

KALIKA TIWARI AND ORS. ETC.

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v.

STATE OF BIHAR

MARCH 25, 1997

[M.M. PUNCHHI AND K.T. THOMAS, JJ.]

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*Penal Code, 1860 : Sections 396, 120-B, 302 and 34—Dacoity with murder—Criminal conspiracy—Even if one of the dacoits commits murder while committing dacoity all dacoits would be liable to be punished—Actual participation of each dacoit in the commission of murder not necessary—Presence at the exact scene and contemplation of the commission as also knowledge of the commission not necessary—Proof of common intention under Sec. 34 or common object under Sec. 149 also not necessary—When accused persons convicted under Sec. 396, addition of charges under Secs. 302 and 34 not necessary.*

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*Criminal Trial : Recovery of stolen property—Neither the police officer who made the recovery nor the person who was present at the time of recovery was examined as a witness—Held, factum of recovery was not proved in the legal manner.*

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*Evidence Act, 1872 : Identification—Witness identifying the dacoits who were brothers and relatives seen in the light of earthen lamp or country-made lamp—Sufficiency of light—Held : sufficient enough to identify them.*

According to prosecution on the night of December, 22, 1987, dacoits armed with guns and lethal weapons entered the house of S, looted cash and jewellery and then gunned down her two sons and a guest. S, who gave first information statement, named certain persons which included her two brothers and nephews.

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S was married to J who was a congenital imbecile. They had an also two sons and three daughters. While sons were still in their infancy, their properties were being looked after by a brother of S. After sons attained majority, relationship with their uncle gradually got strained. A few days prior to the occurrence, the uncle's son had an altercation with the son of S. On the day of occurrence, S's brother came to the house and left later on. In the night time, the tragic event took place.

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A The trial court convicted 12 of the accused under Section 396 and 120-B IPC and sentenced them to life imprisonment. High Court confirmed the conviction and sentence. It additionally convicted them under Sections 302 and 34, IPC. Hence this appeal.

B Partly allowing the appeals, this Court

HELD : 1.1. It is only of academic utility to add Sec. 302 read with Sec. 34 IPC to Sec. 396 if the appellants are convicted for murder with dacoity, [339-B-C]

C 1.2. If a dacoit, in the progress of, and in pursuance of the commission of a dacoity, commits a murder, all his companions who are participating in the commission of the same dacoity may be convicted under Sec. 396 although they may not have participated in the commission of murder or its abetment and may not have been present at the scene of murder. [339-D-E]

D 1.3. It is not necessary that murder should have been within contemplation of all or some of them. All may not have known that murder was going to be committed or has already been committed. [339-E-F]

E 1.4. It is not necessary for the prosecution to establish either common intention under Sec. 34 or common object under Sec. 149, IPC as the tenacles of Sec. 396 would prance to envelop all the dacoits huddled within is penal circumference. [339-G-H]

F 2. There is no use of evidence regarding recovery of stolen articles since neither the police officer who made the recovery nor anyone who was present at the time of such recovery was examined as a witness. Thus, the prosecution did not prove the factum of recovery in the legal manner. [340-C-D]

G 3.1. It is admitted fact that two of the appellants are direct brothers and six of them are direct nephews of S. So it was not difficult for her to identify them. PW 2 who looked after cultivation of land and PW 3 who was an employee of the family were present at the time of occurrence. The trial Court and the High Court found their evidence reliable. [340-G; 341-C-D]

H 3.2. It would be quite possible for witnesses to identify assailants in the light of earthen lamp. The visibility capacity of urban people who are acclimated to fluorescent light or incandescent lamps is not the stand-

ard to be applied to villagers whose optical potency is attained to country-made lamps. [341-E-F] A

*Machhi Singh and Others v. State of Punjab*, AIR (1983) SC 957, relied on.

4.1. A-7 was a stranger, hailing from a different village. He was identified only by PW 3. But no Test Identification Parade was conducted. A-12 is the nephew of S but she had not identified him. Another witness identified him but she had not identified his name when she was questioned by the investigating officer. A-13 was not identified by any of the witnesses. [342-C-D] B C

4.2. The conviction and sentence passed by the High Court on accused nos. 1, 2, 3, 4, 5, 6, 10 and 11 stand undisturbed. A- 7, A-12 and A-13 are acquitted. [341-G-H; 342-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1171-74 of 1995 Etc. D

From the Judgment and Order dated 24.4.94 of the Patna High Court in Crl. A. Nos. 39, 41, 56 and 20 of 1990.

K.B. Sinha, Shiva Pujan Singh, (A.C), Ashok Sharma, H.S. Kaicher and Deepak Sharma for the Appellants. E

B.B. Singh, C. Jai Raj for A.C. Mahimkar, Vijay Kumar, J.P. Pathak and Kumar Parimal for the Respondent/Complainant for State.

The Judgment of the Court was delivered by F

THOMAS, J. For Sanfula Devi - a mother of two sons and three daughters - the nightfall on 22nd December, 1987 was dreadfully catastrophic as dacoits exterminated her entire male progeny besides plundering all her valuable Jewellery. Those whom she named as the murders included her two brothers and nephews. Police after investigation charge-sheeted 14 persons including those kins or Sanfula Devi for the murder of the siblings - Gauri Shankar Rai and Keshav Rai - and another person (Hari Narain) who happened to be present in her house then. Sessions court convicted 12 of the accused under Sections 396 and 120-B of the Indian Penal Code and sentenced them to imprisonment for H

A life. (Some of them were convicted under Section 27 of the Arms Act also.) High Court of Patna while confirming the aforesaid conviction and sentence added Section 302 with the aid of Section 34 of the Indian Penal Code also while disposing of the appeals filed before it.

B Sanfula Devi was married to Jag Narain who was a congenital imbecile. Five children were born to her in the wedlock - two sons (Gauri Shankar and Keshav Rai) and three daughters. The eldest son got married and the second son had only reached marriageable age during the time of occurrence. While the sons were in their infancy Sanfula Devi's properties were looked after by her brother A-4 Inderdeo Rai. But when the sons C reached age of maturity they were miffed with their uncle over the manner he dealt with their properties. Eventually the relationship became strained and led to rencour. A few days prior to the occurrence Inderdeo Rai's son Rama Shankar Rai (A-1) had an altercation with Gauri Shankar Rai.

D Prosecution case, in short, is the following : On the occurrence day, Hari Narain visited Sanfula Devi's house for mootng a marriage proposal for her second son Keshav Rai. Inderdeo Rai went there presumably for reconnaissance and left. After evening meals when the inmates of the house retired for a rest the dacoits reached there armed with guns and other lethal weapons. Rama Shankar Rai (A-1) asked Sanfula Devi to surrender E key of the safe and after wangling the key the dacoits looted the cash and jewellery. They then closed the door of the room from outside where the females were sitting and went on a pillage during which they gunned down Gauri Shankar Rai and Keshav Rai and also their guest Hari Narain. Thereafter, they all left with the booty.

F Trial court convicted all except A-9 Jag Narain and A-14 Radhamuni Pal, of the offences aforesaid. Those convicted persons filed appeals in the High Court, while the State of Bihar filed appeal against their acquittal under Section 302 IPC. High Court disposed of all the appeals by the common judgment confirming the conviction and sentence under Sections G 396 and 120-B and additionally convicting those persons under Section 302 read with Section 34 of the IPC. However, no substantial change was made to the sentences as the High Court directed the sentence of life imprisonment under Section 302 to run concurrently with the sentence imposed under Sections 396 and 120-B IPC.

H All the aforesaid convicted persons, except A-8 Bahadur Pal, have

come up with appeals before this Court. Thus we are dealing with the conviction and sentence passed on 11 accused. We heard all learned counsel at length. A

Shri K.B. Sinha learned senior counsel who argued for some of the appellants, made an endeavour at the outset to show that the conviction under Section 302 read with Section 34 was bad as the common intention of the dacoits was not to murder any of the deceased. We pointed out the futility of that endeavour to the learned counsel that if appellants are liable to be convicted under Section 396 IPC it is only of academic utility whether conviction under Section 302 read with Section 34 should have been additionally added. We expressed to the learned senior counsel that on the peculiar facts of this case we are not inclined to award any sentence less than imprisonment for life to those appellants whose conviction for the offence under Section 396 is liable to the upheld by us. B C

Under Section 396, if any one of the dacoits "commits murder in so committing dacoity" every one of the dacoits is liable to be punished either with 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 not participated 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 commission of the dacoity. D E F

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 circum- G H

A ference and then it would be immaterial that the other dacoits did not share the intention with that person who committed murder.

B There is no dispute that the house of Sanfula Devi was looted on the said night nor the facts that the three deceased were murdered by some of those who went to commit dacoity. Hence the only question which the courts were to decide was whether appellants or any one of them were not the participants in the dacoity.

C We may point out that there is no use in this case with the evidence regarding recovery of a large number of stolen articles. This is because neither the police officer who made the recovery nor any one who was present at the time of such recovery was examined as a witness for the prosecution. The Public Prosecutor who conducted the trial would have thought that the investigating officer who verified the records relating to recovery of the stolen articles would be sufficient to prove such recoveries.

D Whatever be the reason which dissuaded the Public Prosecutor to examine any such witness, the fact remains that prosecution did not prove the factum of recovery of stolen articles in the legal manner. Hence the evidence relating to such recovery would only remain at bay as for the appellants in this case.

E In appreciating the contentions raised before us it is useful to bear in mind that it is an admitted fact that A-4 Inderdeo Rai and A-10 Brij Nandan Rai are direct brothers of Sanfula Devi. Among the remaining appellants, A-1 Ramashanker Rai, A-2 Gopaljee Rai, A-3 Sri Keshwar Rai, A-6 Uma Shankar Rai, A-11 Mangal Rai, and A-12 Sri Ram Rai are direct nephews of Sanfula Devi. A-5 Vijay Bahadur alias Bikau Rai is closely related to A-4 Inderdeo Rai. Hence it was not difficult for Sanfula Devi and the inmates of the house to identify those appellants if they had seen them during the occurrence.

G Sanfula Devi was examined as PW-1. It was she we gave first information statement to the police wherein she mentioned the names of A-1 Ramashanker Rai, A-2 Gopaljee Rai, A-3 Sri Keshwar Rai and A-5 Vijay Bahadur @ Bikau Rai having armed with guns etc. She mentioned those names as persons who gatecrashed into the female apartment where she was then. She had not gone out of the apartment till the dacoits left the premises. When she moved out and went to the first floor she saw her son

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Gauri Shankar Rai lying dead with his hand pressed up and her other son Keshav Rai lying dead nearby besides the dead body of her guest Hari Narain. A

PW-2 Parikha Pasi was the factotum of the family of Sanfula Devi, mainly looking after the cultivation of their agricultural lands. He too was present when the occurrence took place. He identified A-1 Ramashanker Rai, A-2 Gopaljee Rai, A-3 Sri Keshwar Rai, A-4 Inderdeo Rai, A-5 Vijay Bahadur @ Bikau Rai and A-6 Uma Shankar Rai in the trial court as the participants in the occurrence. B

PW-3 Jiut Ram was another employee of the family who too was present when the occurrence took place. He identified A-2 Gopaljee Rai, A-5 Vijay Bahadur Rai, A-7 Kalika Tiwary, A-10 Brij Nandan Rai and A-11 Mangala Rai as the assailants. C

Evidence of the above three witnesses regarding identification of the assailants in courts was found to be reliable and the trial court as well as the High Court fully acted on it. D

Learned counsel for the appellants pointed out from evidence that the only light then available for PW-1 Sanfula Devi was an earthen lamp burning inside the room. On that score he contended that the said light was too meagre to identify the participants of the crime. The visibility capacity of urban people who are acclimated to fluorescent lights or incandescent lamps is not the standard to be applied to villagers whose optical potency is attuned to country-made lamps. Their visibility is conditioned to such lights and hence it would be quite possible for them to identify men and matters in such light. A similar view has been adopted by this Court in *Machhi Singh and Others v. State of Punjab*, AIR (1983) SC 957. For that reason we are not impressed by the argument that the light from earthen lamps would not have been sufficient for those witnesses to identify the assailants. E F

We have therefore no difficulty in concurring with the finding for the High Court regarding the involvement of A-1 Ramashanker Rai, A-2 Gopaljee Rai, A-3 Sri Keshwar Rai, A-4 Inderdeo Rai, A-5 Vijay Bahadur @ Bikau Rai, A-6 Umashanker Rai, A-10 Brij Nandan Rai and A-11 Mangala Rai. The conviction and sentence passed by the High Court on those appellants would hence stand undisturbed. G H

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

A-12 Sri Ram Rai is no doubt the nephew of Sanfula Devi but she  
had not identified him as one among the assailants. PW-7 Singhasani Devi,  
who was in the neighbourhood of the place of occurrence, deposed that on  
C hearing the commotion from the house where the occurrence took place  
she went near that place and peeped through a window to see what was  
happening. Then she identified three dacoits, one among them was A-12  
Sri Ram Rai. But she did not mention anything about A-12 Sri Ram Rai  
when she was questioned by the investigating officer. Her evidence is thus  
weakened by the aforesaid impairment in her testimony. We therefore  
D deem it unsafe to uphold the conviction of A-12 Sri Ram Rai on that sole  
testimony.

A-13 Maloo Pal was not identified by any of the witnesses examined  
in this case. His conviction was based solely on the recovery of stolen  
E articles. As we have already observed regarding the futility of relying on  
the evidence regarding recovery, the conviction of A-13 Maloo Pal also  
cannot be sustained.

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

J.N.S.

Appeals partly allowed.