

Laliya and ors. Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Jul-18-1966

Reported in : AIR1967Raj134

Judge : L.N. Chhangani, J.

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

Appeal No. : Criminal Appeal No. 63 of 1966

Appellant : Laliya and ors.

Respondent : State of Rajasthan

Advocate for Def. : A.R. Mehta, Deputy Government Adv.

Advocate for Pet/Ap. : G.C. Chatterji, Adv.

Disposition : Appeal partly allowed

Judgement :

L.N. Chhangani, J.

1. This is a joint appeal by Laliya. Jaganriath, Jeewan, Chothia and Gheesa and is directed against the order and judgment of the Sessions Judge. Alwar dated 27-11-1965, convicting the first three, appellants for offence under Section 396, Indian Penal Code, and sentencing them to ten years' rigorous imprisonment and a fine

of Rs. 200; in default, one year's further rigorous imprisonment, and the remaining two appellants for an offence under Section 411, Indian Penal Code, and sentencing them to three years' rigorous imprisonment.

2. The facts material and relevant for the disposal of the appeal may be stated as follows:

It is alleged that on 7-8-1964 at about 4 of 5 O Clock seven persons including the five appellants, armed with guns and lathis, arrived in the 'Bazar' of village Bamanwas and looted a few shops. After the commission of dacoity they left the village along with booty. A good number of villagers collected and immediately chased the offenders and over-took them at about a distance of four furlongs to one mile. The alleged dacoits finding them pursued by the villagers took their positions and there was an encounter between the dacoits and the villagers. There was exchange of fire between them. During the encounter the alleged dacoits and some of the villagers received injuries. One Bodia, a villager, died on the spot. Ultimately, the villagers overpowered the dacoits and captured four out of the seven offenders viz., the three appellants Laliya, Jeewan and Jagannath and one Prabhu, with some of the looted property.

According to the prosecution, the remaining three offenders managed to escape with a part of the booty. It may be mentioned at this stage that when the loot in the village was going on Chiranjilal P. W 2 informed one Omprakash---a Gram Sewak of village Bamanwas, who in his turn sent a written report to the police station, Thana Gazi, through Chiranjilal P. W. 2. The police left for the scene of occurrence. By the time the villagers took four offenders and a part of the looted property to the village the police had arrived in the village. The four dacoits and the looted property recovered at the place of the encounter were handed over to the police. The police along with four arrested offenders left for the police station. In the way Prabhu expired and the remaining three Laliya, Jeewan and Jagannath were formally arrested. During the investigation the police learnt that the other persons concerned in the dacoity were Ramnath, Gheesa and Chothia,

The prosecution story further is that Gheesa and Chothia surrendered themselves before the police on 19-8-1964 and at the time of their surrender Gheesa

produced a pair of gold 'bangari' Ex. 35 and Chothia produced one Kanakti Ex. 36, which were seized and sealed vide the seizure memos Ex. P.-4 and Ex. P-3 respectively. Some more recoveries were effected at the instance of Gheesa and Ramnath. During investigation the articles recovered were got identified by the witnesses and the identification by the witnesses of the accused Ramnath, Gheesa and Chothia was also arranged. The post mortem examinations on the dead bodies of Prabhusingh and Bodia were conducted and the injuries of the offenders as well as the villagers were also examined. After investigation the police put up a challan against six persons, that is, five appellants and one Ramnath for offences under Ss. 396 and 397, Indian Penal Code, before the Munsif-Magistrate, Thana Gazi, who after enquiry committed all the six accused to the Court of Session, Alwar. The accused pleaded not guilty and claimed to be tried.

The prosecution examined twenty witnesses. When examined under Section 342, Criminal P. C. accused Laliya, Jeewan and Jagannath stated that on the date of the dacoity they were working in the field of one Shriram in the jungle of Bamanwas and were preparing a 'chhapar'. They further stated that when they saw the villagers chasing the dacoits they also joined them in the pursuit. Some of the villagers, however, began beating, them with the result that they became unconscious. When they regained a consciousness they found themselves in the General Hospital at Alwar. The accused Chothia Gheesa and Ramnath denied having participated in the commission of the dacoity. They denied the recovery of ornaments from their possession.

The Sessions Judge after review of the entire evidence observed in the first instance that 'again there is nothing to suggest that these three accused (Laliya, Jeewan and Jagannath) were captured and beaten by the villagers on a mistaken identity. The dacoity took place in broad day light between 4 and 5 p.m. In the month of August. The villagers chased the dacoits as soon as they left the bazar and overpowered them at a short distance from the village in broad day light. In these circumstances, it cannot be said that the villagers captured them on a mistaken identity'. Then referring to the encounter between the alleged dacoits and the capture of the three dacoits, he recorded the conclusion 'All these

circumstances lead to irresistible conclusion that a dacoity was committed on 7-8-1964 by seven persons armed with deadly weapons, that Laliya, Jeewan and Jagannath were amongst the dacoits and that the murder of Bodia was committed in the course of the dacoity, when the dacoits were in flight with the looted property,'

Dealing with the case of Gheesa and Chothia, the learned Judge recorded a finding that 'From the statement of P. W. 21 Kistoorilal it stands proved beyond doubt that Gheesa produced Ex. 35 and Chothia produced Ex. 36'. However, on the basis of recovery, the Sessions Judge found it difficult to hold that Gheesa and Chothia participated in the dacoity.

On these findings, he convicted the three appellants for an offence under Section 396 and Gheesa and Chothia for an offence under Section 411, Indian Penal Code.

3. in this appeal, the learned counsel for the appellants made three submissions:

(a) That none of the eye witnesses alleged to be present at the time of the dacoity identified the accused to be amongst the dacoits and consequently, the Sessions Judge was wrong in holding that Laliya, Jeewan and Jagannath were amongst the dacoits.

(b) That the transaction of encounter and the murder of Bodia should be held distinct and separate from the transaction of dacoity and the Sessions Judge committed an error in holding that the murder was committed while committing dacoity.

(c) That the story of the prosecution that the two accused Chothia and Gheesa surrendered themselves before the police and produced the two ornaments is not a probable story and since Kistoorilal, P.W. 21 has not been corroborated by the motbir witnesses, namely, Bhanwarlal, P.W. 11 and Abuul Hamid P.W. 12, the recovery of the ornaments from the possession of Gheesa and Chothia should not be held proved and their conviction under Section 411. Indian Penal Code, deserves to be quashed.

4. Taking up the first contention, I find that the counsel for the appellant is correct in stating that the various witnesses have not stated that they identified the three appellants at the time when they along with others were committing dacoity. This, however, is not sufficient to exonerate the three appellants. Gori Sahai P.W. 4 and Ramchander P.W. 5 state that dacoity was committed in their presence by seven persons and that after the commission of the dacoity, a huge crowd pursued the dacoits and that they were amongst the pursuers and that there was an encounter between the dacoits on the one side and the villagers on the other side and that eventually four persons--the first three appellants and Prabhu--were arrested. Shyamlal P.W. 6 is silent as to whether dacoity was committed in his presence but he supports the other witnesses as regards pursuit, encounter and the capture of the three appellants. Rameshwar P.W. 7, Prabhu P.W. 8, Hanuman Sahai P.W. 9 and Jagdish P.W. 10 also state that they were amongst pursuers, that there was regular encounter between the villagers and the dacoits and that three of the appellants were captured after the encounter. Their statements remain unchallenged and there was no cross examination. From this it is clear that the villagers soon after the commission of the dacoity pursued the offenders in a hot pursuit and that there was an encounter between the dacoits and the villagers, the appellants and one Prabhu as also some of the villagers received injuries and eventually the three appellants and Prabhu were captured. On a proper consideration of all this evidence every possible link to connect the appellants with the commission of the dacoity stands proved and it is idle for the appellants to contend that the identity of the appellants has not been proved.

The first contention of the learned counsel for the appellants has thus no force and is negated.

5. The second contention raises a question as to the proper connotation and meaning of expression 'commits murder in so committing dacoity' used in Section 396, Indian Penal Code. Courts have had occasions in various cases to interpret Section 396, Indian Penal Code, and the judicial opinion cannot be said to be quite uniform. In *King-Emperor v. Mathura Thakur*, (1902) 6 Cal WN 72, the learned Judges posed the question whether the attack that was made by the accused Mathura upon one Soman was for the purpose of carrying out the end which it is

said the rioters had in view, namely, in looting the paddy which he had harvested, and observed that:

'It seems to me that it could not be so held; and it follows from this, that one of the main elements which constitutes the offence under Section 395 read with Section 396 is wanting in this case.'

In *Queen Empress v. Umrao Singh*, (1894) ILR 16 All 437 a Division Bench of Allahabad High Court held that 'to establish a liability to the punishment provided in this section it is necessary to prove that the person said to be liable was one of the persons who were conjointly committing dacoity and was present when the act of murder in the dacoity was committed.'

In *Emperor v. Chandar*, (1906) 3 Cri LJ 294. It was held:

'Where after the commission of a dacoity, in which however the dacoits, being interrupted by the villagers, did not get any plunder, the dacoits were attempting to escape, and one or more of them in order to facilitate the escape attacked and killed one of the pursuing party, it was held that Section 396 of the Indian Penal Code, did not apply, but only the person or persons actually taking part in the killing were liable therefor.'

These are the three cases usually relied upon on behalf of the defence for a narrow and strict interpretation of Section 396, Indian Penal Code in General and to oust the applicability of Section 396 in cases where murder is committed by the dacoits while retreating with or without success in the plunder of the property. There are, however, other cases where the language of Section 396 was not interpreted similarly but a different interpretation was given and the observations made in the above cases were directly or indirectly either not approved or explained or held limited to the peculiar facts of their cases.

In *Sitaram v. Emperor*, AIR 1925 Oudh 723 the principle of law was laid down as follows:

'A dacoity, begins as soon as there is an attempt, to commit robbery. A shot fired in order to keep off the rescue party, and allow the theft to be committed, is an act

committed in committing dacoity.'

According to this case the murder need not have been committed for the specific purpose of obtaining property by theft.

The dictum laid down in (1894) ILR 16 All 437 came up for consideration before a Division Bench of the Allahabad High Court in *Queen Empress v. Teja*, (1895) ILR 17 All 86. The learned Judges referred to the two statements made in the earlier case and observed as follows:

'If those two statements to which we have referred are to be taken as of general application, we entirely dissent from their correctness as statements of law..... in our opinion it matters not, when in the commission of a dacoity a murder is committed, whether the particular dacoit charged under Section 396 was inside the house or outside the house, or whether the murder was committed inside or outside the house, so long only as the murder was committed in the commission of that dacoity.'

In *Queen Empress v. Sakham Khandu*, (1900) 2 Bom LR 325 a dacoit party had to retreat on the advent of villagers in superior force and one of its members shot and killed one of the villagers. In answer to the charge for murder it was argued that at the time of murder the common object of the assembly was not to commit the offence but to escape. Dealing with the argument, Sir Lawrence Jenkins, Chief Justice, observed as follows:

'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 is 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.'

Section 396, Indian Penal Code, also came up for consideration before a Full Bench of the Calcutta High Court in *Monoranjan Bhattacharya v. Emperor*, AIR 1932 Cal 818. Rankin, C. J. delivering the judgment of the Court 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 flight 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.'

Dealing with the contention that the accused having dropped the booty a few minutes before the deceased was stabbed, the murder could not be said to have been committed in the course of committing dacoity, the learned Chief Justice observed as follows:

'In my judgment, that contention fails, first of all, completely upon the facts because it is not the statement of the evidence that the booty and the whole of the booty had been abandoned before the murder took place, and secondly, because, if it were true, it would make no difference to the applicability of Section 396, I. P. C.'

In *Sirajuddin v. State*, AIR 1951 All 834, a Division Bench of the Allahabad High Court agreed with the observations made by learned Chief Justice in (1900) 2 Bom LR 825 that

'the question whether the 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.'

The same view was taken in another Bench decision of the Allahabad High Court in *Kaley v. The State*, AIR 1955 All 420.

In *Shyam Behari v. State of Uttar Pradesh*, AIR 1957 SC 320, the Supreme Court had to deal with a case where the dacoits were running away without collecting

any booty and when they had proceeded a considerable distance from the house where the dacoity had been committed one of the accused killed a chaser Mendai while he was crossing the ditch of Pipra Farm in order to effect the release of other accused who had been caught by the, chasers, and a question arose whether it could be held that the murder was committed while committing dacoity. The Supreme Court did not think it necessary to express any definite opinion and left the question open.

On an examination of the entire case law, I record my respectful agreement with the observations made in (1900) 2 Bom LR 325 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. In deciding a question whether the transaction of murder is separate or distinct from the transaction of dacoity the following facts

1. Whether the dacoits retreated without plunder and the murder was committed while retreating;
2. The lapse of interval between the attempt of dacoity and the commission of the murder;
3. The distance between the places where the attempt at dacoity was committed and the murder was committed; and
4. Whether the dacoits abandoned all the booty and the lapse of interval between the abandonment of the booty and the commission of the murder.

are helpful and deserve consideration but each fact by itself should not be invariably treated as conclusive for arriving at a positive conclusion. The decisions as to the murder being a part of the transaction of the dacoity or otherwise should be taken on an over all consideration of the facts and the circumstances of individual cases.

6. Considering the present case in the light of the above principles I need only recall that-

(i) the dacoits were given a hot pursuit by the villagers immediately after the commission of the loot and,

(ii) they were overtaken at a short distance and.

(iii) there was an encounter between the dacoits and the villagers, and

(iv) the dacoits had not abandoned the entire booty before Bodu was murdered. In these circumstances, I am not prepared to agree with the learned counsel for the appellants that the transaction of encounter and murder should be treated as separate and distinct from dacoity. I agree with the Sessions Judge that the murder was committed While committing dacoity.

7. No other point having been made in connection with the appeal of Laliya, Jeewan and Jagannath. I must hold that their convictions are correct and call for no interference.

8. Taking up the third submission relating to the case of Gheesa and Chothia, the learned counsel for the appellants relied upon Shera Jiwan v. Emperor, AIR 1943 Lah 5, where Mohammad Munir J. as he was then, held that:

'When the evidence of recovery of stolen property is attacked, the Court has to examine the evidence in the light of the following alternative hypothesis:

(1) The complainant might have been persuaded by the police to state in the first information report that property which in fact was not stolen had been stolen and to hand over such property to the police to be used in fabricating recoveries from the accused persons. This assumes a conspiracy between the Informant and the police from the very start.

(2) The police might have obtained property similar to the stolen property from the complainant or someone else and used it for the purpose of fabricating the recoveries.

(3) The police might have suppressed some of the stolen property recovered from an accused person and utilized it in inventing a recovery from another accused person.

(4) The property might have been recovered from a third party and used by the police in one of the impugned recoveries.' The learned counsel suggested that in the present case the possibility of the recovery of the property from persons other than Gheesa and Chothia and utilising it in inventing recovery from Gheesa and Chothia cannot be reasonably eliminated. In support of his argument the learned counsel relied upon the following facts:

(1) That the dacoits who committed the robbery were immediately pursued by the villagers and they could have no opportunity of distributing the property amongst themselves and the alleged statement of the accused Gheesa and Chothia while producing one article each that they got the property as their share of the booty cannot be accepted at face value.

(2) That it is hardly probable that the accused while surrendering themselves before the police will produce one article each

(3) That the two motbirs who are quite reliable, do not support Kistoorilal P. W 21 that the property was recovered from the accused in their presence. They unanimously state that when they reached the Police Station the property was lying and they signed the seizure memo on the statement of the police officer that the property had been recovered from the possession of each of the accused.

9. The argument of the learned counsel is not without force. In view of the facts placed by the learned counsel for the appellants, I do not feel quite safe in placing implicit reliance upon the testimony of Kistoorilal unsupported by other witnesses in the matter of recovery of property from the five appellants. In my opinion, the recovery of the property from the possession of Gheesa and Chothia has not been established beyond all doubt and they are entitled to benefit of doubt.

10. In the result, the appeal is partially accepted. Convictions and substantive sentences of Laliya, Jeewan and Jagannath are maintained. I do not feel inclined to maintain sentences of fine. Convictions and sentences of Gheesa and Chothia are set aside. They are in custody and shall be released forth with, if not required in connection with any other case.

