

PETITIONER:

KALIKA TIWARI , UMA SHANKAR RAI ,VIJAY BAHADUR RAI & OTHERS

Vs.

RESPONDENT:

STATE OF BIHAR

DATE OF JUDGMENT: 25/03/1997

BENCH:

MADAN MOHAN PUNCHHI, K.T. THOMAS

ACT:

HEADNOTE:

JUDGMENT:

WITH
CRIMINAL APPEAL NOS 1175-78 OF 1995
AND
CRIMINAL APPEAL NO. 1873 OF 1996
J U D G M E N T

THOMAS. J.

For Sanfula Devi - a mother of two sons and three daughter the nightfall on 22nd December, 1987 was dreadfully catastrophic as dacoits exterminated her entire male progeny besides plundering all her valuable jewellery. Those whom she named as the muraders included her two brothers and nephews. Police after investigation charge-sheeted 14 person including those kins of Sanfula Devi for the murder of the sibblings Gauri Shankar rai and Keshav Rai - and another person (Hari Narain) who happened to be present in her house then. Sessions court convicted 12 of the caused under Section 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.) High Court of Patna while confirming the aforesaid conviction and sentence added Section 302 with the aid of Section 34 of Indian penal Code also while disposing of the appeals filed before it.

Sanfula Devi was married to jag Narain who was congenital imbecile. Five Children were born to her in the wedlock- two sons (Gauri Shankar and keshav Rai) and three daughters. The eldest son got married and the second son had only reached marriageable age during the time of 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 the were miffed with their uncle over the manner 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 Shanker Rai. (A-1) had an altercation with Gauri Shankar Rai.

Prosecution case, in short, is the following: on the occurrence day, Hari Narain Visited Sanfula Devi's house for mootting a marriage proposal for her second son Keshav Rai. Inderdeo Rai went there presumably for reconnaissance and left. After evening meals when he inmates of the house

retired for a rest the dacoits reached there armed with guns and other lethal weapons. Rama Shanker Rai (A-1) asked Sanfula Devi to surrender Key of the safe and after wangling the key the dacoits looted the case 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 Gaury Shakar Rai and Keshav Rai and also their guest Hari Narain. Therefore, they all left with the booty.

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. 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.

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

Shri K.B. Sinha, learned senior counsel who argued for some of the appellants, made an endeavour at the outset to shoe 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 the endeavour to the learned counsel that if appellants are liable to 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 learned senior counsel that on the peculiar facts of this case we are not inclined to award any sentences less than imprisonment for life to those appellants whose conviction for the offence under Section 396 is liable to be upheld by us.

Under Section 396, if any one of the dacoits "commits murder in so committing dacoity" every one of the dacoits is liable to be punished either with either death or imprisonment for life or rigorous imprisonment for a term which any extend to 10 years. If 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 necessary that the murder should have been within the contemplation of all or some of them when the dacoity was planned. nor in 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 commission of the dacoity.

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 that person who committed murder.

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 appellants or any one of them were not the participants in the dacoity.

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 any one who was present at the time of such recovery nor any one 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 the investigating officer who verified the records relating to recovery of the stolen articles would be sufficient to prove such recoveries. Whatever 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 pay as for the appellants in this case.

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 Ramashankar Rai, A-2 Gopaljee Rai, A-3 Shri Keshwar Rai, A-6 Uma Shankar Rai, A-11 Mangal Rai and A-12 Sri Ram Rai are direct nephew 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 inmates of the house to identify those appellants if they had seen them during the occurrence.

Sanfula Devi was examined as PW-1. It was she who gave first information statement to the police wherein she mentioned the names of A-1 Ramashanker Rai, A-2 Gopaljee Rai, A-3 Sri keshwar Rai and A-5 Vijay Bahadur & Bikau Rai having armed with guns etc. She mentioned those names as persons who gaterashed 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 Shanker 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.

PW-2 Parikha Pasi was factotum of the family of Sanfula Devi, mainly looking after cultivation of their agricultural lands. He too was present when their agricultural lands. He too was present when the occurrence took place. He identified A-1 Ramashanker Rai, A-2 Gopaljee Rai, A-3 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.

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 Tiwary, A-10 Brij Nandan Rai and A-11 Mangala Rai as the assailants.

Evidence of the above three witness 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.

Learned counsel for the appellants pointed out from evidence that the only light been available for PW-1 Sanfula

Devi was an earthen lam 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 acclimated 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 and others vs. State of Punjab* (AIR 1983 SC 957). For that reason we are not impressed by the argument that the light from earthen lamp would not have been sufficient for those witnesses to identify the assailants.

We have therefore no difficulty in concurring with the finding of the High Court regarding the involvement of A-1 Ramashanker Rai, A-2 Gopaljee Rai, A-3 Sri keshwar Rai, A-4 Inderdeo Rai A-5 Vijay Bahadur @ Bikau Rai. The conviction and sentence passed by the High Court on those appellants would hence stand undisturbed.

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

A-12 Sri Ram Rai is no doubt the nephew of Sanfula Devi but she has 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 Sri Ram Rai. But she did not mention anything about A-12 Sri 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 Sri Ram Rai on that sole testimony.

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.

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