dacoity. The evidence which was led on behalf of the prosecution specifically implicated him and he was named by the prosecution witness as the person who shot at Mendai while crossing the ditch of Pipra Farm. His examination under section 342 of the Criminal Procedure Code also brought out that point specifically against him and he was questioned in that behalf. Both the courts below recorded their concurrent findings of fact in regard to the part taken by the appellant in the commission of the murder of Mendai. Under these circumstances it could not be urged that the appellant could not be convicted of the offence under section 302, Indian Penal Code if such a charge could be made out against him (Vide our decision in Willie (William) Staney V. State of Madhya Pradesh, Cri App No. 6 of 1955 D/- 31-10-1955: ((S) AIR 1956 SC 116) (F).

16. We do not, therefore, think it necessary to express any definite opinion on the question of law mooted in the order of the High Court granting to the appellant certificate of fitness for appeal. Suffice it to say that even if the conviction of the appellant under section 396, Indian Penal Code be not perchance sustainable, the murder of Mendai having been committed after the dacoits had taken to their heels without collecting any booty, the case against the appellant in regard to the commission of the murder of Mendai has been proved beyond any shadow of doubt and under those circumstances we would convict the appellant of having committed the offence under section 302, Indian Penal Code.

17. We accordingly see no force in this appeal and dismiss the same. The conviction of the appellant will stand confirmed and also the sentence of death passed by the learned Sessions Judge upon him.

Appeal dismissed.

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