

ALLAHABAD HIGH COURT

Emperor

Vs

Naubat

(Mulla, J.)

02.03.1945

JUDGMENT

Mulla, J.

1. This is an application in revision filed on behalf of the Provincial Government for enhancement of the sentences imposed upon Naubat, Udeybaz, Pirna and Budhpal, who were tried with six others by the learned Additional Sessions Judge at Aligarh on a charge under Section 395 read with Section 397, Penal Code, and were upon conviction given a sentence of five years' rigorous imprisonment only with the exception of Budhpal who was given a still lesser sentence of three years' rigorous imprisonment only. The case relates to a dacoity which was committed in the night between 4th and 5th November 1942, at the house of one Daulat Singh of village Burha in the district of Aligarh. The first information report of the dacoity was made by Jumma, the chaukidar of the village, at Police Station Akrabad at 9 A. M. on 5th November 1942. In that report it was stated that the house of Daulat Singh had been raided by a gang of twenty or twenty-two dacoits none of whom had been recognized or identified. It was stated that the dacoits had fired gunshots and some of them were armed with lathis and had at least four or five electric torches in their possession. The investigation of the case on the basis of this report was made by Sub-Inspector Sheobaran Singh, the officer in charge of Police Station Akrabad. An important fact which appears from his evidence is that it was through Budhpal, who is one of the four opposite parties in the present case, that he received information which put him on the track of the offenders in this case. Indeed, he admits in his cross-examination that his investigation of the case was based principally upon information communicated to him by Budhpal. Several persons were arrested in the course of the investigation on different dates and from the possession of some of them certain properties were recovered which were subsequently identified in due course by the complainant and other witnesses. As a result of the investigation ten persons were finally sent up to the Court of Session to take their trial on a charge under Section 395 read" with Section 397, Penal Code. The learned Additional Sessions Judge did not find anything objectionable in the charge, as it stood, and he proceeded to try the case and finally convicted the four persons, against whom the present application in revision is directed, under

Section 397 read with Section 395, Penal Code, while acquitting the remaining" six accused persons before him. We may state at once that the charge as framed by the learned Magistrate was clearly defective. The learned Magistrate and also the learned Additional Sessions Judge seem to think that Section 397, Penal Code, applies to every member of a gang of dacoits some of whom are' armed with deadly weapons. A perusal of Section 897, Penal Code, would, however, show that this is a wholly mistaken view of the law. That section is clearly confined to the case of a particular offender or offenders against whom it is proved that he or they used any deadly weapon or caused grievous hurt to any person or attempted to cause death or grievous hurt to any person and the law provides that in such cases the offender or offenders shall be punished with imprisonment of not less than seven years.

2. So far as the evidence in the present case is concerned, nothing has been placed before us to show that any attempt was made by the prosecution to establish that any one of the four persons with whose cases we are concerned used a deadly weapon or caused grievous hurt to any person. From the evidence on the record it appears that the dacoity was not of a very serious kind. The only person injured in the course of the dacoity seems to be Daulat Singh, the owner of the house that was raided, and even in his case we find from the medical evidence on the record that he received only four or five rather slight injuries, one of them being technically a grievous hurt. Daulat Singh himself has nothing to say in his evidence about this grievous injury having been caused by any particular dacoit whom he identified. His evidence does not connect any one of the four persons, with whose cases we are concerned, with the grievous hurt caused to him; nor does it establish that any one of these four persons used any deadly weapon. There is of course a general statement made by the prosecution witnesses that some of the dacoits were armed with guns, but such a statement would not be sufficient to bring the case against any particular offender within the purview of S 397 Penal Code. The fact, however, remains that these four persons participated in a dacoity and were, therefore, clearly guilty under Section 395, Penal Code. They appealed from that conviction and their appeal was dismissed by a learned Single Judge of this Court. Thereupon, the present application in revision was made on behalf of the Provincial Government. There can be no question now as to the validity or otherwise of the conviction of these four persons, for their appeal has already been dismissed and the only question with which we are now concerned is : Whether in the circumstances of the case the sentences imposed upon them should be enhanced? Learned Counsel for the opposite parties strongly contended that the application in revision was incompetent because the appeal of the opposite parties from their convictions having been dismissed by this Court, it is not now open to them to show cause against their convictions. This contention was sought to be supported by reference to Clause (6) of Section 439, Criminal P.C. which runs as follows: Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under Sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction. It is contended that the opposite parties are now prevented by the dismissal of their appeal from showing cause against their convictions and hence it is not open to this Court to enhance their sentences. This argument

was definitely repelled by a Bench of this Court in *Emperor v. Abdul Qayum*¹ The Bench relied principally upon a decision of the Bombay High Court in *Emperor v. Jorabhai Kisabhai*² The view taken in the Bombay case was approved and followed by another Bench of this Court in *Emperor v. Debi Charan*³ Other High Courts also have taken the same view : see *Bamlakhan Chaudhury v. Emperor*⁴ *Khodabux Haji v. Emperor*⁵ and *Emperor v. Dhanna Lal*⁶ The view taken by the Bombay High Court in *Emperor v. Jorabhai Kisabhai*⁷ was confirmed in the later case of the same Court in *Emperor v. Koya Partap*⁸ We, therefore, find no force in the contention of learned Counsel and we must, therefore, proceed to consider whether in the circumstances of the case the sentences imposed upon the four opposite parties should be enhanced-Considering first the case of Budhpal, we find that he was the person who gave information to the investigating police officer in this case and thereafter he made a confession under Section 164 and also adhered to the same confession in the Court of the committing Magistrate. It is true that a sentence of three years' rigorous imprisonment only has been imposed upon him which appears to be rather lenient in a dacoity case, but we do not think that it would be desirable to discourage confessions by accused persons and having regard to the fact that Budhpal was really responsible for putting the police on the track of the offenders in this case, we think it would not be desirable to enhance the sentence imposed upon him. With regard to the other three opposite parties, namely, Naubat, Udeybaz and Pirna, we do feel that a sentence of five years' rigorous imprisonment-errs on the side of leniency in a dacoity case. Having regard to the fact that this crime is prevalent all over the Province, we think that where a charge under Section 395, Penal Code, has been established the sentence ordinarily should not be less than seven years. We would, therefore, enhance the sentences imposed upon Naubat, Udeybaz and Pirna from five years to seven years, The application in revision is allowed to that extent.

Cases Referred.

- 1('33) 20 A.I.R. 1933 All. 485
- 2('26) 13 A.I.R. 1926 Bom. 555
- 3('42) 29 A.I.R. 1942 All. 339
- 4('32) 19 A.I.R. 1932 Pat. 126
- 5('34) 21 A.I.R. 1934 Cal. 105
- 6('29) 16 A.I.R. 1929 Lah. 797
- 7('26) 13 A.I.R. 1926 Bom. 555
- 8('30) 17 A.I.R. 1930 Bom. 593