SirajuddIn and ors. Vs. State

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Court : Allahabad

Decided On : Jun-22-1951

Reported in : AIR1951All834

Judge : Malik, C.J. and ;Gurtu, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 391 and 396; Code of Criminal Procedure (CrPC) , 1898 - Sections 367 and 367(5)

Appeal No. : Criminal Appeal No. 961 and Cri. Ref. No. 93 of 1950

Appellant : SirajuddIn and ors.

Respondent : State

Advocate for Def. : Govt. Adv.

Advocate for Pet/Ap. : S.N. Misra, Adv. (for Nos. 3 to 6) and ;R. Mitra, Adv. (for Nos. 1 and 2)

Judgement :

Malik, C.J.

1. The appellants have been convicted under Section 396, Penal Code, and while the appellants 1 and 2 have been sentenced to death the other appellants have been sentenced to transportation for life.

2. On the night between 28 and 29-12-1949, a number of dacoits visited village Kadhla and went into the house of one Piru Teli. The villagers, however, on hearing the alarm that dacoits had come to the house of Piru Teli, surrounded the house and there was a free fight between the dacoits and the villagers. As a result one villager Azimullah died and four of the villagers Basanta, Mahfuz Khan, Ibrahim and Manohra received injuries. Two of the dacoits Sirajuddin and Abbu were caught on the spot.

3. The first information report was lodged at the thana, which is at a distance of seven miles from the village, by the village chaukidar at about 12-15 A.M. In it, however, it is not mentioned that any of the dacoits were known to the village people from before nor are the names of witnesses given. All that is said is that the village people had collected and offered resistance and had caught two of the dacoits. The police started investigation. Sirajuddin on 1-1-1950, made a confession to a Magistrate which, however, he subsequently retracted. The fact that Sirajuddin and Abbu were caught in the village at the time of the dacoity cannot be disputed. The story given by Abbu was that he was not caught at night but in the morning in front of Piru's house and he had gone there to have his cow recovered but the cow had strayed into the sugarcane field. One pair of new shoes and a cap which had been recovered by the police, he admitted, were his. The other accused, Sirajuddin, admitted that he was caught in village Kadhla. According to him he left his own village Kawal at 10 o'clock in the morning and was going to his wife's sister's house at Rasulpur when he was suspected of being a dacoit, was beaten and later arrested on the night between 28th and 29th of February. No evidence was given that Sirajuddin's wife's sister was at Rasulpur and it is very unlikely that he would be travelling at night in December if he was merely on a visit to the house of his sister-in-law. The story given by the two appellants for their presence in the village at that time of the night is not at all satisfactory. The suggestion, therefore, that the two might have been arrested merely on suspicion cannot be believed especially as specific parts were assigned by the witnesses to these two accused. The fact that they were arrested in the village is not denied. There is no reason why the witnesses for the prosecution should implicate them falsely and we agree with the reasons given by the lower Court for believing the evidence against the two appellants and for holding them

guilty.

4. We may mention that though some reliance was placed in the lower Court on the fact that Sirajuddin had a razai, Sri R. Mitra, learned counsel appearing for Sirajuddin in this Court, did not even mention that fact in his argument. The razai has not been sent up to this Court and, as no reference was made of it in the argument of learned counsel, we did not think it necessary to send for the same. The learned Sessions Judge has considered the point, and he was of the opinion that the fact that Sirajuddin was carrying a razai was not incompatible with his having taken part in the dacoity. We have no reason to disagree with that conclusion.

5. The chief point urged by Sri Mitra on behalf of these two appellants was that they should not be convicted under Section 396 but under Section 398, Penal Code. He has relied on a decision of this Court in Emperor v. Chandar, 1906 ALL. W. N. 47. In that case the dacoits had failed to remove any goods from the house. The villagers had put up a bold front and they had, therefore, to beat a retreat. While they were running away empty-banded, and the villagers were attempting to catch them, one of the villagers was killed by a dacoit. The question was whether in the circumstances a conviction under Section 396, Penal Code was proper.

6. Section 396 is as follows :

'If any one of five or more persona, 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.'

In considering whether the section applied, the learned Judges held that where, after an unsuccessful attempt to commit dacoity, the dacoits abandoned the idea and decided to escape, if, while escaping to prevent being caught, one of them commits murder then a conviction under Section 396 was not possible as the murder was not committed in 'committing dacoity.' The point arose before a Bench of the Calcutta High Court in Monoranjan Bhattacharya v. Emperor, 33 Cr. L. Jour. 722, where a dacoity had been successfully committed at a Post Office and while

the dacoits were running away with the booty they were chased by the Post Office staff and a large number of villagers and to scare them away the dacoits killed one of the villagers. The learned Chief Justice (Rankin C. J.) held :

'In order to commit dacoity it is necessary not only that the dacoit should get the booty away but that he should get away with the booty and as long as he is being pursued in hot haste after the act of the dacoity has just been committed and is in light for the purpose of completing his offence it is idle to contend that the dacoity is complete and that another transaction and a separate transaction has begun.'

In that case there was some evidence that the dacoits had adandoned the whole of the booty before the murder was committed. Prom the judgment, it appears that the learned Chief Justice was not satisfied that the whole of the booty had been abandoned by the dacoits. What the learned Chief Justice's decision would have been if he had held that the whole of the booty had been abandoned it is not necessary for us to consider in this case. If the point ever directly arises where from the evidence it is fully established that the dacoits had abandoned the idea of committing dacoity and were attempting to get away without any booty and then one of them commits a murder to scare away the villagers, or to prevent arrest, the question of the applicability of Section 396, Penal Code, and the correctness or otherwise of the decision in Emperor v. Chandar; 1906 ALL. W. N. 47 may have to be considered by a larger Bench.

7. Before we come to discuss the facts of this case, which make it unncessary to refer the case to a larger Bench, we may mention a decision of the Bombay High Court in Queen-Empress v. Sakharam, 2 Bom L. R. 325. There the dacoity was not successful as the villagers showed a bold front and interfered with the dacoits from the beginning. On the villagers collecting immediately on the alarm being raised the dacoits attempted, to run away and after going a few yards they turned round and one of them to intimidate the villagers fired a gun, the shot wounding three of the villagers and killing Rama. The learned Chief Justice (Jenkins C. J.) held :

'It has been found by the learned Judge, and I accept his finding on this point, that the murder was committed in effecting a safe retreat, so that the question is

whether the retreat was separated by time or space from the offence which formed the common object of the assembly as not to form part of it. This, it is obvious, is a pure question of fact and of degree, not to be determined by any general rule, but by the special circumstances of each case. In my opinion, there was no such separation : the retreat was an essential part of the common criminal purpose; it was a continuation of the actual dacoity while the dacoits were still acting in concert, and so Closely and necessarily connected with the actual demand of 'khand' that I think it must be taken that the murder was committed in prosecution of the common object of the assembly.'

If we may say so with respect we fully agree with the observations made by the learned Chief Justice that the question whether murder was committed while committing dacoity is a pure question of fact and of degree, not to be determined by any general rule but by the special circumstances of each case.

8. There is one more submission which may conveniently be disposed of here. It was suggested that, as the dacoits were not able to remove any booty, no dacoity was committed, and it could not, therefore, be said that the murder was committed in 'committing dacoity.' Section 391, Penal Code, defines dacoity as follows :

'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 or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit 'dacoity' '.

So the word 'dacoity' has been defined not only where a robbery is committed by five or more persons but where five or more persons had attempted to commit a robbery. In view of the definition of dacoity the argument that, as the dacoits were unsuccessful in removing any booty, no dacoity was committed, is misconceived.

9. Coming now to the facts of this case, no attempt was made on behalf of the defence to establish that the murder was so dissociated by time or space from the dacoity that it must be held that one chapter bad closed and a new chapter had begun and that only the person committing the murder could alone be held

responsible for his act and that there was no common intention between him and the other members of the gang. (After discussing the evidence, the judgment proceeded:) On the evidence in the case it is not possible to hold that at the time when Azimullah was killed the dacoits had abandoned the idea of committing dacoity and they murdered Azimullah only with the object of getting away. The case Emperor v. Chandar is, therefore, distinguishable. In our view the appellants were rightly convicted under Section 396, Penal Code, and we affirm their convictions.

10. It has been urged that the appellants should not be given the extreme penalty of death. Learned counsel has urged that while under Section 302, Penal Code, a sentence of death may be the normal sentence, under Section 396, Penal Code, the Court has a wider discretion. Section 396, Penal Code, provides for sentenance of death, or transportation for life, or rigorous imprisonment for a term which may extend to ten years and also fine, while Section 302, Penal Code, provides for sentence of death or transportation and fine. Learned counsel has relied on a decision of this Court in Lal Singh v. Emperor, A. I. R. (25) 1938 ALL. 625 for his submission.

11. Section 367, Criminal P. C., which deals with the language in which judgment should be written and the contents of the judgment provides in Clause (5) that if the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why a sentence of death was not passed. No distinction is made in this section between Section 302 and Section 396, Penal Code and all that Section 367(5) provides is that a Judge should give reasons when he passes a sentence other than a sentence of death.

12. When a Judge holds that an accused person is guilty of an offence he has to apply his judicial mind to the question of sentence and decide what sentence will be appropriate in the circumstances of the case. Such a discretion is liable to be corrected where necessary by the higher Court, if any. All that Section 367(5), Criminal P. C., requires is that the Judge shall give his reasons when he passes a sentence, other than a sentence of death, where a sentence of death could be

passed. The Indian Penal Code leaves it to the Judge's judicial discretion to decide whether he should pass a sentence of death, or a sentence of transportation for life, or any other sentence which may be permissible under the law. As in awarding any other sentence, a Judge who passes a sentence of death has to apply his judicial mind. He has to consider the question whether the case is one where a sentence of death should be passed or a lesser sentence. No Judge would pass a sentence of death where it is proper to pass a sentence of transportation for life merely because he has to give reasons for imposing the lesser sentence. As Section 367(5) makes it necessary for the Judge to give reasons for imposing the lesser sentence, where no such reason is available, a sentence of death has to be passed. It is only to this limited extent that it can be said if at all, that the death sentence is the normal sentence in case of murder, but in that respect an offence of murder does not appear to us to be materially different from an offence of dacoity with murder. If while committing a dacoity a murder is committed it cannot be said that the gravity of the offence is less than an ordinary murder. The law recognises this, as in a case of murder a person, other than the person who has actually committed the murder, can be convicted under Section 302, Penal Code, only if Section 34 or Section 149 of the Code is applicable. Under Section 396, however, every member of the gang becomes liable for a murder committed in the course of the dacoity. The appellant Sirajuddin is a previous convict. He has already been convicted under Sections 307 and 396. There is definite evidence that Abbu killed Azimullah. They were the ring leaders. We, therefore, do not see any reason to interfere with the sentences passed by the learned Sessions Judge.

13. We dismiss the appeals of these two appellants and confirm the sentences of death passed on them.

14. The appellants Nos. 3 to 6, Bakhtawar, Sukhey, Bashir and Rafiq are represented by Sri. S. N. Misra, while Nasroo and Qamroo are unrepresented. They are, however, present in person and we have heard them. (After discussing the evidence against each of them the judgment proceeded) The result, therefore, is that Siraj Uddin alias Siraju's and Abbu's appeals are dismissed. Their convictions and sentences under Section 396, Penal Code are confirmed and the

reference as against them is accepted.

15. The appeal of Bakhtawar is allowed and his conviction and sentence are set aside. He is to be released forthwith unless he is required in some other case.

16. The convictions of Sukhey, Bashir, Rafiq, Nasroo and Qamroo are maintained and while the sentences of Sukbey, Rafiq and Nasroo are reduced from transportation of life to seven years' rigorous imprisonment each, the sentences passed against Bashir and Qamroo of transportation for life are maintained.