

Khanzaday Singh Vs. State

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Court : Allahabad

Decided On : Mar-11-1959

Reported in : AIR1960All190; 1960CriLJ431

Judge : B. Mukerji and ;W. Broome, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 53, 302 and 396; [Code of Criminal Procedure \(CrPC\), 1898](#) - Sections 32, 367 and 367(5)

Appeal No. : Criminal Appeal Nos. 9 and 148 of 1959 and Referred No. 4 of 1959

Appellant : Khanzaday Singh

Respondent : State

Advocate for Def. : Govt. Adv.

Advocate for Pet/Ap. : R.N. Mitra, Adv.

Judgement :

B. Mukerji, J.

1. Appeal No. 9 of 1959 is by Pearey against his conviction under Section 396 I.P.C. and a sentence of imprisonment for life awarded to him by the First Additional Sessions Judge of Shahjahanpur. Appeal No. 148 of 1959 is by Khanzadey Singh against his conviction by the same learned Judge at the same

trial at which Pearey was convicted, under Section 396 I.P.C. and a sentence of death. There is the usual reference by the learned Judge for the confirmation of the sentence of death awarded by him to Khanzadey Singh.

2. The facts giving rise to the aforementioned two appeals lie within a short compass and may briefly be stated as follows:--

3. On the night between the 10th and the 11th of April, 1958, a band of 20 or 25 men broke into the house of one Balbir Sahai, while they were armed with firearms and other weapons, and thereby the use of a firearm caused the death of Ram Bharosey, brother of Balbir Sahai, Dwarka Prasad, his uncle, Kumari Urmila Devi, his daughter, and Shyam Lal, a neighbour of his. Some of the other inmates of the house of Balbir Sahai were also injured. These were Srimati Girja Devi, the wife of Ram Bharosey, Srimati Sita Pyari, the wife of Madan Lal, and Dharam Vir.

At the time when the dacoits obtained access to the house of Balbir Sahai, Balbir Sahai was sleeping in the courtyard with his little daughter Urmila. In the same courtyard slept his brother Ram Bharosey, his uncle Dwarka Prasad, and the sister-in-law Girja Devi. Srimati Sita Pyari, another inmate of the house slept in a verandah adjoining the courtyard. On the outside slept Madan Lal and Dharam Vir. They slept near the flour mill and the crusher which had been fixed in the house and belonged to Balbir Sahai.

4. The aforementioned people received injuries.

5. The first knowledge that the house had been raided by dacoits was when Balbir Sahai was fired at from the roof by one of the dacoits. This shot caused injury to Balbir Sahai and some others that slept in the courtyard and also brought about the death of the little infant Urmila. Soon after the firing of the first shot two dacoits jumped into the courtyard with lathis. One of the dacoits while jumping stumbled, fell and sustained some injury. When the dacoits had jumped into the courtyard, Balbir Sahai and Ram Bharosey made an attempt to tackle them with the result that the other dacoits who were on the roof jumped into the courtyard to the assistance of their two companions who had jumped into the courtyard earlier.

In all some 10 or 12 dacoits got into the courtyard of Balbir Sahai. Dwarka Prasad and Ram Bharosey were shot and killed by the dacoits because they attempted to grapple with some of the dacoits in the courtyard. After causing injuries and killing people the dacoits thought of leaving the house for, apparently, they found that they had raised the entire village and that villagers in large numbers were collecting outside. Shyam Lal, one of the neighbours, set a thatch hut on fire in order to obtain a brilliant source of light which could illuminate the entire area and thereby make recognition easy and apprehension of the miscreants, possible.

The dacoits, when they found Shyam Lal setting fire to the thatch hut and declaring that he had recognised people, shot at Shyam Lal and killed him. The dacoits left without taking any property from the house. The sources of light inside the courtyard were a lantern which was burning there, the reflected light from the flashing of torches which the dacoits themselves indulged in and later on the light which emanated from the burning thatch hut just outside the courtyard.

6. The dacoits had been seen by witnesses of both kinds, namely, those that were the inmates of the house and those that collected from outside. None of the dacoits seems to have been recognised, for they were unknown to the witnesses. In evidence, however, it has appeared that Shyam Lal was shot and killed when he shouted out that he had recognised some dacoits: whether Shyam Lal did recognise some one among the miscreants or not cannot now be known.

7. A first information report of the incident was made at police station Sindhauli, which was five miles from Deorla kalyanpur, the village of incident, on the 11th of April, 1958, at 6.45 a.m. The report had been written out by Balbir Sahai at the village and had been sent to the police station through Ajudhia Prasad Yadav. The Station Officer Har Bhajan Singh was present at the time when Ajudhia Prasad handed in the written report Ex. Ka-10 at the police station. So that, Har Bhajan Singh at once left for the place of occurrence.

On reaching there Har Bhajan Singh recorded the statements of Balbir Sahai, Girja Devi, Madan Lal, Dharam Vir Sita Pyari, Hira Lal, Hemraj, Ram Lal, Bulaqi, Pradhu, Munna Lal and a few others. He inspected the four dead bodies and prepared inquest reports in respect of these and thereafter he sent the bodies to

the Sadar mortuary for post-mortem examination through two constables. He also sent the injured for medical examination. A site-plan was also prepared by the Investigating officer. The Investigating Officer found the chain of one of the 'western doors of the house of Balbir Sahai broken.

Satbir Singh brought out 5 cartridges from inside the house and handed them over to the Investigating Officer. Five other cartridges were handed over to him which had been picked up from outside the house. Two separate memoranda were prepared in respect of the cartridges found from the two places. The cartridges were separately sealed. 183 pellets; 25 wads were also found in the courtyard and round the walls of it and these were also taken in possession and a proper recovery memorandum prepared in respect of these. Six pellets were recovered from the cot of deceased Urmila. These were also sealed and a recovery memorandum prepared. Certain blood-stained garments were also taken possession of by the, Investigating Officer.

8. The injured were examined and their examination revealed that some had gunshot injuries, while others had lathi injuries on their persons.

9. A post-mortem was performed on the body of Ram Bharosey on the 12th of April 1958, at 3 p.m. His autopsy revealed that he had died of gunshot injuries.

10. Shyam Lal's body was subjected to a postmortem on the same day at 5 p.m. and his autopsy revealed that he too had died of gun-shot injuries.

11. The autopsy on Dwarka Prasad's body was held at 2 p.m. on the same day and in his case there were, over and above the gun-shot wounds, two contusions which could be ascribed to lathis injuries, but in his case too death was due to the gun-shot injuries.

12. The autopsy on the body of Kumari Urmila was performed at 4 p.m. on the 12th of April, 1958, and it revealed that she too had died of gunshot injuries.

13. On the 27th of April. 1958, Har Bhajan Singh happened to go to police station Muhamdi in connection with the investigation of another dacoity and there he learnt that that day, i.e., 27th April, 1968, the police of Muhamdi had arrested three

persons, Lallu, Rajjab Ali and Pearey. The Investigating Officer came to know thereafter that these three arrested persons could have been participants in the dacoity at the house of Balbir Sahai. On the 2nd of May, 1958, Khanzadey Singh, the appellant in Appeal No. 148 of 1959, was arrested at 1.30 a.m. near the bridge of Mahasil by Har Bhajan Singh himself.

The arrested persons were made Ba Parda and sent to the police lock-up. At the time of the arrest of Khanzadey Singh he was found to be in possession of a country-made gun and five live cartridges. A recovery memorandum, therefore, was prepared at the spot and the same was witnessed by four persons, Itwari Chamar, Duja Chamar, Shanker Lal and Subedar. This recovery memorandum, Ex. Ka-58 is a detailed document and gives a detailed description of the gun and the cartridges as also the Khaki jhola which too was found in the possession of Khanzadey Singh. Two of the witnesses who witnessed the recovery memorandum, namely, Shanker Lal and Duja, were produced in Court and they satisfactorily proved the recoveries which were alleged to have been made from the person of Khanzadey Singh.

14. Pearey, appellant in Appeal No. 9 of 1959, denied all connection with the incident. His case was that he had been falsely implicated in the case and that he was after his arrest, shown to the witnesses. He further took the plea that he was known to Balbir Sahai because he used to bring grain to the flour mill of Balbir Sahai for purposes of having it ground and that during one such transaction he had a dispute with Prabhu. P, W. 4, who was in the service of Balbir Sahai.

15. Khanzadey Singh, appellant in Appeal No. 142 of 1959, made a statement to a Magistrate in which he more or less admitted having taken a certain part in the dacoity which was committed in the house of Balbir Sahai. This statement of Khanzadey Singh was recorded on the 31st of May, 1958. It appears that the Investigating Officer had made a report to the effect that Khanzadey Singh was likely to make a confession but before action could be taken on that it appears that Khanzadey Singh himself sent an application to the District Magistrate of Shahjahanpur on the 8th of May, 1958, in which he expressed a desire to make a statement disclosing true facts to the District Magistrate. What Khanzadey Singh

said in that application was this:

"Shriman Ji Men hardik ichcha hai ki huzur ki sharan men pahunch kar Shriman ke pratyaksh satya satya kahne ka avsar prapt ho.'

On receiving this application the District Magistrate, Sri S.P. Areen, directed his City Magistrate to go to the Jail and record Khanzadey Singh's statement. The City Magistrate accordingly went to the jail on the 26th of May, 1958, but Khanzadey Singh refused to make a statement to him and reiterated his desire to make a statement only to the District Magistrate. Therefore, Sri Areen, the District Magistrate, very properly, himself went to the Jail on the 31st of May, 1958, and then Khanzadey Singh made a fairly long statement to him which was recorded by the District Magistrate.

The record of the statement made by Khanzadey Singh is Ex. Ka-14. On the statement there is an endorsement to the effect that the Magistrate had explained to Khanzadey Singh that he was not bound to make a confession and further that if he did make one, the confession was likely to be used as evidence against him. The learned Magistrate also warned Khanzadey Singh about making a confession and asked him several questions to find out whether or not Khanzadey Singh was going to make a statement under some threat, promise or some other temptation. The learned Magistrate's impression was that Khanzadey Singh was making the statement voluntarily. An examination of the answers which Khanzadey Singh gave at his preliminary examination by the learned Magistrate indicates to Us also that Khanzadey Singh made his confession voluntarily.

16. The evidence against the two appellants, Pearey and Khanzadey Singh in the two respective appeals, is chiefly of identifications in the case of Pearey it is purely so, while in the case of Khanzadey Singh apart from the evidence of identification, there was his own statement, and further there was the corroborative evidence furnished by the expert evidence of Shyam Narain, the Ballistic Expert to Government which showed that the gun which had been recovered from the possession of Khanzadey Singh at the time of his arrest was one of the guns which had been used at the time when the dacoity had been committed in the house of Balbir Sahai, for one of the empty cartridges which had been picked up

from the place of incident appeared, without doubt to have been fired from the gun which was recovered from Khanzadey Singh's possession.

17. Khanzadey Singh was examined in the Magistrate's Court during the commitment proceedings on the 18th of August, 1958, and there, among other things that he stated, he also stated that shots had been fired during the course of the dacoity but not with the object of killing but with the object of scaring away people. He certainly stated in that statement that he had gone to commit a dacoity. He also, curiously enough, said that he was caught in the course of the same dacoity. When asked 'Do you want to say anything else' he answered as follows:--

'I and 20-22 other persons went to commit a dacoity at the house of Balbir Sahai. I had a country made gun, while the rest had English guns, Kantas, spears and Sujas. All of us committed loot-mar, we got property worth Rs. 100-150 in the dacoity. Guns, lathis, etc., were used to scare away people. People received injuries and lost their lives in the course thereof. Both these accused were not with me.'

By the last sentence he apparently meant Pearey and Nankai Singh (an accused who was convicted by the learned Sessions Judge but whose appeal is not before us). In the Court of Sessions Khanzadey Singh admitted having made the statement dated the 18th of August, 1958, before the Committing Magistrate's Court. He further admitted that he had sent an application to the District Magistrate and had made a statement to him and that the said statement (Ex. Ka-14) was correct. In the Court of Sessions, however, Khanzadey Singh said that he did not fire the gun though he admitted having had a gun and admitted having gone to the house of Balbir Sahai to commit a dacoity.

18. The question that arises in connection with Khanzadey Singh's appeal is, whether there was sufficient evidence to justify his conviction under Section 396 I.P.C., and further whether the sentence which had been awarded to him by the trial judge, namely, the sentence of death, was a proner sentence. Khanzadey Singh was put up for identification on the 19th of May, 1958. All his distinctive marks were hidden and he was mixed with 20 other undertrials and every precaution was taken by the Magistrate, who conducted his identification parade,

to see that the identification was a fair and honest identification.

Khazadey Singh was identified by Balbir Sahai, Girja Devi, Madan Lal, Dharam Vir, Hemraj, Sita Pyari, Bulaqi, Ram Lal, Hira Lal and Munna Lal. The learned Judge did not rely on the identification of Madan Lal, Dharam Vir and Hira Lal because he found the probative value of their identification not very good, but the value of the remaining seven witnesses was found satisfactory by the learned Judge and we have ourselves seen absolutely no reason to take a different view. These witnesses had ample opportunity and on the prosecution case, which we believe, there was ample light which made visibility and recognition fairly certain.

Khazadey Singh's plea at the time of the identification parade that he had been shown to witnesses at police station Sindhauri was, in our opinion, false. The identification evidence against Khazadey Singh, was, therefore, overwhelming. As we have said earlier, there was as against Khazadey Singh further evidence to show his guilt and that evidence lay in the fact that the gun which had been recovered from his possession was shown to have been one of the guns which was used at the time of the dacoity because one of the spent cartridges which had been picked up from the scene of occurrence was shown to have been fired from this gun.

The evidence of Shyam Narain, the Ballistic Expert, left no room for doubt on this score. We have already noticed that the evidence of the recovery of the gun from Khazadey Singh's possession was satisfactory. The evidence, therefore, of Khazadey Singh's participation in the incident was overwhelming and indeed in his own statement he admitted that he had participated in the dacoity, though, according to him, he was not responsible for any of the murders which had been committed during the course of the dacoity.

19. Mr. R.N. Mitra, appearing on behalf of Khazadey Singh, contended that the sentence of death which had been awarded to Khazadey Singh was not an appropriate sentence. His contention was that the evidence did not indicate that any of the people who died, died as a result of the firing indulged in by Khazadey Singh. It is no doubt true that the witnesses did not state that Khazadey Singh, in particular, fired at any person and that as a result of his firing any particular

individual met his death, but on the evidence it is perfectly clear that Khanzadey Singh used his gun and was one of the gunmen forming part of the assembly of decoits.

Under Section 395 I.P.C. the sentence which is awardable is either death, or imprisonment for life or rigorous imprisonment for a term which may extend to ten years, and also fine. Mr. Mitra relied on a decision of this Court in Lal Singh v. Emperor : AIR1938 All625 to contend that as a general rule of a sentence of death should not follow a conviction under Section 396 I.P.C. and that a sentence of death should only be imposed under Section 396 I.P.C. when there was evidence to indicate that the, accused had been responsible for killing some one with his gun. We regret we are unable to accept this contention of Mr. Mitra. The observations on which reliance was placed by Mr. Mitra were in these words at page 631, second column:

'We do not consider that as a general rule a sentence of death should necessarily follow a conviction under Section 396, I.P.C. and this section differs from Section 302 I.P.C. in that respect. The rule is under Section 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.'

As we read Section 302, I, P. C., we find the section saying

'Whoever commits murder shall be punished with death or transportation for life and shall also be liable to fine.'

Section 396, I.P.C. says this:

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

The obligation in the matter of imposing the sentence is, in our judgment, in the same sequence in the two sections, only that in Section 396 I.P.C. the scope of the discretion is larger in so far as there is the possibility of imposing a sentence

lesser than death or transportation for life (now imprisonment for life) for an offence punishable under this section.

20. Section 367 Cr. P. C., as it stood before the amendment of 1955, by Clause (5) cast a duty on the Court to record its reasons for not inflicting a death , penalty on a conviction for an offence which was punishable with death. That obligation was not confined to the awarding of a sentence under Section 302 I.P.C. only, for death was a punishment prescribed and awardable for a conviction under Section 396 I.P.C. also. Therefore, in our opinion -- and we express it with respect -- the distinction that was seen by the learned Judge in Lal Singh's case : AIR1938 All625 (supra) was an unsubstantial distinction: at any rate, the wordings of the relevant sections, which we have quoted above, did not justify that view.

After the amendment to Section 367 Cr. P. C. in 1955, it is no longer obligatory for the trial Judge to give reasons for imposing the lesser penalty, but that amendment has nothing to do with the point that has cropped up for our decision: what we have to decide is whether, as we said before, the sentence that had been imposed by the trial Judge on Khanzadey Singh was an appropriate sentence. In our opinion, it certainly was, for we have found that Khanzadey Singh not only participated in the dacoity but also used his gun and there is no presumption that a gun when fired misses its mark.

Punishment is awarded in Order to achieve any or as many as possible of the four objectives, namely, to serve as deterrent, to be preventive, to be reformative and to be retributive. Of these four the first is the all important one, others being merely accessory. Punishment has to be before all things deterrent, for the chief end of the law of crime is to make the evil doer an example and a warning to all that are like-minded with him. Punishment is intended to prevent offences being committed by destroying the interests to which they owe their origin by making all deeds which are injurious to others injurious also to the doers of them. Locke rightly thought that punishment must make the evildoer feel that his act was an 'ill bargain' for him.

21. The confession which Khanzadey Singh made and which has been held to have been made voluntarily by him indicated that this was not his first venture in

dacoity. Further, crimes of violence with the aid of firearms, whether they be of local manufacture or not are becoming more and more common. Courts cannot shut their eyes to common trends which magnify the results of a crime, for Courts are called upon in the discharge of their duties to make out punishment to criminals with the sole object of protecting society against acts of criminality.

So that, unless Court properly consider the question of sentence in relation to the situation in which a crime is committed and the nature of the crime keeping in mind also the fact as to how often such crimes are committed, Courts will never be able to discharge their obligation properly. We, therefore, are of the opinion that whatever may have been the position in regard to the use of firearms at dacoities in the year 1938, when Lal Singh's case : AIR1938 All625 , was decided, the position has considerably worsened since then and it is necessary, in our opinion therefore to view dacoities in which firearms are used with seriousness and that whenever a dacoit is proved to have used a gun in the course of the dacoity, whether he actually killed or injured some one or not, he should be awarded a sentence of death. We are of the opinion that the element of the deterrent in such cases should be given its proper place in assessing the measure of the punishment. We therefore, are of the Opinion that the sentence which had been imposed On Khanzadey Singh, namely, the sentence of death, was well-merited. We accordingly affirm that sentence.

22. Reverting now to the appeal of Pearey, the evidence against him consisted, as we have stated earlier, of identification alone. He had been identified by Balbir Sahai. Girja Devi and Prabhu. Both Balbir Sahai and Girja Devi were injured. None of the three witnesses made any mistakes. We have already held that these witnesses had ample opportunity of seeing the appellant, Pearey, and that visibility at the time was good. So that, in our opinion, the evidence against Pearey was also sufficient to warrant his conviction. We accordingly uphold his conviction and his sentence as well.

23. In the result, we dismiss Pearey's appeal (Appeal No. 9 of 1959) and uphold his conviction under Section 396 I.P.C., and his sentence of imprisonment for life. We also dismiss Khanzadey Singh's appeal (Appeal No. 148 of 1959) and uphold

his conviction under Section 396 I.P.C., and his sentence of death. The reference by the trial Judge for the confirmation of the sentence of death awarded by him to Khanzadey Singh is accepted. The same shall be carried out in accordance with law.

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