

Kalika Tiwari And Others

Vs

State of Bihar, Uma Shankar Rai and Others

Vs

State of Bihar

Vijay Bahadur Rai

Vs

State of Bihar

Criminal Appeals Nos. 1171-74 of 1995 with Nos. 1175-78 of 1995

(M. M. Punchhi, K. T. Thomas JJ)

25.03.1997

JUDGMENT

THOMAS, J. –

1. For Sanfula Devi - a mother of two sons and three daughters - the nightfall on 22-12-1987 was dreadfully catastrophic as dacoits exterminated her entire male progeny besides plundering all her valuable jewellery. Those whom she named as the marauders included her two brothers and nephews. The police after investigation charge-sheeted 14 persons including those kins of Sanfula Devi for the murder of the siblings - Gauri Shankar Rai and Keshav Rai - and another person (Hari Narain) who happened to be present in her house then. The Sessions Court convicted 12 of the accused under Sections 396 and 120-B of the Indian Penal Code and sentenced them to imprisonment for life. (Some of them were convicted under Section 27 of the Arms Act also). The High Court of Patna while confirming the aforesaid conviction and sentence added Section 302 with the aid of Section 34 of the Indian Penal Code also while disposing of the appeals filed before it.

2. Sanfula Devi was married to Jag Narain who was a congenital imbecile. Five children were born to her from the wedlock - two sons (Gauri Shankar Rai and Keshav Rai) and three daughters. The eldest son got married and the second son had only reached marriageable age during the time of the occurrence. While the sons were in their infancy Sanfula Devi's properties were looked after by her brother A-4 Inderdeo Rai. But when the sons reached age of maturity they were miffed with their uncle over the manner in which he dealt with their properties. Eventually the relationship became strained and led to rancour. A few days prior to the occurrence Inderdeo Rai's son Rama Shankar Rai (A-1) had an altercation with Gauri Shankar Rai.

3. The prosecution case, in short, is the following : On the day of occurrence, Hari Narain visited Sanfula Devi's house for mootng a marriage proposal for her second son Keshav Rai. Inderdeo Rai went there presumably for reconnaissance and left. After evening meals when the inmates of the

house retired for a rest the dacoits reached there armed with guns and other lethal weapons. Rama Shankar Rai (A-1) asked Sanfula Devi to surrender the key of the safe and after wangling the key the dacoits looted the cash and jewellery. They then closed the door of the room from outside where the females were sitting and went on a pillage during which they gunned down Gauri Shankar Rai and Keshav Rai and also their guest Hari Narain. Thereafter, they all left with the booty.

4. The trial court convicted all except A-9 Jag Narain and A-14 Radhamuni Pal of the offences aforesaid. Those convicted persons filed appeals in the High Court, while the State of Bihar filed appeal against their acquittal under Section 302 IPC. The High Court disposed of all the appeals by a common judgment confirming the conviction and sentence under Sections 396 and 120-B and additionally convicting those persons under Section 302 read with Section 34 of the IPC. However, no substantial change was made to the sentence as the High Court directed the sentence of life imprisonment under Section 302 to run concurrently with the sentence imposed under Sections 396 and 120-B IPC.

5. All the aforesaid convicted persons, except A-8 Bahadur Pal, have come up with appeals before this Court. Thus we are dealing with the conviction and sentence passed on 11 accused. We heard all the learned counsel at length.

6. Shri K.B. Sinha, learned Senior Counsel who argued for some of the appellants, made an endeavour at the outset to show that the conviction under Section 302 read with Section 34 was bad as the common intention of the dacoits was not to murder any of the deceased. We pointed out the futility of that endeavour to the learned counsel that if appellants are liable to be convicted under Section 396 IPC it is only of academic utility whether conviction under Section 302 read with Section 34 should have been additionally added. We expressed to the learned Senior Counsel that on the peculiar facts of this case we are not inclined to award any sentence less than imprisonment for life to those appellants whose conviction for the offence under Section 396 is liable to be upheld by us.

7. Under Section 396, if anyone of the dacoits "commits murder in so committing dacoity" everyone of the dacoits is liable to be punished either with death or imprisonment for life or rigorous imprisonment for a term which may extend to 10 years. If a dacoit in the progress of, and in pursuance of, the commission of a dacoity commits a murder, all of his companions, who are participating in the commission of the same dacoity may be convicted under this section, although they may have no participation in the murder beyond the fact of participation in dacoity. It is not necessary that the murder should have been within the contemplation of all or some of them when the dacoity was planned, nor is it necessary that they should have actually taken part in, or abetted, its commission. Indeed they may not have been present at the scene of murder, or may not have known even that murder was going to be, or had in fact been, committed. But nonetheless they all will be liable for enhanced punishment, provided a person is in fact murdered by one of the members of the gang in the commission of the dacoity.

8. It is not necessary for the prosecution in such a case to establish either any common intention envisaged in Section 34 or common object contemplated in Section 149 of IPC. If one of the dacoits committed murder during the commission of dacoity the tentacles of Section 396 would prance to envelop all the dacoits huddled within its penal circumference and then it would be immaterial that the other dacoits did not share the intention with the person who committed murder.

9. There is no dispute that the house of Sanfula Devi was looted on the said night nor the fact that

the three deceased were murdered by some of those who went to commit dacoity. Hence the only question which the courts were to decide was whether the appellants or anyone of them were not the participants in the dacoity.

10. We may point out that there is no use in this case with the evidence regarding recovery of a large number of stolen articles. This is because neither the police officer who made the recovery nor anyone who was present at the time of such recovery was examined as a witness for the prosecution. The Public Prosecutor who conducted the trial would have thought that the investigating officer who verified the records relating to recovery of the stolen articles would be sufficient to prove such recoveries. Whatever be the reason which dissuaded the Public Prosecutor to examine any such witness, the fact remains that prosecution did not prove the factum of recovery of stolen articles in the legal manner. Hence the evidence relating to such recovery would only remain at bay as for the appellants in this case.

11. In appreciating the contentions raised before us it is useful to bear in mind that it is an admitted fact that A-4 Inderdeo Rai and A-10 Brij Nandan Rai are direct brothers of Sanfula Devi. Among the remaining appellants, A-1 Rama Shankar Rai, A-2 Gopaljee Rai, A-3 Shri Keshwar Rai, A-6 Uma Shankar Rai, A-11 Mangala Rai, and A-12 Shri Ram Rai are direct nephews of Sanfula Devi. A-5 Vijay Bahadur alias Bikau Rai is closely related to A-4 Inderdeo Rai. Hence it was not difficult for Sanfula Devi and the inmates of the house to identify those appellants if they had seen them during the occurrence.

12. Sanfula Devi was examined as PW 1. It was she who gave the first information statement to the police wherein she mentioned the names of A-1 Rama Shanker Rai, A-2 Gopaljee Rai, A-3 Shri Keshwar Rai and A-5 Vijay Bahadur @ Bikau Rai having been armed with guns etc. She mentioned those names as persons who gatecrashed into the female apartment where she was then. She had not gone out of the apartment till the dacoits left the premises. When she moved out and went to the first floor she saw her son Gauri Shankar Rai lying dead with his hand tressed up and her other son Keshav Rai lying dead nearby, besides the dead body of her guest Hari Narain.

13. PW 2, Parikha Pasi, was the factotum of the family of Sanfula Devi, mainly looking after the cultivation of their agricultural lands. He too was present when the occurrence took place. He identified A-1 Rama Shankar Rai, A-2 Gopaljee Rai, A-3 Shri Keshwar Rai, A-4 Inderdeo Rai, A-5 Vijay Bahadur @ Bikau Rai and A-6 Uma Shankar Rai in the trial court as the participants in the occurrence.

14. PW 3 Jiut Ram was another employee of the family who too was present when the occurrence took place. He identified A-2 Gopaljee Rai, A-5 Vijay Bahadur Rai, A-7 Kalika Tiwari, A-10 Brij Nandan Rai and A-11 Mangala Rai as the assailants.

15. Evidence of the above three witnesses regarding identification of the assailants in court was found to be reliable and the trial court as well as the High Court fully acted on it.

16. The learned counsel for the appellants pointed out from evidence that the only light then available for PW 1 Sanfula Devi was an earthen lamp burning inside the room. On that score he contended that the said light was too meagre to identify the participants of the crime. The visibility capacity of urban people who are acclimatised to fluorescent lights or incandescent lamps is not the standard to be applied to villagers whose optical potency is attuned to country-made lamps. Their visibility is conditioned to such lights and hence it would be quite possible for them to identify men

and matters in such light. A similar view has been adopted by this Court in *Machhi Singh v. State of Punjab* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681 : AIR 1983 SC 957]. For that reason we are not impressed by the argument that the light from earthen lamps would not have been sufficient for those witnesses to identify the assailants.

17. We have therefore no difficulty in concurring with the finding of the High Court regarding the involvement of A-1 Rama Shankar Rai, A-2 Gopaljee Rai, A-3 Shri Keshwar Rai, A-4 Inderdeo Rai, A-5 Vijay Bahadur @ Bikau Rai, A-6 Uma Shankar Rai, A-10 Brij Nandan Rai and A-11 Mangala Rai. The conviction and sentence passed by the High Court on those appellants would hence stand undisturbed.

18. But the position regarding A-7 Kalika Tiwari, A-12 Shri Ram Rai and A-13 Maloo Pal is different. The presence of A-7 Kalika Tiwari was mentioned only by PW 3 Jiut Ram. None else had seen him as one of the dacoits. For PW 3 Jiut Ram, A-7 Kalika Tiwari was a total stranger who hailed from a different village. No test identification parade was conducted with Jiut Ram. In these circumstances we are unable to uphold the finding that A-7 Kalika Tiwari was one among the dacoits.

19. A-12 Shri Ram Rai is no doubt the nephew of Sanfula Devi but she had not identified him as one among the assailants. PW 7 Singhasani Devi, who was in the neighbourhood of the place of occurrence, deposed that on hearing the commotion from the house where the occurrence took place she went near that place and peeped through a window to see what was happening. Then she identified three dacoits, one among them was A-12 Shri Ram Rai. But she did not mention anything about A-12 Shri Ram Rai when she was questioned by the investigating officer. Her evidence is thus weakened by the aforesaid impairment in her testimony. We therefore deem it unsafe to uphold the conviction of A-12 Shri Ram Rai on that sole testimony.

20. A-13 Maloo Pal was not identified by any of the witnesses examined in this case. His conviction was based solely on the recovery of stolen articles. As we have already observed regarding the futility of relying on the evidence regarding recovery, the conviction of A-13 Maloo Pal also cannot be sustained.

21. In the result, we set aside the conviction and sentence of A-7 Kalika Tiwari, A-12 Shri Ram Rai and A-13 Maloo Pal and they are acquitted. But appeals regarding the remaining appellants would stand dismissed.