

# ALLAHABAD HIGH COURT

Kaley

Vs

State (Allahabad)

Criminal Appeals Nos.1688 and 1648 and Referred No.138 of 1953

(Agarwala and Roy, JJ.)

18.11.1953. 05.04.1954

## JUDGMENT

### **Roy, J.**

1. On the Night between the 27th and 28th of February, 1953, an armed dacoity was committed at the house of Raghubar Dayal and Dhanni Mal at about 1 a.m. in village Piana Kalan in the district of Bulandshahr. The dacoits were 15 or 20 in number. Two of them, namely, Kaley and Atri appellants, were armed with guns and the others were armed with lathis. They entered the house of Raghubar Dayal and Dhanni Mal, overpowered both of them and looted their property. The shouts raised by these two persons attracted their neighbours. During the commission of the dacoity, the neighbours did not actually enter the house. The dacoits, after committing the dacoity, escaped with the looted property. On their retreat, the villagers chased them. When the dacoits had just passed out of the village and were near the Takia of a Faqir by the side of the field of Raja Faqir, they turned round and made an attack on the villagers who were pursuing them. The appellants fired with their guns. Kaley appellant shot at Ratan Singh who died on the spot. Atri appellant shot at Malkhan Singh who received gun-shot injuries but fortunately escaped death.

A pitched fight took place between the dacoits on the one hand and the villagers on the other at that spot and both sides received injuries. The gun of Atri appellant was broken and the gun of Kaley was snatched away from him. They were both beaten, overpowered and arrested. The other dacoits made good their escape. The two dacoits, who were arrested, were handed over to Khem Chand along with the cartridges that were found from their possession and the cartridges that were picked up from the passage where the fight took place. The First Information Report of the occurrence was lodged at the 'thana' by Dhanni Mal at 7 a.m. on 28-2-1953, the 'thana' being at a distance of 4½ miles from the scene of occurrence.

The police took up investigation of the matter. The 'post mortem' examination on the dead body of Ratan Singh was performed on 28-2-1953, at 6 in the evening. Gun-shot wounds were found

on his person. Internal examination disclosed that the 5th, 6th and 7th Cervical Vertebrae were fractured and the first rib of the right side was also fractured. In the opinion of the doctor, death was due to shock and haemorrhage as a result of injuries to neck blood vessels caused by shooting. Malkhan Singh was also medically examined and he had gun-shot wounds. The other persons, who received injuries on the side of the complainant, were also medically examined and 'lathi' injuries were found on them. The two arrested dacoits were made over to the police. The defence of Kaley and Atri appellants was that they were not amongst the dacoits. According to Kaley, he was arrested in the evening before the dacoity and he was falsely implicated. Atri alleged that he was arrested in the morning after the dacoity on his way home and he was falsely implicated.

2. In support of the prosecution story, Dhanni Mal, Raghubar Dayal, Kehar Singh, Malkhan Singh Raghubir Singh, Rashid Khan, Nanhey Khan, Ram Saran, Parna and Bashir Khan, who were eye-witnesses of the dacoity and who had taken part in the encounter, were examined. Khem Chand, in whose custody the arrested dacoits were put, was also examined. The learned Sessions Judge, after a careful consideration of the evidence of these witnesses, came to the conclusion that a charge under Section 396, Penal Code, was established beyond doubt against both these appellants. He accordingly convicted them under Section 396, Penal Code and sentenced Kaley to death and Atri to transportation for life. He further convicted them under Section 19(f), Arms Act, and sentenced each of them to one year's rigorous imprisonment. There can be no doubt whatsoever that an armed dacoity took place in the house of Raghubar Dayal and Dhanni Mal on the night in question and the two appellants, who were amongst the dacoits, were arrested in the manner proved by the prosecution. Both of them were armed with guns. When the dacoits were being pursued by the villagers while they were retreating with their booty, Kaley shot dead Ratan Singh and Atri appellant fired with his gun and hit Malkhan Singh, causing him gun-shot injuries.

3. On behalf of Kaley, it has been urged that the offence, that was made out against Kaley, was not one under Section 396 but was one under Section 395, Penal Code, and that the killing of Ratan Singh was not an act which was part and parcel of the dacoity so as to be made punishable under Section 396, Penal Code. It has further been urged that, for that individual act of Kaley, he could have been prosecuted under Section 302, Penal Code, but since there was no charge against him under that section, the sentence of death under Section 396, Penal Code, cannot be maintained.

The first case, on which reliance has been placed for this proposition, is the case of - '*Queen Empress v. Umrao Singh*'<sup>1</sup>, There it was laid down that where certain persons were shown to have been concerned in a dacoity in the course of which murder was committed, but it was not shown that they were in the house in which the dacoity was committed at the time when the murder took place and the evidence, if any, pointed to a contrary conclusion, the accused could not properly be convicted under Section 396 but only under Section 395, Penal Code. This declaration was later on distinguished by this Court in - '*Queen Empress v. Teja*'<sup>2</sup>, where it was held that when, in

the commission of a dacoity, a murder is committed, it matters not whether the particular dacoit charged under Section 396 was inside the house where the dacoity was committed or outside the house, or, whether the murder was committed inside or outside the house, so long as the murder was committed in the commission of that dacoity.

In support of his contention that, in the circumstances of the present case, since there was no charge under Section 302, Penal Code, the sentence of death under Section 396, Penal Code, cannot be maintained, learned counsel for Kaley appellant has relied upon the case of - '*Emperor v. Chandar*'<sup>3</sup>, There it was laid down that where, after the commission of a dacoity, the dacoits, being interrupted by the villagers, did not get any plunder and they were attempting to escape and one or more of them, in order to facilitate the escape, attacked and killed one of the pursuing party, S.396, Penal Code, did not apply, but only the person or persons actually taking part in the killing were liable therefor. In that case, a conviction under Section 395, Penal Code, was maintained and for the offence of murder a retrial was directed. The decision in that case appears to us to be distinguishable on facts. Here the dacoits were escaping with the booty and when they were pursued and attacked by the villagers, they turned round and killed one of them and injured several others.

In 3 Cri LJ 294 (All), the decision was correct on facts but the law appears to have been laid down rather too widely.

4. A Full Bench of the Calcutta High Court in - '*Monoranjan Bhattacharjya v. Emperor*'<sup>4</sup>, held that, in order to commit dacoity, it is necessary not only that the dacoit should get the booty away but that he should get away with the booty and as long as he is being pursued in hot haste after the act of the dacoity has just been committed and is in flight for the purpose of completing his offence, the dacoity is not complete and that, therefore, where one of the dacoits stabs and kills a man pursuing him, the murder is committed while committing dacoity so as to be punishable under Section 396 of the Code.

5. In - '*Bishunath v. Emperor*'<sup>5</sup>, it was held that Section 396 applies even where murder is committed for facilitating the escape of the perpetrators of the crime while retreating. A similar view was taken by the Lahore High Court in - '*Karim Bakhsh v. The Crown*'<sup>6</sup>, where it was observed that the fact that the murder was committed in the compound of the house raided at a time when the dacoits were making good their escape is not sufficient to take the case out of S.396.

In the case of - '*Sunder v. Emperor*'<sup>7</sup>, it was held that where murder is committed by dacoits while retreating or carrying away the stolen property in order to facilitate their escape, it would be murder committed in the commission of the dacoity punishable under Section 396, Penal Code. Upon the facts and circumstances of the present case and the evidence on the record, we are driven to the conclusion that the appellants were rightly convicted under Section 396, Penal Code. The murder was committed by Kaley appellant while the dacoits were retreating and were carrying away the stolen property in order to facilitate their escape. It was at the same time that

Atri appellant, when he was chased and followed by the villagers with 'lathis', turned round and fired with his gun and hit Malkhan Singh, causing him the gun-shot injuries. In our opinion, they were rightly convicted and the sentence of death on Kaley was the proper sentence that could have been passed, and the sentence of transportation for life was the proper sentence against Atri appellant under Section 396, Indian Penal Code. They were also rightly convicted under Section 19(f) of the Indian Arms Act and each of them was properly awarded the sentence of one year's rigorous imprisonment. While awarding sentence to dacoits, a duty lies upon the Court to see that all protection is given to any member of the public who is brave enough to do his duty in trying to arrest dacoits. The fact that murder is committed because the criminal is being brought to bay and in the desire to escape is not an extenuating circumstance. In our opinion, there is no merit in these appeals which deserve dismissal.

6. As a result we dismiss the appeal of Kaley and we accept the reference and confirm the sentence of death passed against Kaley appellant and we direct that it should be carried out according to law. The appeal of Atri appellant is also dismissed.

7. Leave to appeal to the Supreme Court is refused.

Appeals dismissed.

Cases Referred.

116 All 437

217 All 86

33 Cri LJ 294 (All)

4AIR 1932 Cal 818

5AIR 1935 Oudh 190

6AIR 1923 Lah 329 (1)

7AIR 1925 Lah 142(2)