

Rahimal (In Jail) Vs. State of U.P.

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SooperKanoon Citation : sooperkanoon.com/467188

Court : Allahabad

Decided On : May-13-1992

Reported in : 1992CriLJ3819

Judge : G.D. Dube and ;Virendra Saran, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 395, 396, 399 and 402

Appeal No. : Criminal Appeal No. 3633 of 1978

Appellant : Rahimal (In Jail)

Respondent : State of U.P.

Advocate for Def. : D.G.A.

Advocate for Pet/Ap. : Kamleshwar Singh, Adv.

Disposition : Appeal allowed

Judgement :

G. D. Dube, J.

1. This appeal has been preferred against the judgment and order of VIth Additional Sessions Judge, Fatehpur convicting and sentencing appellant to undergo 7 years' rigorous imprisonment under Section 395, I.P.C. and imprisonment for life under Section 396, I.P.C.

2. The case of the prosecution was that at about 1.30 a.m. in the night between 3/4-9-1977 six to seven dacoits entered into the house of Raisa Khatoon and Azizun. They committed dacoity in the houses and looted properties. It was alleged that there was a Dibbi burning in front of the house of Azizun and a lantern was burning in front of the house of Raisa Khatoon situated in village Amaun, P.S. Khaga, District Fatehpur. During the dacoity the dacoits fired towards witnesses. Mohd. Yusuf received serious injuries and later on died. The other persons also received gun shot wounds. It was alleged that during the dacoity a heap of paddy straw (payal) was put to fire. This created ample light enabling the witnesses to recognise the dacoits. The dacoits were unknown persons and the witnesses had seen them during the course of committing dacoity.

3. After the occurrence Buddhu along with Raisa Khatoon and Shafi Mohammad went to P.S. Khaga and lodged the first information report at 4 a.m. After lodging of report the investigation was taken up by Bhushan Singh, Station Officer, PW8. He had made the usual investigation prepared the inquest report of the dead body, collected the empty cartridges, one lathi, sample ash, blood stained and plain earth from the spot. The appellant was arrested in the night between 8 and 9 of September, 1977 and brought to the police station at 3.30 a.m. in Baparda condition and kept in the lock up. Thereafter he was sent to the District Jail in a veiled condition. His identification was conducted in the District Jail on 4-11-1977 by Executive Magistrate, K. B. Srivastava, PW4. Out of 8 witnesses sent for identification only 5 had identified the appellant. Thereafter a charge-sheet was submitted.

4. The accused had pleaded not guilty to the charges. It was urged that he was falsely implicated in this case on account of enmity with the police.

5. The prosecution had examined 10 witnesses. Out of them PW1 Buddhu, PW2 Peer Mohammad, PW3 Ramashankar and PW5 Abdul Hasan were witnesses of fact. Out of them PW2 had turned hostile. The others were formal witnesses. The defence had examined two witnesses i.e. Mohan Lal DW1 and Nand Kishore DW2. Mohan Lal DW1 had stated that while Panchayat was being held in village Qasba Sohan, the appellant was called and taken to the police station by two

constables. DW2 Nand Kishore was the Lekhpal of the area in which the village, in which the dacoity was committed, was situated. He stated that in all the fields of Abdul Hasan late paddy crops was sown. This crop is harvested in the end of October and beginning of November.

6. After assessing the evidence of the two parties, the learned Sessions Judge held that the appellant was guilty of the offences punishable under Sections 395 and 396 of Indian Penal Code. Hence this appeal has been preferred.

7. A basic error has been committed by the trial Judge in convicting the appellant under Sections 395 and 396 of Indian Penal Code. Offence under Section 396 of Indian Penal Code is only an aggravated form of the offence of dacoity. In an offence under Section 395 of I.P.C. the prosecution has to establish (1) that five or more persons were jointly concerned in the commission of robbery, (2) that one or more of them committed or attempted to commit robbery, and (3) that others were present and aiding such commission or attempt. To bring an offence under Section 396 of I.P.C. prosecution has to establish that murder was committed during dacoity. Hence when prosecution alleges that murder was committed during the dacoity the offence traverses from Section 395 of I.P.C. to 396 of I.P.C. Any person committing the offence of dacoity with murder cannot be convicted and sentenced under both the sections.

8. The learned Vth Additional Sessions Judge had framed the charges in the following words:--

Firstly, that on 4th of September, 1977 at about 1.30 a.m. both of you along with 4 or 5 other unknown persons committed dacoity at the residential houses of Mst. Azizun and Subrate situated in village Amaun Bazar h/ o Amaun P.S. Khaga of this district, and thereby committed an offence punishable under Section 396, I.P.C. within the cognizance of this Court.

Secondly that on the aforesaid date, time and place some one of you or your companions intentionally caused the death of Mohd. Yusuf s/o Buddhu aforesaid in the commission of said dacoity, and thereby committed an offence punishable under Section 396, I.P.C, within the cognizance of this Court.

And I hereby direct that you be tried by this Court on the aforesaid charges.

9. The learned Sessions Judge has bifurcated the offence under Section 396, I.P.C. The offence of dacoity was incorporated in charge No. 1 and thus the appellant was charged for the offence punishable under Section 395 of I.P.C. In the second charge it was stated that offence of murder was committed during the dacoity as mentioned in charge No. 1. Actually the facts mentioned in both the charges constituted one offence under Section 396 of I.P.C. and one charge under Section 396 of I.P.C. ought to have been framed.

10. It was argued by the learned counsel for the appellant that the arrest of the appellant was disbelieved in a sessions trial. The appellant was alleged to have been arrested in connection with the crime punishable under Sections 399 and 402 of I.P.C. In order to support his contention the learned counsel has moved an application for bringing on record the judgment in the Sessions Trial of the case under Section 399/402 of I.P.C. It was argued that if the arrest has been disbelieved then the very foundation of the case is knocked out and the appellant is entitled to acquittal. The learned counsel has also assailed the source of light and delay in identification.

11. We have heard the learned Additional Public Prosecutor.

12. There is no need to admit the judgment in this case as an evidence. The prosecution has not established the fact of arrest. The investigating officer stated that the appellant was arrested in the night of 8/9-9-1977. The time and place of arrest was not disclosed. The investigating officer ought to have given a full detail, as to in what manner the appellant was arrested. This would enable the Court to assess whether the witnesses of identification were involved in arrest and that they had any opportunity to see the appellant. A single sentence of the investigating officer regarding arrest without mentioning even the time and place is not sufficient to prove the arrest.

13. We have grave doubts that there would have been ample light at the spot. According to all the eye-witnesses the dacoits could not have been recognised if there was no light of burning paddy straw. According to the witnesses the straw

had been stocked a few days before after taking out the grain. Hence these straws would not have been dry and, therefore, it would have been quite difficult for any one to burn it. It will require a little long time to make the straw burn. Common experience reveals that materials which are not completely dry take more time to start burning. A little long effort has to be made to make such materials burn. Witnesses have stated that dacoits were firing their guns to scare away the residence of village. They had even shot dead one person. In such state of terror the paddy straw could not have been burnt. We are of opinion that the evidence regarding light is unworthy of acceptance.

14. No explanation has come forward as to why a delay of about two months took place in arranging an identification parade. Despite a time gap of exactly two months in the dacoity and identification five persons out of eight had identified the appellant correctly. The victims of the dacoity had failed to identify the appellant. The above mentioned circumstances, therefore, make such an identification evidence unreliable.

15. For the reasons mentioned above we hold that the prosecution had failed to prove its case against appellant. The lower Court had erred in holding the appellant guilty.

16. The appeal is allowed. The judgment and order of lower Court are set aside. The appellant is acquitted of the charges levelled against him. His bail bonds are cancelled and sureties discharged.