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High Court Of Punjab And Haryana At Chandigarh

Case No: CRA Nos. 476-DB and 565-DB of 2010

Lal and Others	APPELLANT
Vs	
State of Haryana	RESPONDENT

Date of Decision: Sept. 21, 2015

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 173, 313
- Penal Code, 1860 (IPC) - Section 149, 300, 302, 304, 34

Hon'ble Judges: Hemant Gupta and Raj Rahul Garg, JJ.

Bench: Division Bench

Advocate: B.S. Saroha, Advocate, for the Appellant; Rajesh Gaur, A.A.G., for the Respondent

Final Decision: Dismissed

Judgement

Hemant Gupta, J.

This order shall dispose of aforementioned two appeals i.e. CRA No. 476-DB of 2010 preferred by Lal and Toofan @ Shambhu, both sons of Shibju @ Laxman as well as CRA No. 565-DB of 2010 preferred by Siri Ram @ Dussa @ Bokhla son of Kishna, directed against the judgment of conviction dated 26.02.2010 and order of sentence dated 27.02.2010 passed by the learned Additional Sessions Judge, Palwal, whereby all the appellants were convicted for the offences punishable under Sections 396 and 460 IPC and sentenced to undergo for varying terms as mentioned in the order of sentence.

2. The prosecution case was set in motion on the statement of Kavita wife of Surender made to ASI Ram Kumar, P.S. Camp Palwal on 16.08.2007. In her statement (Ex. P8), Kavita stated that she was married four months back in Village Agwanpur. She came to her parental home yesterday i.e. 15.08.2007 on the festival of Teej. She stated that she slept while wearing all jewellery with her mother Smt. Rameshwari, whereas her brother Banti @ Devi Singh was sleeping on bed in the

outer room and her father Om Parkash was sleeping at the roof. She stated that at about 2.00 AM, she heard noise as a result of which she woke up and saw that two young persons, armed with dandas, were standing near their cot. They started giving beatings to them with dandas and threatened them not to shout otherwise they would be killed. They removed all her ornaments as well as of her mother and muffled their faces. Both of them had also taken away Rs. 5000/- from the almirah. She further stated that at that time, cries ''maar diya'' from her brother and father was also heard. Thereafter, all of them after taking all the ornaments and cash ran away. She stated that after coming outside, she and her mother saw that condition of her brother and father was serious to whom the companions of said persons had given beatings with dandas and also taken away other articles lying in the room with them. She further stated that they were four in numbers; all are young and were speaking village language. She also stated that two persons were wearing underwear and vest only and that she can identify them. On the basis of such statement, ruqa (Ex. P20) was sent to the Police Station for registration of an FIR. On receipt of ruqa, FIR (Ex. P22) under Sections 457 and 380 IPC was lodged on the same day.

3. Thereafter, ASI Ram Kumar visited the spot and prepared rough site plan (Ex. P23). He also taken into possession blood stained earth vide recovery memo Ex. PB. He also called SI Hukam Singh, Finger Prints Expert, who lifted chance prints from the spot and handed over the same to ASI Ram Kumar after converting into separate sealed parcel.

4. However, on the next day i.e. 17.08.2007, Banti @ Devi Singh, brother of Kavita - complainant, succumbed to the injuries sustained during the occurrence in Safdarjung Hospital, Delhi. Pursuant to such information, ASI Mahesh Chand, P.S. Sarojni Nagar, Delhi registered DD No. 668 dated 17.08.2007 (Ex. P16). After completing inquest proceedings (Ex. P15), ASI Mahesh Chand sent the dead body for post mortem examination vide application Ex. P13. Thereafter, Sections 395 , 396 & 460 IPC were added in the FIR.

5. It was on 11.09.2007, accused Ashok @ Gopal and accused Siri Ram were arrested in FIR No. 335 of 2007. They disclosed their involvement in the present case. Both the accused were arrested and during interrogation suffered disclosure statements Ex. P1 and Ex. P4 on 14.09.2007 respectively before SI Dev Vrat, CIA Satff, Palwal in respect of their involvement in the commission of crime in the present case as well as regarding concealment of jewellery. Pursuant to such statements, both the accused got demarcated the place of occurrence vide memo Ex. P2. As per his disclosure statement, accused Ashok led the police party to Sohna and got recovered a gold necklace from his jhuggi, which was taken into possession vide memo Ex. P3. Similarly, as per his disclosure statement, accused Siri Ram also led the police party to his jhuggi in Javed Colony, Sohna and got recovered gold ear tops and one pair of gold kundals, which were also taken into possession vide recovery

memo Ex. P5.

6. Accused Lal and Toofan, were arrested in case FIR No. 335 of 2007 on 24.09.2007 from Bhatinda, Punjab. During interrogation on 25.09.2007, both of them suffered separate disclosure statements Ex. P24 and P25 respectively admitting their involvement alongwith other co-accused in the present case. In pursuance of their disclosure statements, accused Lal and Toofan also demarcated the place vide memo Exs. P6 & P7 respectively. On 27.09.2007, accused Lal also got recovered one pair of Jhumki and one pair of gold ear tops, which were taken into possession vide memo Ex. P12. Similarly, accused Toofan also got recovered two gold rings from his jhuggi, Ranjeet Singh Nagar, Bhatinda, which were taken into possession vide memo Ex. P11. On completion of necessary investigations, report under Section 173 Cr.P.C. was filed against the present appellants as well as Ashok @ Gopal.

7. It may be noticed that since accused namely Desh Raj could not be arrested, he was declared proclaimed offender vide order dated 22.02.2008.

8. To prove its case, the prosecution examined the witnesses of formal nature as well as PW-11 SI Ram Kumar and PW-13 SI Dev Vrat, who deposed with regard to the investigations carried out by them. The prosecution examined PW-5 Kavita, the author of FIR; PW-1 Smt. Rameshwari, mother of Kavita - complainant and PW-6 Harinder, brother of Kavita - complainant. The prosecution has also examined PW-8 Dr. Sarvesh Tandon, Associate Professor, Forensic Medicines, Safdarjung Hospital, New Delhi, who conducted the post mortem examination on the dead body of Banti @ Devi Singh. Apart from proving post mortem report Ex. P14, PW-8 Dr. Sarvesh Tandon opined that the death was cranio cereberal damage due to blunt force diverted upon the head by other party and that all the injuries were ante mortem in nature and the injury caused on head was sufficient to cause death in the ordinary course of nature.

9. After conclusion of prosecution evidence, the statements of all the accused were recorded under Section 313 Cr.P.C. The incriminating circumstances appearing against them in the prosecution evidence were put to them. They denied the prosecution case and pleaded false implication. In their defence, the accused tendered certified copy of judgment dated 18.07.2008 (Ex. D1).

10. After going through the evidence on record, the learned trial Court in the judgment dated 26.02.2010 returned a finding that the prosecution has able to prove beyond any reasonable doubt that the present appellants as well as Ashok @ Gopal had committed lurking house trespass and dacoity with murder of Banti @ Devi Singh in the residential house of the complainant. On the next day i.e. 27.02.2010, accused Ashok @ Gopal managed to escape from the custody of the escort when he was being taken to the Court on way from District Jail Bhondsi to Palwal for hearing on the quantum of sentence. Therefore, the trial Court only sentenced the remaining accused i.e. the present appellants, as mentioned in the

order of sentence dated 27.02.2010.

11. Before this Court, learned counsel for the appellants have vehemently argued that it is PW-5 Kavita - complainant and PW-1 Rameshwari, who are said to have seen the accused, but since the accused were not known and the time of occurrence is mid-night at about 2.00 PM, therefore, the evidence that they have identified the accused is not tenable. PW-6 Harinder, brother of PW-5 Kavita is not the witness of the occurrence, therefore, his testimony is not relevant to determine, as to whether the appellants were the one, who were involved in the commission of offence. Still further, it is argued that PW-5 Kavita was not known to any of the accused, therefore, how she identified all the appellants is not clarified. The appellants were identified by PW-5 Kavita in Court only, therefore, in the absence of any test identification parade, the testimony of PW-5 Kavita - complainant is not that of a reliable and trustworthy witness. It is also argued that recovery of jewellery articles pursuant to the disclosure statements of the appellants is not that of reliable nature, as the jewellery articles are of ordinary wear and could be planted by the prosecution at any time. Still further, no independent witness has been examined by the prosecution to prove the recovery of such jewellery articles. It is argued that the weapon of offence attributed to the appellants are the dandas, which are generally available, therefore, the prosecution case is not based upon reliable and cogent evidence. Lastly, it is argued that for an offence under Section 396 IPC, the punishment is death or life imprisonment or imprisonment for ten years, therefore, the sentence upon the appellants should be modified to that of ten years.

12. We have heard learned counsel for the parties and with their assistance gone through the entire record carefully. A perusal of the record shows that the prosecution has moved an application for conducting identification parade of accused Ashok @ Gopal and Siri Ram @ Dussa. However, vide their statements dated 12.09.2007, the accused had declined to participate in identification parade. As per PW-5 Kavita - complainant, her mother PW-1 Rameshwari, her father Om Parkash and her brother Banti @ Devi Singh (deceased) have also received injuries during the intervening night of 15/16.08.2007. Such fact stands proved by the testimony PW-14 Dev Ashish, Record Keeper, Om Hospital, Palwal, who proved the medico legal report of patient Om Parkash, Banti @ Devi Singh and PW-5 Kavita - complainant as Exs. P29, P30 & P31 respectively. Both the injured i.e. PW-5 Kavita and PW-1 Smt. Rameshwari, mother of Kavita - complainant, who are the eye-witnesses, have identified the accused in Court. In her cross-examination, PW-5 Kavita stated that the police had called her after about 1 1/2 months to identify the accused persons after their arrest. She denied the suggestion that the accused present in the court have never attacked her and her other family members on the night of 15/16.08.2007 and stolen her jewellery. PW-5 Kavita, who is a victim of the appellants, cannot forget the faces of her assailants. All the accused stands identified by both the eye-witnesses i.e. PW-5 Kavita and PW-1 Rameshwari, whose presence is proved from the medical and surrounding circumstances including their

testimonies on oath. The identification by the witnesses of the accused in Court is sufficient to nail the present appellants with the commission of crime after an offer by the prosecution for their test identification was not accepted by the accused.

13. Still further, in pursuance of their disclosure statements all the accused have got recovered the jewellery articles falling in their share from the disclosed places by pointing out the same vide recovery memos Exs. P3, P5, P11 & P12. Such recovery process was witnessed by PW-6 Harinder, brother of PW-5 Kavita - complainant, PW-12 ASI Janki Parshad & PW-13 SI Dev Vrat. On the basis of such cogent and reliable evidence, the identification of the accused by the injured eye-witnesses in Court after their refusal to join the test identification parade and recovery of articles at the instance of the accused, the prosecution is able to conclusively prove the commission of crime by the appellants beyond any reasonable doubt.

14. We also do not find any merit in the argument that recovery of jewellery articles pursuant to the disclosure statements of the appellants is not that of reliable nature, as the jewellery articles are of ordinary wear and could be planted by the prosecution at any time. The recovery of jewellery articles is from the disclosed places pursuant to the disclosure statements of all the accused-appellants. The said fact cannot be doubted only for the reason that no independent witness has been examined, when such fact is proved by PW-6 Harinder, brother of PW-5 Kavita - complainant, PW-12 ASI Janki Parshad & PW-13 SI Dev Vrat, the Investigating Officer. The mere fact that such witnesses are near relative of the victim or the police officials is not sufficient to discard their testimonies. Being near relation or police officials, the Court may scrutinize their statements with little more care and caution. But if after careful and cautious scrutiny, the Court comes to the conclusion that the same are reliable and trustworthy, the same can be made basis for conviction. PW-12 ASI Janki Parshad & PW-13 SI Dev Vrat, witnesses to the recovery of jewellery articles in their cross-examination admitted that no independent person was joined at the time of recovery, but there is nothing on record that the official witnesses were inimical towards the accused. They had no ill-will or enmity against the accused to falsely implicate them in the present case. From the statements of the prosecution witnesses, it cannot be accepted that such jewellery articles have been planted. There is nothing to suggest as to why PW-6 Harinder, brother of PW-5 Kavita - complainant, PW-12 ASI Janki Parshad & PW-13 SI Dev Vrat - the Investigating Officer would falsely implicate the accused.

15. Similarly, the weapon of offence in the present case i.e. dandas are also recovered pursuant to the disclosure statements of the accused-appellants. PW-5 Kavita in her initial version has stated that the assailants, who inflicted injuries to her and her family members, were armed with dandas. Such was the first statement given immediately after the occurrence and much before the arrest of the accused. PW-8 Dr. Sarvesh Tandon opined that death of Banti @ Devi Singh was due to blunt force diverted upon the head by other party. Thus, the weapon of offence is danda

only. It cannot be said that the recovery of dandas was falsely planted upon the appellants.

16. The defence has sought to establish the innocence of the accused on the basis of judgment Ex. D1, whereby they have been acquitted in case FIR No. 335 of 2007 in pursuance of which the appellants were apprehended in the present case. A perusal of the judgment Ex. D1 shows that the present appellants were also the accused in the said case. The accused were acquitted for the reason that the disclosure statements are not admissible in evidence and there is material contradictions affecting the credibility of the prosecution witnesses. The acquittal in the said case is of no relevance to the present case, where the witnesses are different and the allegations regarding commission of crime are different. Thus, we do not find that there is any error in the findings recorded by the learned trial Court in convicting the present appellants.

17. In respect of the prayer of the appellants to reduce the sentence to that of ten years, learned counsel for the appellants rely upon a Division Bench judgment of Rajasthan High Court in Gopal Singh Vs. The State of Rajasthan--> .

18. We do not find that the appellants are entitled to any indulgence in the matter of sentence. In Gopal Singh''s case (supra), the reasoning given by the Bench is that there is no subsequent criminal conduct of the appellant; the incident is about 25 years old and the appellant is about 62 years of age. In the present case, the appellants have been found guilty of commission of offence under Section 396 IPC i.e. dacoity with murder.

19. An offence under Section 396 IPC has two components i.e. dacoity and murder. The murder is defined under Section 300 and also has exceptions. The punishment for culpable homicide is death or imprisonment for life. It is culpable homicide not amounting to murder, which falls under Section 304 i.e. if the act by which the death is caused without the intention of causing death, which is punishable for a period less than life.

20. The Hon''ble Supreme Court in a judgment reported as Shyam Behari Vs. State of Uttar Pradesh, found that the essential ingredients for an offence of dacoity are that five or more persons should be concerned in the commission of offence. The Court held that charge under Section 396 IPC has two ingredients i.e. (i) the commission of the dacoity, and (ii) the commission of the murder in so committing the dacoity. The Court found that even if conviction of the appellant under Section 396 IPC is not sustainable, the murder having been committed, the offence under Section 302 IPC would be made out.

21. In Iman Ali and Another Vs. State of Assam, , the Hon''ble Supreme Court held that offence under Section 396 IPC is not less heinous than an offence under Section 302 IPC. The Court in the said judgment was considering, as to whether the accused convicted for an offence under Section 396 IPC, death sentence should be awarded.

It was held that rule under Section 302 IPC is that sentence of death should follow unless reasons are shown for giving a lesser sentence, but no such rule applies to Section 396 IPC. It may be noticed that the said judgment was given prior to development of punishment of grant of death sentence in rarest of rare cases. The Court held as under:

"4. .....Again, we do not think that the learned Judges of the Allahabad High Court intended to lay down that, even in cases where a person is convicted for the offence under Section 396 IPC, and there is clear evidence that he himself had committed a cold-blooded murder in committing the dacoity, a sentence of death should not follow. Clearly, the view expressed was meant to apply to those cases where there could be no definite finding as to which person committed the murder and all the members of the gang are held constructively guilty of the offence punishable under Section 396 IPC. A principle enunciated for such a situation cannot be applied to a case where there is direct evidence that a particular accused committed the murder himself, as is the finding in the present case. In these circumstances, the order made by the High Court must be held to be justified and the appeal is dismissed."

22. A perusal of the above extract shows that the members of the gang for an offence under Section 396 IPC are constructively guilty of the offence.

23. Later in a judgment reported as Kalika Tiwari and others Vs. State of Bihar, , the Hon''ble Supreme Court held that for an offence under Section 396 IPC, if any one 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 pursuance of commission of dacoity, commits a murder, all of his companions, who are participating in the commission of the same dacoity may be convicted under Section 396 IPC, although they may have no participation in the murder beyond the fact of participation in dacoity. It is not necessary for the prosecution to establish either any common intention envisaged in Section 34 or common object contemplated in Section 149 IPC. The relevant extract from the judgment reads as under:

"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."

24. The aforesaid judgments have been recently considered by the Hon''ble Supreme Court in Rafiq Ahmed @ Rafi Vs. State of U.P., . The Court held that offence of murder has been lifted and incorporated in the provisions of Section 396 IPC. The offence of murder punishable under Section 302 IPC will have to be read into the provisions of offences stated under Section 396 IPC. It is a principle akin to ''legislation by incorporation''. The Court held to the following effect:

"24. The ingredients of both these offences, to some extent, are also different inasmuch as to complete an offence of "dacoity" under Section 396 IPC, five or more persons must conjointly commit the robbery while under Section 302 IPC even one person by himself can commit the offence of murder. But, as already noticed, to attract the provisions of Section 396 , the offence of "dacoity" must be coupled with murder. In other words, the ingredients of Section 302 become an integral part of the offences punishable under Section 396 IPC. Resultantly, the distinction with regard to the number of persons involved in the commission of the crime loses its significance as it is possible that the offence of "dacoity" may not be proved but still the offence of murder could be established, like in the present case. Upon reasonable analysis of the language of these provisions, it is clear that the court has to keep in mind the ingredients which shall constitute a criminal offence within the meaning of the penal section. This is not only essential in the case of the offence charged with but even where there is comparative study of different penal provisions as the accused may have committed more than one offence or even offences of a graver nature. He may finally be punished for a lesser offence or vice versa, if the law so permits and the requisite ingredients are satisfied.

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61. In the present case, we are primarily concerned with an offence punishable under Section 396 IPC and in the alternative for an offence punishable under Section 302 IPC. The offence under Section 396 consists of two parts: firstly, dacoity by five or more persons, and secondly, committing of a murder in addition to the offence of dacoity. If the accused have committed both these offences, they are liable to be punished with death or imprisonment for life or rigorous imprisonment for a term which may extend to ten years and be liable to pay fine as well. Under Section 302 IPC, whoever commits murder shall be punished with death or imprisonment for life

and shall also be liable to pay fine. The offence of murder has been explained under Section 300 IPC. If the act by which the death is caused is done with the intention of causing death, it is murder. It will also be a murder, if it falls in any of the circumstances in Secondly, Thirdly and Fourthly of Section 300 and it is not so when it falls in the Exceptions to that section.

62. On the conjoint reading of Sections 396 and 302 IPC, it is clear that the offence of murder has been lifted and incorporated in the provisions of Section 396 IPC. In other words, the offence of murder punishable under Section 302 and as defined under Section 300 will have to be read into the provisions of offences stated under Section 396 IPC. In other words, where a provision is physically lifted and made part of another provision, it shall fall within the ambit and scope of principle akin to "legislation by incorporation" which normally is applied between an existing statute and a newly enacted law. The expression "murder" appearing in Section 396 would have to take necessarily in its ambit and scope the ingredients of Section 300 IPC. In our opinion, there is no scope for any ambiguity. The provisions are clear and admit no scope for application of any other principle of interpretation except the "golden rule of construction" i.e. to read the statutory language grammatically and terminologically in the ordinary and primary sense which it appears in its context without omission or addition. These provisions read collectively, put the matter beyond ambiguity that the offence of murder, is by specific language, included in the offences under Section 396 . It will have the same connotation, meaning and ingredients as are contemplated under the provisions of Section 302 IPC."

25. Keeping in view the aforesaid principle, where an offence of culpable homicide amounting to murder punishable under Section 302 IPC in committing dacoity, the punishment is death or imprisonment for life. The rigorous imprisonment for a term, which may extent to ten years as stipulated under Section 396 IPC is only in those cases, which fall within Section 304 IPC attracting Exceptions specified in Section 300 IPC i.e. where death is not intended to be caused.

26. In the present case, we find that the appellants have given merciless beatings to the deceased Banti @ Devi Singh, his mother PW-1 Rameshwari, his father Om Parkash and his sister PW-5 Kavita - complainant. Not only the appellants have taken life of a innocent citizen, they have also committed dacoity falling under Section 391 IPC. Therefore, the appellants cannot be imposed a punishment, which is less than imprisonment for life, as the appellants are guilty for commission of murder and for dacoity punishable under Section 391 . Thus, the imprisonment for life is the only punishment, which can be given under Section 396 IPC.

27. In view of the above, we find that the learned trial Court has considered the entire evidence in correct perspective to return a finding that the prosecution has succeeded in proving the charges against the appellants. The judgment of conviction and order of sentence recorded by the learned Additional Sessions Judge do not suffer from any patent illegality or irregularity.

28. Consequently, the present appeals are dismissed.