Rafiq Ahmed @ Rafi Vs State of U.P.

Court: Supreme Court of India

Date of Decision: Aug. 4, 2011

Acts Referred: Criminal Law Act, 1967 â€" Section 6(2)
Criminal Procedure (Amendment) Act, 1955 â€" Section 537
Criminal Procedure Code, 1973 (CrPC) â€" Section 173, 211, 212, 213, 214
Evidence Act, 1872 â€" Section 113B<

Citation: (2011) 3 ACR 3059 : AIR 2011 SC 3114 : (2011) CriLJ 4399 : (2012) 1 JCC 108 : (2011) 9 JT 279 : (2011) 4 KCCR 474 SN : (2011) 4 KLT 61 SN : (2011) 4 RCR(Criminal) 389 : (2011) 4 RLW 2868 : (2011) 8 SCALE 272 : (2011) 8 SCC 300 : (2011) 11 SCR 907 : (2011)

Hon'ble Judges: Swatanter Kumar, J; B.S. Chauhan, J

Bench: Division Bench

Advocate: R. Anand Padmanabhan, Prithvi Raj B.N. and G. Ramakrichna Prasad, for the Appellant; T.N. Singh, Rajeev Dubey, Kamlendra Mishra and Jatinder Kumar Bhatia, for the Respondent

Final Decision: Allowed

Judgement

Swatanter Kumar, J.
Fine distinctions of law, if discerning, should normally be recognized and permitted to operate in their respective

fields. With the development of criminal jurisprudence, the law has recognized the concept of cognate charges besides alternative charges. The

differentiation between the offences from the same family in contradistinction to the offences falling in different categories have persuaded the courts

to apply the principle of ''cognate offences'' and punish the offender of a less grave offence because the offence of greater gravity has not been

proved beyond reasonable doubt. This principle is to be applied keeping in view the facts and circumstances of a given case and notwithstanding

the fact that no charge for such less grave offence had been framed against the offender. In the case in hand, we are concerned with a similar

question which arises from the following facts:

All the five accused, namely, Rafiq Ahmad, Ahsan, Imamuddin, Arun Kumar and Yashwant Singh, according to the prosecution, in the intervening

night of 30th September, 1977 and 1st October, 1977 committed dacoity in Ambassador Car No. UPS 7293 belonging to Rafiq Ahmad. While

the car was going on the pucca road from Nehtaur to Dhampur within the jurisdiction of thana Nehtaur, the accused had committed the murder of

Jagdish Prasad @ Jagdish Chandra @ Jagdish Babu and thereafter thrown his body in a sugarcane field of one Ikrar Ahmad situated in Village

Kashmiri, thana Nehtaur with the intention of screening themselves from punishment for committing any offence. Shri Krishna Garg, uncle of the

deceased was carrying on the wholesale business of sugar, Khandsari, flour, food grains etc. under the name of M/s. Badri Prasad Sunder Lal in

Mohalla Bari Mandi, Dhampur (Bijnor). This firm had branches in the name of ''Garg Brothers''. The firm used to sell the above products on credit

to the customers at Dhampur, Nagina, Sherkot, Sheohara, Haldaur and Nehtaur and the deceased, Jagdish Prasad, used to go to Nehtaur every

Friday to realize money from them. On Friday, 30th September, 1977, also he left for Nehtaur to collect money. Ordinarily, he used to return

home between 9.00 p.m. and 10.00 p.m. with collections roughly up to Rs. 10,000/-. Though, Jagdish Prasad, on that day also had collected

more than Rs. 8,000/- from the customers, but he did not return home that night. The next morning, Shri Krishna Garg sent his Munim, Ramesh

Chandra to Nehtaur to enquire about Jagdish Prasad. The Munim returned and disclosed to Shri Krishna Garg the above facts. After arrival of the

Munim, Shri Krishna Garg left Dhampur for Nehtaur along with Pyare Lal, Surendra Kumar, Har Kishan and Kamlesh to enquire about Jagdish

Prasad. From the enquiries, it came to light that at about 8.00 p.m., the deceased Jagdish Prasad had occupied a taxi, in which some persons were

already sitting, at the Agency Chauraha, Nehtaur. The matter was reported and after making an entry in the GD on 1st October, 1977 at 2.30

p.m., SI K.L. Verma started investigation and interrogated a number of persons including Shri Krishna Garg and Pyare Lal. Thereafter, a case was

registered u/s 364 of the Indian Penal Code (IPC). On 2.10.1977, the investigation was taken up by Station Officer (S.O.) Raj Pal Yadav and

both Mr. Verma and Mr. Yadav left the police station together for investigation and reached P.S. Dhampur. At about 9.00 pm, accused Rafiq

Ahmad was arrested by the police along with his taxi No. UPS 7293. His arrest led to recovery of the taxi which was made in presence of Pyare

Lal and Surendra Kumar. During the course of the investigation, the accused Rafiq Ahmad also made a confessional statement before the

investigating officer in presence of Surendra Kumar and Pyare Lal that the dead body of the deceased was lying in the sugarcane fields near village

Kashmiri. The body of the deceased was, thus, recovered and identified by Pyare Lal. SI K.L Verma (PW9) prepared the inquest report and the

body was subjected to post mortem by Dr. R.B. Saxena (PW8), the Medical Officer.

On 3rd October, 1977, the accused Ahsan and his brother Imamuddin were arrested with the help of Zamal Ahmad @ Khan Zamaloo and Sattar.

A gold ring was recovered from the possession of Ahsan. These arrests were effected at about 9.00 pm. Similarly, the accused Yashwant Singh

was arrested by the police from the railway platform at 1.00 am on 2nd October, 1977.

We may refer to the post-mortem report and the ante mortem injuries found by Dr. Saxena (PW8) on the body of the deceased which are as

follows:

1. Incised wound with chopping of left ear vertically oblique with 1/2 part of ear missing.

2. Incised wound oblique from above down wards below left side angle of jaw to upper neck 1/1/4""X3/4""X1/4"".

3. Incised wound 6""X1""X bone deep at front of neck just above Adam''s cartilage.

4. Abrasion 1/4"" X 1/4"" on back of both shoulders.

5. Abrasion 1/8"" X 1/4"" on back of right elbow joint.

6. Abrasion 1/4"" X 1/4"" on outer side and back of left elbow.

In the opinion of Dr. Saxena, death was caused on account of respiratory failure and hemorrhage resulting from severing of trachea.

The investigation was completed and the charge-sheet in accordance with the provisions of Section 173 of the Code of Criminal Procedure (for

short ''Code of Criminal Procedure '') was filed before the court of competent jurisdiction. The accused were committed to the Court of Sessions

and tried in accordance with law.

The learned Trial Court having considered the material and the report submitted to it in terms of Section 173 of the Code of Criminal Procedure

and vide order dated 11th September, 1979 framed the following charge against all the accused, including the present Appellant, Rafiq Ahmad:

S.T. No. 3/78

State v. Rafiq Etc.

Charge

I Jawant singh III additionaL Sessions Judge, Bijnour hereby charge you Rafiq, Ahsan, Imamuddin, Arun Kumar and Yashwant Singh accused as

follows:

That you in the night of 30-9-77 committed dacoity in Taxi No. UPS 7273 while it was running on Nehtaur to Dhampur road and that in the

commission of said dacoity murder was committed by you of one jagdish prashad and that you thereby committed an offence punishable u/s 396

IPC and within my cognizance And I hereby direct that you be tried by me on the said charge.

Dt.11-9-79

Sd/- Judge

Charge read over and explained in Hindi to the accused who pleaded not guilty.

Sd/- Judge

Sd/- Rafiq,

Sd/- Ahsan,

Sd/- Imamuddin,

Sd/- Arun Kumar

Sd/- Yashwant Singh

This charge came to be amended by the learned Trial Court and the amended charge read as under:

S.T. No. 3/78

State v. Rafiq Etc.

Amended Charge

I Jaswant singh III additional Sessions Judge, Bijnour hereby charge you Rafiq, Ahsan, Imamuddin, Arun Kumar and Yashwant Singh accused as

follows:

Firstly that you along with one another during the night of 30-9-77 and 1-10-77 committed dacoity in Ambassador Car No. UPS 7293 belonging

to rafiq accused while it was going from Nehtaur to Dhampur on the pucca road within the circle of P.S. Nahtaur District Bijnaur and that in the

commission of the said dacoity, murder of jagdish prashad was committed by you and that you thereby committed an offence punishable u/s 396

IPC and within the cognizance of this Court.

Secondly - that you along with one another during the night of 30-09-77 and 1-10-77 in the area of village Kashmiri P.S. Nehtaur Dist. Bijnore

knowing or having reason to believe that an offence u/s 396 IPC punishable with death or imprisonment for life has been committed did cause

evidence of the said offence to disappear by secreting the dead body of jagdish prashad in the sugar cane field of Ikrar Ahmad with the intention of

screening yourself from legal punishment and thereby committed an offence punishable u/s 201 IPC and with the cognizance of this Court.

And I hereby direct that you be tried by this Court on the said charge

25-2-80

Sd/- Judge

Charge read over and explained in Hindi to the accused who pleaded not guilty.

Sd/- Judge

Sd/- Rafiq,

Sd/- Ahsan,

Sd/- Imamuddin,

Sd/- Arun Kumar

Sd/- Yashwant Singh

The prosecution examined as many as 12 witnesses to prove its case. Besides the statement of these witnesses, prosecution had also placed

reliance on Exhibits Ka-1 to Ka-23. Incriminating evidence against the accused which came on record during the course of the trial was put to the

accused whose statement u/s 313 of the Code of Criminal Procedure was recorded by the Court on 20th February, 1981. It may be stated here

that in his statement, accused Rafiq Ahmad denied his presence at the place of occurrence and stated that the witnesses being the relatives of the

deceased were deposing against the Appellant. The accused had also led defence and examined two witnesses, namely, Naik Singh (DW1) and

Shri J.P. Singh (DW2) and placed number of documents on record.

The Trial Court, by a detailed judgment dated 17th August, 1981, came to the conclusion that Rafiq Ahmad was guilty of charge under Sections

302 and 201 IPC under which the accused was liable for conviction and punishment. The Court further held that Ahsan was guilty of a charge u/s

411 IPC but acquitted him and the three other accused, namely, Imamuddin, Arun Kumar and Yashwant Singh u/s 396 IPC by giving them benefit

of doubt. The Court awarded rigorous imprisonment for life to Rafiq Ahmad u/s 302 IPC and seven years rigorous imprisonment u/s 201 IPC.

Both the sentences were ordered to run concurrently. The Trial Court ordered the accused Ahsan to undergo rigorous imprisonment for a period

of one year and to pay a fine of Rs. 500/- u/s 411, IPC and in default to undergo imprisonment for further period of six months.

Accused Rafiq Ahmad, dissatisfied with the judgment of the Trial Court, preferred an appeal before the High Court. Ahsan also challenged his

conviction and sentence. Both these appeals were heard and disposed of by the High Court by a common judgment. The appeal filed by Rafiq

Ahmad was dismissed. His conviction and sentence was maintained while the appeal preferred by Ahsan was accepted and he was acquitted even

of the charge u/s 411 IPC.

Rafiq Ahmad, in the present appeal, has impugned the judgment of the High Court.

2. The entire emphasis of the submissions made on behalf of the Appellant is primarily founded on determination of a question of law, which, if

answered in favour of the Appellant, according to the learned Counsel appearing for the Appellant, would entitle the Appellant to an order of

acquittal. The argument is that the Appellant was charged for an offence u/s 396 IPC and without reformulation/alteration of the charge, the

Appellant has been convicted for an offence u/s 302 IPC. This according to the learned Counsel, has deprived the Appellant of a fair opportunity

of defence and has caused him serious prejudice. Section 302 IPC is a graver offence than an offence punishable u/s 396 of the IPC and as such

the entire trial and conviction of the Appellant is vitiated in law.

3. It is also contended that the learned trial court as well as the High Court have erred in fact and in law, have failed to appreciate the evidence in

its correct perspective and also that there are serious contradictions between the statements of the witnesses. It is also urged that this being a case

of circumstantial evidence, the prosecution has failed to prove the chain of events, pointing towards the guilt of the accused. Therefore, the

judgments of the courts below are liable to be set aside.

4. On the contra, it is contended on behalf of the State that despite the present case being a case of circumstantial evidence, the prosecution has

been able to establish its case beyond any reasonable doubt. The Appellant has suffered no prejudice, whatsoever, because of his conviction u/s

302 of the IPC.

5. Before we proceed to examine the merit or otherwise of the above rival contentions, it will be important for us to refer to the relevant provisions

of the IPC at this stage itself. The relevant provisions read as under:

302. Punishment for murder.- Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

396. Dacoity with murder.- If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity,

every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten

years, and shall also be liable to fine.

6. As is evident from the amended charge reproduced earlier, the Appellant was charged with an offence under Sections 396 and 201 of the IPC.

It is not necessary for us to examine the charge framed against the other co-accused as all of them have been acquitted and the judgment of

acquittal has not been challenged before this Court.

7. Section 391 IPC explains the offence of ''dacoity''. When five or more persons conjointly commit or attempt to commit a robbery, or where the

whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission and attempt

amount to five or more, every person so committing, attempting or aiding, is said to commit ''dacoity''. u/s 392 IPC, the offence of ''robbery''

simplicitor is punishable with rigorous imprisonment which may extend to ten years or 14 years depending upon the facts of a given case. Section

396 IPC brings within its ambit a murder committed along with ''dacoity''. In terms of this provision, if any one of the five or more persons, who

are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death or

imprisonment for life or rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine.

8. On a plain reading of these provisions, it is clear that to constitute an offence of ''dacoity'', robbery essentially should be committed by five or

more persons. Similarly, to constitute an offence of ''dacoity with murder'' any one of the five or more persons should commit a murder while

committing the dacoity, then every one of such persons so committing, attempting to commit or aiding, by fiction of law, would be deemed to have

committed the offence of murder and be liable for punishment provided under these provisions depending upon the facts and circumstances of the

case.

9. Section 299 defines ''culpable homicide''. Whoever causes death by doing an act with the intention of causing death, or with the intention of

causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of

culpable homicide. Except the exceptions provided u/s 300 IPC, culpable homicide is murder if the act by which death is caused is done with the

intention of causing death. The intention to cause death is the primary distinguishing feature between these two offences. It is a fine but clear line of

distinction.

10. In terms of Section 300 IPC, except in the cases stated in that provision, culpable homicide is murder if the act by which the death is caused is

done with the intention of causing death or in terms of any of the circumstances stated secondly, thirdly and fourthly respectively. The law clearly

marks a distinction between culpable homicide amounting to murder and culpable homicide not amounting to murder. Another distinction between

Sections 302 and 396 is that under the latter, wide discretion is vested in the courts in relation awarding of punishment. The court, in exercise of its

jurisdiction and judicial discretion in consonance with the established principles of law can award sentence of ten years with fine or even award

sentence of life imprisonment or sentence of death, as the case may be while u/s 302, the court cannot, in its discretion, award sentence lesser than

life imprisonment.

11. The ingredients of both these offences, to some extent, are also different inasmuch as to complete an offence of ''dacoity'' u/s 396 IPC, five or

more persons must conjointly commit the robbery while u/s 302 of the 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 u/s 396 of the 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.

12. So far the judicial pronouncements show a consistent trend that wherever an accused is charged with a grave offence, he can be punished for a

less grave offence finally, if the grave offence is not proved. For example, a person charged with an offence u/s 302 of the IPC may finally be

convicted only for an offence u/s 304 Part II where the prescribed punishment is lesser and the consequences of conviction are less serious in

comparison to a conviction u/s 302. But even in those cases, the Court has to be cautious while examining whether the ingredients of the offences

are independently satisfied. If the ingredients even of a lesser offence are not satisfied then it may be difficult in a given case for the court to convict

the person for an offence of a less grave nature. There can be cases where it may not be possible at all to punish a person of a less grave offence if

its ingredients are completely different and distinct from the grave offence. To deal with this aspect illustratively, one could say that a person who is

charged with an offence u/s 326 may not be liable to be convicted for an offence u/s 406 IPC because their ingredients are entirely distinct,

different and have to be established by the prosecution on its own strength. In other words, the accused has to be charged with a grave offence

which would take within its ambit and scope the ingredients of a less grave offence. The evidence led by the prosecution for a grave offence, thus,

would cover an offence of a less grave nature. But it is essential that the offence for which the Court proposes to punish the accused, is established

beyond reasonable doubt by the prosecution.

13. A Constitution Bench of this Court in the case of 281108 dealt with a question as to whether omission to frame a charge was a curable

irregularity. In that case the accused was charged for committing an offence punishable u/s 302 IPC but the Court finally convicted him of an

offence punishable u/s 304, Part II. The Court, while examining if the accused had been prejudiced in his defence and the validity of his conviction,

held as under:

6. Before we proceed to set out our answer and examine the provisions of the Code, we will pause to observe that the Code is a code of

procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless

technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-

understood line that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands

the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair

opportunity of defending himself, then, provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure,

mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show

substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based.

7. Now here, as in all procedural laws, certain things are regarded as vital. Disregard of a provision of that nature is fatal to the trial and at once

invalidates the conviction. Others are not vital and whatever the irregularity they can be cured; and in that event the conviction must stand unless the

Court is satisfied that there was prejudice. Some of these matters are dealt with by the Code and wherever that is the case full effect must be given

to its provisions. The question here is, does the Code deal with the absence of a charge and irregularities in it, and if so, into which of the two

categories does it place them ? But before looking into the Code, we deem it desirable to refer to certain decisions of the Privy Council because

much of the judicial thinking in this country has been moulded by their observations. In our opinion, the general effect of those decisions can be

summarised as follows.

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17. It is possible (though we need not so decide in this case) that the recent amendment to Section 537 in the Code of Criminal Procedure

(Amendment) Act XXVI of 1955, where mis-joinder of charges has been placed in the curable category, will set at rest the controversy that has

raged around the true meaning of N.A. Subramania Iyer v. King-Emperor. In any case, our opinion is that the real object of the Code is to leave

these matters to the discretion and vigilance of the courts. Slightly to alter the language of the Privy Council in Babulal Choukhani v. The King-

Emperor (1938) L.R. 65 Ind Ap 158, we would say -

It must be hoped, and indeed assumed, that magistrates and judges will exercise their jurisdiction fairly and honestly. Such is the implied condition

of the exercise of judicial power. It they do not, or if they go wrong in fact or in law, the accused has prima facie a right of recourse to the superior

courts by way of appeal or revision; and the cases show how vigilant and resolute the High Courts are in seeing that the accused is not prejudiced

or embarrassed by unsubstantial departures from the Code and how closely and jealously the Supreme Court guards the position of the accused.

These safeguards may well have appeared to the Legislature to be sufficient when they enacted the remedial provisions of the Code and have now

left them substantially unaltered in the new Code recently introduced

This, we feel, is the true intent and purpose of Section 537(a) which covers every proceeding taken with jurisdiction in the general phrase ""or other

proceedings under this Code"". It is for the Court in all these cases to determine whether there has been prejudice to the accused; and in doing so

to bear in mind that some violations are so obviously opposed to natural justice and the true intendment of the Code that on the face of them and

without anything else they must be struck down, while in other cases a close examination of all the circumstances will be called for in order to

discover whether the accused has been prejudiced.

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In adjudging the question of prejudice the fact that the absence of a charge, or a substantial mistake in it, is a serious lacuna will naturally operate to

the benefit of the accused and if there is any reasonable and substantial doubt about whether he was, or was reasonably likely to have been, misled

in the circumstances of any particular case, he is as much entitled to the benefit of it here as elsewhere; but if, on a careful consideration of all the

facts, prejudice, or a reasonable and substantial likelihood of it, is not disclosed the conviction must stand; also it will always be material to

consider whether objection to the nature of the charge, or a total want of one, was taken at an early stage.

If it was not, and particularly where the accused is defended by AIR 1930 57 (Privy Council) it may in a given case be proper to conclude that the

accused was satisfied and knew just what he was being tried for and knew what was being alleged against him and wanted no further particulars,

provided it is always borne in mind that ""no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the

advocate of the accused"" AIR 1927 44 (Privy Council)

But these are matters of fact which ill be special to each different case and no conclusion on these questions of fact in any one case can ever be

regarded as a precedent or a guide for a conclusion of fact in another, because the facts can never be alike in any two cases however alike they

may seem. There is no such thing as a judicial precedent on facts though counsel, and even judges, are sometimes prone to argue and to act if there

were.

14. The Court, while laying down the above law, significantly noticed that the Code is a code of procedure and like all procedural laws is designed

to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the code is to ensure that an

accused person gets a full and fair trial along with certain well-established and well-understood canons of law that accord with the notions of

natural justice.

15. In the case of Iman Ali and Anr. v. State of Assam AIR 1968 SC 1464, the Court had the occasion to explain the distinction between the

scope, liability and punishment for an offence u/s 396, as opposed to Section 302 IPC. The Court noticed that the offence u/s 396 was no less

heinous than an offence u/s 302 though in the latter case, it was obligatory on the part of the Court to record reasons for not awarding death

sentence. The Court while sustaining the enhancement of punishment from sentence of life imprisonment to sentence of death by the High Court on

the ground that there was a direct evidence to show that the accused had committed the alleged murder, held as under:

Learned Counsel for the Appellants, in challenging the justification for the order of enhancement of sentence by the High Court, relied on the

principle laid down by this Court in 282453 at pp. 367-368 which was explained in the following words:

In a case of murder, the death sentence should ordinarily be imposed unless the trying Judge for reasons which should normally be recorded

considers it proper to award the lesser penalty. But the discretion is his and if he gives reasons on which a judicial mind could properly be found,

an appellate court should not interfere. The power to enhance a sentence from transportation to death should very rarely be exercised and only for

the strongest possible reasons. It is not enough for an appellate court to say, or think, that if left to itself it would have awarded the greater penalty

because the discretion does not belong to the appellate court but to the trial Judge and the only ground on which an appellate court can interfere is

that the discretion has been improperly exercised, as for example, where no reasons are given and none can be inferred from the circumstances of

the case, or where the facts are so gross that no normal judicial mind would have awarded the lesser penalty.

It appears to us, however, that, in the present case, this principle is of no assistance to the Appellants for challenging the step taken by the High

Court. This Court cautioned the appellate court against interfering if the discretion of the trying Judge is exercised for reasons recorded by him and

if it appears from the reasons that he had exercised a judicial mind in not awarding the sentence of death. In the present case, as mentioned by the

High Court and as is apparent from the judgment of the Court of Session, the trial court awarded the sentence of imprisonment for life without

giving any reasons at all for adopting that course. It is true that the Appellants were not convicted in the present case for the offence of murder

simpliciter u/s 302 IPC; but that, in our opinion, is immaterial. The conviction of the Appellants u/s 396 IPC, was not based on constructive liability

as members of the gang of dacoits. There was clear finding by the court of Session which has been upheld by the High Court that each of these

Appellants committed a cold-blooded murder by shooting two inmates of the house simply with the object of facilitating commission of dacoity by

them. Those persons were shot and killed even though they had not even tried to put up any resistance. The offence u/s 396 IPC, was therefore,

no less heinous than an offence u/s 302 IPC. In these circumstances, when the court of Session gave no reason at all for not awarding the sentence

of death and for sentencing them to imprisonment for life only, it cannot be held that the High Court was not justified in interfering with that order.

Learned Counsel in this connection refereed us to a decision of a Division Bench of the Allahabad High Court in 132165 where it was held:

We do not consider that as a general rule a sentence of death should necessarily follow a conviction u/s 396, I.P.C., and this Section differs from

Section 302, I.P.C., in that respect. The rule is u/s 302, that a sentence of death should follow unless reasons are shown for giving a lesser

sentence. No such rule applies to Section 396, I.P.C.

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 u/s 396, I.P.C., 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 u/s 396, I.P.C. 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.

16. With the passage of time more and more such cases came up for consideration of this Court as well as the High Courts. The development of

law has not changed the basic principles which have been stated in the judgments afore-referred. Usually an offence of grave nature includes in

itself the essentials of a lesser but cognate offence. In other words, there are classes of offences like offences against the human body, offences

against property and offences relating to cheating, misappropriation, forgery etc. In the normal course of events, the question of grave and less

grave offences would arise in relation to the offences falling in the same class and normally may not be inter se the classes. It is expected of the

prosecution to collect all evidence in accordance with law to ensure that the prosecution is able to establish the charge with which the accused is

charged, beyond reasonable doubt. It is only in those cases, keeping in view the facts and circumstances of a given case and if the court is of the

view that the grave offence has not been established on merits or for a default of technical nature, it may still proceed to punish the accused for an

offence of a less grave nature and content.

17. In the case of Anil @ Raju Namdev Patil v. Administration of Daman & Diu and Anr. 2006 Supp. (9) SCR 466, the Court had to deal with a

situation where the accused, a car driver had kidnapped a child of five years for the purpose of demanding ransom and later killed the child. The

accused had been charged for an offence punishable under Sections 364, 302 and 201 IPC, but was finally convicted for an offence punishable u/s

364A and was awarded sentence of death. This Court held that there was prejudice caused to the Appellant and the sentence was modified from

death to rigorous imprisonment for life with conviction u/s 364 IPC. The Court, besides recording the above findings on the merits of the case

noticed the precedents in relation to non-framing of charge. The Bench referred to various judgments of this Court in 297322 , 278942 290269

261194 301102 and recapitulated the principles of law stated in these judgments and stated the following precepts of law which would govern

such cases:

The propositions of law which can be culled out from the aforementioned judgments are:

(i) The Appellant should not suffer any prejudice by reason of misjoinder of charges.

(ii) A conviction for lesser offence is permissible.

(iii) It should not result in failure of justice.

(iv) If there is a substantial compliance, misjoinder of charges may not be fatal and such misjoinder must be arising out of mere misjoinder to frame

charges.

The ingredients for commission of offence of Section 364 and 364A are different. Whereas the intention to kidnap in order that he may be

murdered or may be so disposed of as to be put in danger as murder satisfied the requirements of Section 364 of the Indian Penal Code, for

obtaining a conviction for commission of an offence u/s 364A thereof it is necessary to prove that not only such kidnapping or abetment has taken

place but thereafter the accused threatened to cause death or hurt to such person or by his conduct gives rise to a reasonable apprehension that

such person may be put to death or hurt or causes hurt or death to such person in order to compel the government or any other person to do or

abstain from doing any act or to pay a ransom.

It was, thus, obligatory on the part of the learned Sessions Judge, Daman, to frame a charge which would answer the description of the offence

envisaged u/s 364A of the Indian Penal Code. It may be true that the kidnapping was done with a view to get ransom but the same should have

been put to the Appellant while framing a charge. The prejudice to the Appellant is apparent as the ingredients of a higher offence had not been put

to him while framing any charge.

It is not a case unlike Kammari Brahmaiah (supra) where the offence was of a lesser gravity, as has been observed by Shah, J.

18. In light of the above principles, let us now examine the meaning of ''prejudice''. The expression has been defined in Black''s Law Dictionary

(Eighth Edition), as follows:

prejudice, 1. Damage or detriment to one''s legal rights or claims. See dismissal with prejudice, dismissal without prejudice under DISMISSAL.

Legal prejudice. A condition that, if shown by a party, will usu. defeat the opposing party''s action: esp. a condition that, if shown by the

Defendant, will defeat a Plaintiff''s motion to dismiss a case without prejudice. The Defendant may show that dismissal will deprive the Defendant

of a substantive property right or preclude the Defendant from raising a defense that will be unavailable or endangered in a second suit.

Undue prejudice. The harm resulting from a fact-trier''s being exposed to evidence that is persuasive but inadmissible (such as evidence of prior

criminal conduct) or that so arouses the emotions that calm and logical reasoning is abandoned.

2. A preconceived judgment formed without a factual basis; a strong bias

19. When we speak of prejudice to an accused, it has to be shown that the accused has suffered some disability or detriment in the protections

available to him under the Indian criminal jurisprudence. It is also a settled canon of criminal law that this has occasioned the accused with failure of

justice. One of the other cardinal principles of criminal justice administration is that the courts should make a close examination to ascertain whether

there was really a failure of justice or whether it is only a camouflage, as this expression is perhaps too pliable. With the development of law, Indian

courts have accepted the following protections to and rights of the accused during investigation and trial:

(a) The accused has the freedom to maintain silence during investigation as well as before the Court. The accused may choose to maintain silence

or make complete denial even when his statement u/s 313 of the Code of Criminal Procedure is being recorded, of course, the Court would be

entitled to draw inference, including adverse inference, as may be permissible to it in accordance with law;

(b) Right to fair trial

(c) Presumption of innocence (not guilty)

(d) Prosecution must prove its case beyond reasonable doubt.

20. Prejudice to an accused or failure of justice, thus, has to be examined with reference to these aspects. That alone, probably, is the method to

determine with some element of certainty and discernment whether there has been actual failure of justice. ''Prejudice'' is incapable of being

interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not

matters falling beyond their scope. Once the accused is able to show that there is serious prejudice to either of these aspects and that the same has

defeated the rights available to him under the criminal jurisprudence, then the accused can seek benefit under the orders of the Court.

21. Right to fair trial, presumption of innocence until pronouncement of guilt and the standards of proof, i.e., the prosecution must prove its case

beyond reasonable doubt are the basic and crucial tenets of our criminal jurisprudence. The Courts are required to examine both the contents of

the allegation of prejudice as well as its extent in relation to these aspects of the case of the accused. It will neither be possible nor appropriate to

state such principle with exactitude as it will always depend on the facts and circumstances of a given case. Therefore, the Court has to ensure that

the ends of justice are met as that alone is the goal of criminal adjudication. Thus, wherever a plea of prejudice is raised by the accused, it must be

examined with reference to the above rights and safeguards, as it is the violation of these rights alone that may result in weakening of the case of the

prosecution and benefit to the accused in accordance with law.

During conduct of trial, framing of a charge is an important function of the court. Sections 211 to 224 of Chapter XVII of the Code of Criminal

Procedure, 1973 have been devoted by the Legislature to the various facets of framing of charge and other related matters thereto. u/s 211, the

charge should state the offence with which the accused is charged and should contain the other particulars specified in that section. In terms of

Section 214, in every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by

the law under which such offence is punishable. Another significant provision is Section 215 which states that no error in stating either the offence

or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the

case as material unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice. Further, the court has

been vested with the power to alter the charge. There could be trial of more than one offence together and there could even be joint trial of the

accused. We have referred to these provisions primarily to indicate that the purpose of framing of a charge is to put the accused at notice regarding

the offence for which he is being tried before the court of competent jurisdiction. For want of requisite information of offence and details thereof,

the accused should not suffer prejudice or there should not be failure of justice, as held by this Court in the case of Shamnsaheb M. Multtani v.

State of Karnataka, (2001) 2 SCC 577 The requirements of putting the accused at notice and there being a charge containing the requisite

particulars, as contemplated u/s 211, has to be read with reference to Section 215 of the Code. Every omission would not vitiate the trial. This

Court has settled this position in the case of 281108 wherein the Court held as under:

36. Sections 222 to 224 deal with the form of a charge and explain what a charge should contain. Section 225 deals with the effect of errors

relating to a charge. Sections 233 to 240 deal with the joinder of charges. Sections 535 and 537 are in the Chapter that deals with irregularities

generally and these two sections deal specifically with the charge and make it clear that an omission to frame a charge as well as irregularities,

errors and omission in a charge are all irregularities that do not vitiate or invalidate a conviction unless there is prejudice.

37. But, apart from that, if we examine the learned Counsel''s contention more closely, the fallacy in his argument becomes clear. Sections 237 and

238 deal with cases in which there is a charge to start with and then they go on to say that in certain cases the trial can proceed beyond the matter

actually charged and a conviction for an offence disclosed in the evidence in that type of case will be good despite the absence of a charge in

respect of it. But what are those cases? Only those in which the additional charge or charges could have been framed from the start; and that is

controlled by Sections 234, 235 and 239 which set out the rules about joinder of charges and persons.

261495 was a case where the accused was charged with an offence u/s 304B read with Section 34 IPC but was finally convicted for an offence

u/s 498A. The plea of prejudice, on the ground that no specific charge u/s 498A was framed and the Court, while referring to the facts and

circumstances of the case and the cross-examination of the prosecution witnesses found that it was unmistakably shown that the defence had made

concerted efforts to discredit the testimony of the alleging cruelty, was rejected and the accused was punished for an offence u/s 498A. This clearly

demonstrates the principle that in all cases, nonframing of charge or some defect in drafting of the charge per se would not vitiate the trial itself. It

will have to be examined in the facts and circumstances of a given case. Of course, the court has to keep in mind that the accused ''must be'' and

not merely ''may be'' guilty of an offence. The mental distance between ''may be'' and ''must be'' is long and divides vague conjectures from sure

conclusions. 286328

22. Having stated the above, let us now examine what kind of offences may fall in the same category except to the extent of ''grave or less grave''.

We have already noticed that a person charged with a heinous or grave offence can be punished for a less grave offence of cognate nature whose

essentials are satisfied with the evidence on record. Examples of this kind have already been noticed by us like a charge being framed u/s 302 IPC

and the accused being punished u/s 304, Part I or II, as the circumstances and facts of the case may demand. Furthermore, a person who is

charged with an offence u/s 326 IPC can be finally convicted for an offence of lesser gravity u/s 325 or 323 IPC, if the facts of the case so

establish. Alike or similar offences can be termed as ''cognate offences''. The word ''cognate'' is a term primarily used in civil jurisprudence

particularly with reference to the provisions of the Hindu Succession Act, 1956 where Section 3(c) has used this expression in relation to the

descendants of a class of heirs and normally the term is used with reference to blood relations. Section 3(c) of the Hindu Succession Act defines

cognate"" as follows:

one person is said to be a cognate of another if the two are related by blood or adoption but not wholly through males.

23. The Encyclopedia Law Lexicon, explain the word ''cognate'' in relation to civil law as follows:

Cognate. - According to Hindu Law it is a class of heirs, descended or borrowed from the same earlier form.

- It means blood relation including female relation.

Word ""cognate"" literally means ""akin in nature"", Ram Briksh v. State 1978 All Cri C 253

24. This expression has also been recognized and applied to the criminal jurisprudence as well not only in the Indian system but even in other parts

of the world. Such offences indicate the similarity, common essential features between the offences and they primarily being based on differences of

degree have been understood to be "cognate offences". Black"s Law Dictionary (Eighth Edition) defines the expression "cognate offences" as

follows:

cognate offences. A lesser offence that is related to the greater offense because it shares several of the elements of the greater offense and is of the

same class or category. For example, shoplifting is a cognate offence of larceny because both crimes require the element of taking property with

the intent to deprive the rightful owner of that property.

25. Therefore, where the offences are cognate offences with commonality in their feature, duly supported by evidence on record, the Courts can

always exercise its power to punish the accused for one or the other provided the accused does not suffer any prejudice as afore-indicated.

26. We may now refer to certain cases where this Court had the occasion to deal with such issues. Certain divergent views were also expressed in

relation to conversion of an offence from a grave to a less grave offence. In the case of 294559 the accused was charged with an offence u/s 302

IPC and convicted and sentenced for the said offence, both by the Trial Court as well as the High Court. In appeal, a Division Bench of this Court

considered whether the offence could be converted and the Appellant could be convicted for an offence u/s 306 IPC. Having regard to the

evidence adduced by the prosecution and the answer of the accused to the questions put to him u/s 313 of the Code of Criminal Procedure, the

Court was satisfied that the accused had fair notice of the allegations to attract an offence u/s 306 IPC and as such there was no denial of fair trial

to the accused. Finally, the Court convicted him of an offence u/s 306 IPC. However, a different view was expressed in a subsequent judgment by

another Division Bench of this Court in the case of 296849 ; 270783 . In that case also the Court was dealing with the situation where the accused

was charged u/s 302 but had been convicted u/s 306 IPC. This Court felt that having acquitted the accused for an offence u/s 302 which was the

only charge against the accused, he could not have been convicted for an offence punishable u/s 306 IPC as both these offences were distinct and

different. Resultantly, the accused was acquitted. The controversy arising from these two judgments of this Court came up for consideration before

a three-Judge Bench of this Court in the case of 290269 , wherein the accused was charged with an offence under Sections 302, 498A and 304-

B IPC, but finally was convicted u/s 302 by the Trial Court and sentenced to death. On appeal, the High Court acquitted him of the charge u/s 302

IPC opining that the evidence on record clearly established the charge u/s 306 IPC. Keeping in view the decision in the case of Sanagaraboina

Sreenu (supra), the High Court had concluded that the accused could not be convicted u/s 306 and on this basis convicted him u/s 498A alone.

The argument raised before this Court was that the basic ingredients were distinct and different. The accused was not aware of the basic

ingredients, the facts sought to be established against him were not explained to him and he did not get a fair chance to defend himself. Resultantly,

he ought not to have been convicted for an offence u/s 498A IPC. Rejecting all these contentions, this Court, while convicting the accused for an

offence u/s 306, held that the law stated in Sanagaraboina Sreenu (supra) was not correct enunciation of law and held as under:

This question was again examined by a three Judge Bench in 270783 in which it was held as under:

[I]n judging a question of prejudice, as of guilt, Courts must act with a broad vision and look to the substance and not to technicalities, and their

main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to

be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself.

17. There are a catena of decisions of this Court on the same lines and it is not necessary to burden this judgment by making reference to each one

of them. Therefore, in view of Section 464 Code of Criminal Procedure, it is possible for the appellate or revisional Court to convict an accused

for an offence for which no charge was framed unless the Court is of the opinion that a failure of justice would in fact occasion. In order to judge

whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the

offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether

he got a fair chance to defend himself. We are, therefore, of the opinion that 270783 was not correctly decided as it purports to lay down as a

principle of law that where the accused is charged u/s 302 IPC, he cannot be convicted for the offence u/s 306 IPC.

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The next question to be seen is whether the accused was confronted with the aforesaid features of the prosecution case in his statement u/s 313

Code of Criminal Procedure. His statement runs into six pages where every aspect of the prosecution case referred to above was put to him. He

also gave a long written statement in accordance with Section 233(2) Code of Criminal Procedure wherein he admitted that Vimla committed

suicide. He also admitted that the scooter and color TV were subsequently given to him by his in-laws but came out with a plea that he had paid

money and purchased the same from his in-laws. There is no aspect of the prosecution which may not have been put to him. We are, therefore, of

the opinion that in view of the material on record, the conviction u/s 306 IPC can safely be recorded and the same would not result in failure of

justice in any manner. The record shows that the accused was taken into custody on 29-3-1991 and was released from jail after the decision of

the High Court on 20-3-1997 and thus he has undergone nearly six years of imprisonment. In our opinion, the period already undergone (as under

trial and after conviction) would meet the ends of justice.

27. We may also make a reference to another three-Judge Bench judgment of this Court in the case of Shamnsaheb M. Multtani v. State of

Karnataka, (2001) 2 SCC 577 which was not noticed in the case of Dalbir Singh (supra). In that case, the accused initially had been charged with

an offence u/s 302 IPC but was convicted for an offence u/s 304B IPC as according to the High Court there was no failure of justice. This Court

found error in the judgment of the High Court convicting the accused of an offence u/s 304B as the accused was not put at notice of the adverse

presumption that the Court is statutorily bound to draw on satisfaction of two ingredients of Section 304-B. Therefore, this Court remanded the

matter. It also noticed the conflict of views expressed in the cases of Lakhjit Singh (supra) and Sanagaraboina Sreenu (supra) and mentioned that

in "cognate offences", the main ingredients are common and the one amongst them that is punishable with a lesser sentence can be regarded as a

minor offence. The Court, finding that the ingredients of Sections 302 and 304B are different, held as follows:

15. Section 222(1) of the Code deals with a case ""when a person is charged with an offence consisting of several particulars"". The section permits

the court to convict the accused ""of the minor offence, though he was not charged with it"". Sub-section (2) deals with a similar, but slightly different

situation.

222. (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor

offence, although he is not charged with it.

16. What is meant by ""a minor offence"" for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can

be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two

illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main

ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-Ã¯Â¿Â½-vis the other offence.

17. The composition of the offence u/s 304B IPC is vastly different from the formation of the offence of murder u/s 302 IPC and hence the former

cannot be regarded as minor offence vis-Ã¯Â¿Â½-vis the latter. However, the position would be different when the charge also contains the offence u/s

498A IPC (husband or relative of husband of a women subjecting her to cruelty). As the word ""cruelty"" is explained as including, inter alia,

harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any

property or valuable security or is on account of failure by her or any person related to her to meet such demand

18. So when a person is charged with an offence under Sections 302 and 498-A IPC on the allegation that he caused the death of a bride after

subjecting her to harassment with a demand for dowry, within a period of 7 years of marriage, a situation may arise, as in this case, that the offence

of murder is not established as against the accused. Nonetheless, all other ingredients necessary for the offence u/s 304-B IPC would stand

established. Can the accused be convicted in such a case for the offence u/s 304-B IPC without the said offence forming part of the charge?

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30. But the peculiar situation in respect of an offence u/s 304-B IPC, as discernible from the distinction pointed out above in respect of the offence

u/s 306 IPC is this: Under the former the court has a statutory compulsion, merely on the establishment of two factual positions enumerated above,

to presume that the accused has committed dowry death. If any accused wants to escape from the said catch the burden is on him to disprove it. If

he fails to rebut the presumption the court is bound to act on it.

31. Now take the case of an accused who was called upon to defend only a charge u/s 302 IPC. The burden of proof never shifts onto him. It

ever remains on the prosecution which has to prove the charge beyond all reasonable doubt. The said traditional legal concept remains unchanged

even now. In such a case the accused can wait till the prosecution evidence is over and then to show that the prosecution has failed to make out

the said offence against him. No compulsory presumption would go to the assistance of the prosecution in such a situation. If that be so, when an

accused has no notice of the offence u/s 304-B IPC, as he was defending a charge u/s 302 IPC alone, would it not lead to a grave miscarriage of

justice when he is alternatively convicted u/s 304-B IPC and sentenced to the serious punishment prescribed there under, which mandates a

minimum sentence of imprisonment for seven years.

32. The serious consequence which may ensue to the accused in such a situation can be limned through an illustration: If a bride was murdered

within seven years of her marriage and there was evidence to show that either on the previous day or a couple of days earlier she was subjected to

harassment by her husband with demand for dowry, such husband would be guilty of the offence on the language of Section 304-B IPC read with

Section 113B of the Evidence Act. But if the murder of his wife was actually committed either by a dacoit or by a militant in a terrorist act the

husband can lead evidence to show that he had no hand in her death at all. If he succeeds in discharging the burden of proof he is not liable to be

convicted u/s 304B IPC. But if the husband is charged only u/s 302 IPC he has no burden to prove that his wife was murdered like that as he can

have his traditional defence that the prosecution has failed to prove the charge of murder against him and claim an order of acquittal.

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35. As the Appellant was convicted by the High Court u/s 304-B IPC, without such an opportunity being granted to him, we deem it necessary in

the interest of justice to afford him that opportunity. The case in the trial court should proceed against the Appellant (not against the other two

accused whose acquittal remains unchallenged now) from the stage of defence evidence. He is put to notice that unless he disproves the

presumption, he is liable to be convicted u/s 304-B IPC.

28. This concept of punishing the accused for a less grave offence than the one for which he was charged is not unique to the Indian Judicial

System. It has its relevancy even under the English jurisprudence under the concept of alternative verdicts. In R v. Coutts (Appellant), 2006

UKHL 39, the Appellant was convicted by the jury of the murder of the deceased on an indictment charging him with that crime alone. The

deceased had died by accident when the Appellant and she had been engaged in consensual sexual asphyxial activity. The House of Lords

considered whether the issue of manslaughter should have been left to the jury as an alternative verdict which they could return u/s 6(2) of the

Criminal Law Act, 1967. The Court of Appeal rejected the Appellant''s contention that this issue should have been left to the jury by the trial judge

on the ground that for the judge to introduce the possibility of a verdict of manslaughter on these grounds would have transformed the nature of the

case that the Appellant was required to meet. The Appellant argued in appeal that if the trial judge fails to leave to the jury an intermediate verdict

in the alternative which is raised by credible evidence, that is an irregularity which will render the verdict unsafe. The Crown took the stand that this

was a deliberate and sadistic killing. In resolving this issue, the House of Lords was simultaneously faced with the broader question concerning the

duty and discretion of trial judges to leave alternative verdicts of lesser-included offences to the jury where there is evidence which a rational jury

could accept to support such a verdict but neither prosecution nor defence seek it. Lord Bingham of Corn hill spoke thus on behalf of his four

learned colleagues:

The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject

to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to

support. I would not extend the rule to summary proceedings since, for all their potential importance to individuals, they do not engage the public

interest to the same degree. I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives

which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious

counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the Defendant, protecting him against

an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A

Defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a

contingency.

(emphasis supplied)

29. Therefore, the Lords were of the unanimous opinion that the judge should have left a manslaughter verdict to the jury and his failure to do so

was a material irregularity. The Court of Appeal, following the advice of the House of Lords, quashed the Appellant"s conviction and ordered a

retrial.

30. As is evident from the above stated principles of law in various judgments, there is no absolute bar or impediment, in law, in punishing a person

for an offence less grave than the offences for which the accused was charged during the course of the trial provided the essential ingredients for

adopting such a course are satisfied.

31. In the present case, we are primarily concerned with an offence punishable u/s 396 IPC and in alternative for an offence u/s 302 of the IPC.

The offence u/s 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. u/s 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 u/s 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 secondly,

thirdly and fourthly of Section 300 and it is not so when it falls in the exception to that Section.

32. 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 u/s 302 and as defined u/s 300 will have to be read into the provisions of

offences stated u/s 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 of the 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 u/s 396. It will have the same connotation, meaning and ingredients as are contemplated

under the provisions of Section 302 IPC.

33. In light of the principles afore-stated, now we may revert to the facts and circumstances of the case in hand. It is admittedly a case of

circumstantial evidence and, thus, the evidence has to be examined in that context. There is no dispute to the fact that the charge under Sections

396 and 201 IPC had been framed against the accused. The Trial Court had acquitted the four accused but convicted the present Appellant for an

offence under Sections 302 and 201 while convicting another accused, namely Ahsan, for an offence punishable u/s 411 IPC. The judgment of the

trial court was upheld by the High Court in so far as the acquittal of the four accused for the offences u/s 396 was concerned as well as the

conviction of the present Appellant u/s 396 IPC. However, the High Court acquitted Ahsan for the offence u/s 201 IPC which does not concern

us in the present appeal. The charge being u/s 396 alone whether the accused could have been convicted for an offence u/s 302 IPC without

alteration of charge is the short question involved in the case before us. Let us examine the evidence for conviction of the Appellant on the basis of

the circumstantial evidence. The High Court in paragraph 35 of its judgment has stated the following circumstances which undoubtedly point

towards the guilt of the accused:

1. That the deceased (Jagdish Chandra) left his house/shop for Nehtaur on 30.09.77 to realize the amount from customers.

2. That he was seen in Nehtaur Kasba by PW-2 Ved Prakash and PW-4 Gyan Chand on that day who saw him occupying taxi No. UPS 7293.

3. That the deceased was sitting in the taxi along with others and Appellant Rafiq Ahmad was found on the driver seat;

4. That the taxi in question proceeded for Dhampur from Agency Chauraha, Nehtaur in the presence of PW-4 Gyan Chand;

5. That the Appellant (Rafiq Ahmad) was arrested by the police on 2.10.77 alongwith his taxi and he made a confession to the IO in the presence

of two public witnesses that he had concealed the dead body in a sugarcane field near village kashmiri;

6. That subsequent recovery of the dad (sic) body of deceased (Jagdish Chandra) from the sugarcane field at the pointing out of the Appellant in

the night indicates that Rafiq Ahmad alongwith some others looted the cash and other valuables from the person of the deceased.

7. That Jagdish Chandra was done to death by the Appellant (Rafiq Ahmad) in the night intervening 30.9.77/1.10.77 and the Appellant with a

view to screen himself from legal punishment caused disappearance of the dead body by throwing the same in the sugarcane field.

34. The above circumstances have to be examined along with the statements of Ved Prakash (PW2) and Gyan Chand (PW4), the witnesses who

had last seen the deceased with the Appellant. The statements of the Investigating Officer (PW11) and the witnesses including Pyare Lal (PW3), in

whose presence the dead body was recovered at the behest of the Appellant, by means of recovery memo Ex. PW Ex-Ka 3 are the other material

pieces of evidence which would complete the chain of events and point undoubtedly towards the guilt of the accused. The accused, for the reasons

best known to him, had taken up a stand of complete denial in his statement dated 20th February, 1981 recorded u/s 313 Code of Criminal

Procedure and opted not to explain his whereabouts at the relevant time. Furthermore, he was a regular taxi driver at the stand of Agency

Chauraha. It is true that the statement u/s 313 Code of Criminal Procedure cannot be the sole basis for conviction of the accused but certainly it

can be a relevant consideration for the courts to examine, particularly when the prosecution has otherwise been able to establish the chain of

events. It is clearly established from the evidence on record that the deceased was a regular trader and used to come to Nehtaur from where he

was picked up by the Appellant on the fateful day. These were certain definite circumstances clearly indicating towards the involvement of the

Appellant in the commission of the crime. The prosecution has been able to establish its case beyond reasonable doubt on the basis of the

circumstantial evidence. There is no significant link which is missing in the case put forward by the prosecution.

35. At this stage, we may refer to a Constitution Bench judgment of this Court in the case of AIR 1976 400 (SC) wherein the accused after being

charged for an offence u/s 396 IPC was finally convicted u/s 302 IPC. The Court in the said judgment held as under:

15. It is, however, unnecessary to do so because in the facts and circumstances of the present case the Appellant is liable to be convicted of the

offence u/s 302 Indian Penal Code without anything more. The charge u/s 396, Indian Penal Code comprised of two ingredients: (1) the

commission of the dacoity, and (2) the commission of the murder in so committing the dacoity. The first ingredient was proved without any doubt

and was not challenged by the learned Counsel for the Appellant. The second ingredient also was proved in any event as regards the commission

of the murder because the attention of the accused was focused not only on the commission of the offence while committing the dacoity but also on

the individual part which he took in the commission of that murder. So far as he was concerned, he knew from the charge which was framed

against him that he was sought to be made responsible not only for the commission of the dacoity but also for the commission of the murder in

committing such dacoity. The evidence which was led on behalf of the prosecution specifically implicated him and he was named by the

prosecution witnesses as the person who shot at Mendai while crossing the ditch of the Pipra Farm. His examination u/s 342 of the Code of

Criminal Procedure also brought out that point specifically against him and he was questioned in that behalf. Both the Courts below recorded their

concurrent findings of fact in regard to the part taken by the Appellant in the commission of the murder of Mendai. Under these circumstances it

could not be urged that the Appellant could not be convicted of the offence u/s 302, Indian Penal Code if such a charge could be made out against

him (Vide our decision in 281108

36. The above Constitution Bench judgment of this Court, in law, squarely applies to the present case. We ought not be understood to say that the

facts of both the cases are identical. In the case of Shyam Behari (supra), the accused had killed the deceased while retreating after committing the

dacoity while in the present case the evidence, though circumstantial, is that the Appellant had killed the accused brutally and then hid his dead

body in the fields to destroy the evidence. Thus, suffice it to note that both the cases have some similarity in circumstances but the principle of law

stated in Shyam Behari''s case (supra) is squarely applicable to the present case.

37. For the reasons afore-recorded, we are of the considered view that no prejudice has been caused to the Appellant by his conviction for an

offence u/s 302 IPC though he was initially charged with an offence punishable u/s 396 IPC read with Section 201 IPC. Further, the nature of

injuries namely three incised wounds, three abrasions and severing of the trachea, caused by a sharp-edged weapon as noticed by the High Court

in para 34 of its judgment, indicate that the accused knew that the injury inflicted would be sufficient in the ordinary course of nature to cause

death. The ''prejudice'' has to be examined with reference to the rights and/or protections available to the accused. The incriminating evidence had

been clearly put to the accused in his statement u/s 313 Code of Criminal Procedure The circumstances which constitute an offence u/s 302 were

literally put to him, as Section 302 IPC itself is an integral part of an offence punishable u/s 396 IPC. The learned Counsel appearing for the

Appellant has not been able to demonstrate any prejudice which the Appellant has suffered in his right to defence, fair trial and in relation to the

case of the prosecution. Once the Appellant has not suffered any prejudice, much less a serious prejudice, then the conviction of the Appellant u/s

302 IPC cannot be set aside merely for want of framing of a specific/alternate charge for an offence punishable u/s 302 IPC. It is more so because

the dimensions and facets of an offence u/s 302 are incorporated by specific language and are inbuilt in the offence punishable u/s 396 IPC. Thus,

on the application of principle of ''cognate offences'', there is no prejudice caused to the rights of the Appellant.

38. For the reasons afore-stated, we find no merit in this appeal and the same is dismissed.