A.F.R.

Reserved on 27.03.2019
Delivered on 12.04.2019

In Chamber

Case :- CRIMINAL APPEAL No. - 277 of 1998

Appellant :- Gopali Prasad
Respondent :- State Of U.P.
Counsel for Appellant :- Alok Kapoor,Mohd. Salman,Neeraj Trivedi,R.B.S. Rathaur,S C Shukla,Sanjeev Shukla,Sunil Kumar
Counsel for Respondent :- Govt. Advocate

Hon'ble Chandra Dhari Singh,J.

1. The instant appeal, filed on behalf of the accused-appellants, is directed against the judgment and order dated 21.04.1998 passed by Vth Additional Sessions Judge, Unnao in Sessions Trial No. 221 of 1990 [State Vs. Mahadev and others]. The conviction and sentence of the appellants are as under:

(i). Appellants no. 1, 2 and 3, namely, Gopali, Ram Kumar and Chhedi have been convicted and sentenced a follows:

U/s 395/397 IPC : Seven years rigorous imprisonment.

(ii). Appellants no. 4, 5, 6 and 7, namely, Jang Bahadur, Ganga Prasad, Shri Pal and Om Prakash have been convicted and sentenced a follows:

U/s 412 IPC	:	Seven years rigorous imprisonment and to pay fine of Rs.1000/- each.
	:	In default of payment of fine one years' R.I.

2. Facts giving rise to the present appeal may be summarized as under:

(i). According to the prosecution case, on 22.04.1990 at 8.15 am, the complainant Radhey Shyam along with his cousin brother Ram Gopal son of Shyam Bihari, residing in the same house in village Pakra Buzurg, P.S. Bihar, District Unnao, went to the police station and lodged a first information report stating therein that in the intervening night of 21/22.04.1990 at about 12.00 hours some miscreants climbed over the roof from behind, opened main door and started looting the household goods, whereupon the inmates of his family raised the alarm, on which Sheo Bahadur, Raj Bahadur, Jang Bahadur, Babu Lal, Sri Krishna, Maksood, Kaushal Kumar and Bholai etc. rushed to the spot, the miscreants running with jewellery box belonging

to him and his brother making firing, as a result of which, some persons received injuries. At the time of loot, miscreants Mahadev, Gopali and Ram Kumar were identified in torch light. The complainant has also stated that he has no knowledge of articles, which have been taken away by the miscreants and its list will be given later on.

(ii). At this chick FIR was scribed, Case Crime No. 76 of 1990, under sections 395, 397, 412 I.P.C., was registered at police station Bihar, District Unnao Ext. Ka-1. The investigation of the case was entrusted to Sub Inspector Sri J.N. Singh, who inspected the spot and prepared the site plan of the place of occurrence Ext. Ka-4. Recovery of lantern and torch were prepared as Ext. Ka-5. Memos regarding search of accused Mahadev and Ram Kumar Ext. Ka-6 and Ka-7. Memo regarding taking in custody of box and its supurdiginama is Ext. Ka-8. Memo regarding search of shop of Sri Gautam son of Kedar Nath Ext. Ka-9. Memo regarding recovery of five packets in which 150 grams pieces of silver and in one packet 9 grams of gold jewellery and its pieces from possession of accused Mahadev, Jang Bahadur,Om Prakash, Ganga Prasad and Sri Pal is Ext. Ka-

10. Site plan of the place of recovered articles Ext. Ka-11. Injury reports of Raj Bahadur, Jang Bahadur, Bholai, Smt. Nirmala, Smt. Rajeshwari, Babu Lal, Brij Raj, Ganga Sewak, Ashok Kumar, Kushal Kumar and Sri Krishna are Ext. Ka-12 to Ka-22. Identification parade held on 29.05.1990 in respect of accused Sri Pal and Om Prakash Ext. Ka-23. Identification memo of the parade in respect of Jamuna Prasad held on 18.07.1990 Ext. Ka-27. After completion of the investigation, separate charge-sheet under sections 395/397 IPC against accused Mahadev, Ram Kumar, Chhedi, Om Prakash and Sri Pal Ext. Ka-2, charge-sheet under section 395/397 IPC against accused Gopali and Jamuna Ext. Ka-3 and charge-sheet under sections 395/397/412 IPC against accused Mahadev, Om Prakash, Sri Pal, Jang Bahadur and Ganga Prasad Ext. Ka-26, were filed. Accused-appellants pleaded not guilty and claimed to be tried.

(iii).The then Additional Sessions Judge-III, Unnao, on 27.11.1990 framed charges under sections 395/397 IPC against accused Mahadev, Ram Kumar, Chhedi, Om Prakash, Gopali, Sri Pal and Jamuna and against accused

Om Prakash, Sri Pal and Mahadev charged separately under section 412 IPC. Accused Jang Bahadur and Ganga Prasad were charged separately under section 412 IPC, on 18.04.1991. The case was committed to the court of Sessions on 27.08.1990.

(iv).In order to prove its case, prosecution examined as many as eleven witnesses. P.W.1 Radhey Shyam (complainant), P.W. 2 Ram Gopal, P.W. 3 Smt. Nirmala Devi, P.W. 4 Krishna Mohan Singh, these are the witnesses of recovery as well as witnesses of fact while P.W.5 Sub Inspector Ram Sumujh Verma, is the Investigating Officer of the case, P.W.6 Sub Inspector J.N. Singh (earlier Investigating Officer of the case), P.W. 7 Dr. S.C. Katiyar, who proved injury reports of injured Ext. Ka-12 to Ka-22, P.W.8 Ajai Deep Singh, the then Executive Magistrate, Unnao, who proved identification parade memo Ext. Ka-23. P.W.9 Constable Mohan Lal, who proed chik report Ext. Ka-24 and G.D. report Ext. Ka-25. P.W.10 Sub Inspector Ramesh Chndra Shukla, Investigating Officer, who took the investigation of this on 16.12.1990 and proved charge-sheet Ext. Ka-26 against accused Mahadev, Om Prakash, Sri

Pal, Jang Bahadur and Ganga Prasad under sections 395/397/412 IPC and P.W.11 Sri M.P. Srivastava, the then Executive Magistrate, who proved identification memo Ext. Ka-27 as formal witnesses.

(v). After close of the prosecution evidence, statement of the accused persons were recorded under section 313 of the Code of Criminal Procedure. They denied the prosecution allegations and pleaded that a false recovery was made against they and they have been falsely implicated in this case due to enmity. In defence no evidence either oral or documentary has been produced in support of their case.

3. Heard Sri Sunil Kumar, learned counsel appearing on behalf of appellants, Sri Ram Singh, learned Additional Government Advocate for the State-respondent and perused the record.

4. Learned counsel for the appellants submits that the court below has not appreciated the evidence in proper perspective and illegally and wrongly convicted and sentenced to the appellants for seven years rigorous

imprisonment. He further submits that the trial court has not followed the ingredients of sections 394, 395, 396 IPC while holding the appellants guilty, therefore, the judgment and orders passed by the court below deserves to be set aside and quashed and further appellants deserve to be acquitted from the charges levelled against them.

5. In support of his learned counsel for the appellants relied on the following case laws:

(i). 1983(2) SCC 65 [Ram Lakhan Vs. State of U.P.].

(ii). 2007(4) SCC 45 [State of Rajsthan Vs. Netrapal and others].

(iii). 2010(70) ACC 416 [Bhagwan Das and another Vs. State of U.P.].

6. Learned Additional Government Advocate appearing on behalf of the State-respondent vehemently opposed the contentions raised on behalf of the appellants and submits that the conviction and sentence recorded by the trial court vide judgment and order dated 21.04.1998 is based on proper appreciation of evidence and does not call for any

interference by this Court. The criminal appeal filed by the accused-appellants deserves to be dismissed.

7. Before discussing the arguments advanced on behalf of the parties, it is necessary to have a glance on the evidence recorded by the trial court.

8. P.W.1 Radhey Shyam, who is also the complainant of the incident dated 21/22.04.1990 at 12.00 hours (mid night). The complainant in his deposition has stated that on the intervening night of 12/22.04.1990, the accused persons committed dacoity in his house and have looted jewelry and other valuable articles. He further deposed that he was sleeping outside the house in a Chhapper and on hearing the hue and cry of the family members, he woke up and in the torch light he recognized to some of the dacoits, namely, Mahadev (died during trial), Ram Kumar-appellant no.2 and Gopali-appellant no.1 (died during the pendency of present criminal appeal. The source of light has been mentioned as lantern and torch. The complainant in his cross-examination deposed that after hearing the hue and cry of the family members, he ran away towards the village and raised alarm, and on hearing his alarm, several

villagers gathered there and thereafter on seeing the gathering of the villagers, the dacoits had started firing, in which several villagers have received firearm injuries and the robbers brandishing their country made pistols ran away.

9. P.W.2 Ram Gopal is the cousin brother of the complainant. He in his deposition has stated that his family and the family of the complainant are living in a common house, rooms are different and courtyard is the same. The dacoits also looted the golden and silver ornaments from his house including other valuable household goods. He further deposed that dacoits Chhedi, Gopali, Ram Kumar and Mahadev were recognized by him in the light of torch. He further stated that accused Ganga Prasad and Jang Bahadur were not present in the dacoity. During the course of identification parade in jail he also recognized accused Jamuna Prasad and Om Prakash.

10. P.W.3 Kumari Nirmala daughter of Sri Radhey Shyam (complainant). In her deposition it has been stated that she did not know the name of the dacoits nor saw them prior to the incident and on hearsay of the villagers, she told that

she had recognized to the dacoits namely, Mahadev, Gopali, Ram Kumar and Chhedi. She further deposed that before the trial court she had recognized to the accused Sri Pal and Om Prakash.

11. P.W.4 Krishna Mohan Singh son of Shiv Raj Singh, at the relevant time, he was the village pradhan of Gram Panchayat Pakara Bujurg. He deposed that he is the witness of recovery, he being the pradhan of the Gram Panchayat was called by the police, when recovery of some of the ornaments from the possession of the accused persons were made.

12. P.W.5 Sub Inspector Samujh Verma. This witness deposed that at the relevant time, he was posted at police station Bihar, District Unnao and he was the first Investigating Officer of the case. After completion of the investigation, he filed charge-sheet against accused Mahadev, Ram Kumar, Chhedi and Sri Pal and during the trial, he has proved the said document.

13. P.W.6 J.N. Singh is the witness of fact. At the relevant point of time, he was posted as Station Officer, P.S. Bihar,

District Unnao. In his presence the case was registered at the police station under section 394 IPC, he also inspected the spot and prepared the site plan Ext. Ka-4, recovery memo of lantern and torch as Ext. Ka-5 and has proved the said documents during the trial.

14. P.W.7 Dr. S.C. Katiyar, at the relevant point of time was posted as Incharge, Medical Officer, Primary Health Centre, Purwa, District Unnao. He deposed that on the next day i.e. 22.04.1990, he had examined the injuries of the injured persons, namely, Raj Bahadur, Jang Bahadur, Bhulai, Smt. Nirmala (PW.3.), Rajeshwari wife of Ram Gopal, Babu Lal, Brij Raj, Gang Sewak, Manoj Kumar, Kaushal Kumar and Sri Kishan and during trial he has proved the injury reports as Ext. Ka-12 to Ka-22.

15. P.W.8 Sri Ajay Deep Singh is the witness of fact. At the relevant time P.W.8 was posted as Pergana Magistrate, Purwa. He deposed that on 29.7.1990 in his presence identification parade took place in jail.

16. P.W.9 Constable Mohan Lal is the scribe of the FIR. He deposed before the trial court that chik FIR was entered by him in the G.D. vide Rapat No.9 on 22.04.1990 at 8.15 am.

17. P.W.10 Sub Inspector Ramesh Chandra Shukla is also the witness of fact. He deposed before the trial court that on 16.12.1990 the investigation of case crime no. 76 of 1990 was later on entrusted to him. He further deposed that on 28.01.1991 identification parade was conducted in presence of Magistrate and on 30.01.1991 he submitted the charge-sheet against accused Mahadev, Om Prakash, Sri Pal, Jang Bahadur and Ganga Prasad. He proved the said document as Ext. Ka-26.

18. P.W.11 M.P. Srivastava is the witness of the Fact. This witness at the relevant time was posted as Magistrate, Purwa, District Unnao. He deposed that on 18.07.1990 in his presence identification parade of accused Jamuna Prasad was conducted.

19. After close of the prosecution evidence, the statements of the accused persons under section 313 of the Code of Criminal Procedure has been recorded. The accused persons

stated before the trial court that they have been falsely implicated in the present, false recovery of golden and silver ornaments have been shown from their possession. They further stated that the witnesses due to enmity deposed against them.

20. I have heard the arguments of learned counsel for the parties and perused the evidence available on record.

21. Before coming to the conclusion, it is necessary to have a glance at the ingredients of sections 395, 396 and 397 IPC:

> ***395. Punishment for dacoity****.—Whoever commits dacoity shall be punished with 1[imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine*
>
> ***396. Dacoity with murder****.—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 1[imprisonment for life], or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.*
>
> ***397. Robbery, or dacoity, with attempt to cause death or grievous hurt****.—If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.*

22. According to the Oxford Dictionary, Dacoity means – an act of violent robbery committed by an armed gang.

There is no difference between robbery and dacoity except in the number of offenders. Robbery is dacoity, if the persons committing robbery are five or more in number. The offence of dacoity consists in the cooperation of five or more persons to commit or attempt to commit robbery. It is necessary that all the persons should share the common intention of committing robbery.

On a plain reading of Section 391, IPC it would appear that in order that a dacoity can be said to have been committed, it is necessary that five or more persons conjointly commit a robbery or attempt to commit robbery. If a robbery was committed, the dacoits would have the booty with them, but if the matter rested only with an attempt to commit a robbery there would be no question of the dacoits having any booty with them.

There are three ingredients in Dacoity:

(a). The accused commit or attempt to commit robbery;

(b). Persons committing or attempting to commit robbery and persons present and aiding must not be less than five;

(c) All such persons should act conjointly.

The word conjointly refers to united or concerted action of five or more persons participating in the act of committing the offence. In other words, five or more persons should be concerned in the commission of the offence and they should commit or attempt to commit robbery.

23. From perusal of the above extracted sections, it is evident that for the purpose of commission of dacoity, five or more persons are conjointly required to commit the said offence. In the present case, eight persons have been made an accused for committing the said offence. During trial appellant nos. 4 to 7 have been acquitted from the charge of sections 395/397 IPC and they have been convicted under section 412 IPC only. Further the trial court held guilty to the appellant nos. 1, 2 and 3 only for committing the offence of dacoity but perusal of the above extracted sections and discussions reflects that for commission of dacoity five or more persons are required, therefore, the trial court has committed manifest error in holding the appellant nos. 1, 2 and 3 guilty for committing dacoity.

24. Further the trial court has committed error in holding the guilty to the appellant nos. 4 to 7 because of the fact that when dacoity has not been proved against the appellants, then without connecting the recovered ornaments with any crime , they cannot be held guilty under section 412 IPC, therefore, the appellants deserves to be acquitted.

25. In view of the above discussions, this Court is of the view that the arguments advanced on behalf of the appellants have substance and the present appeal deserves to be allowed and the survival appellants deserve to be acquitted from the charges levelled against them.

26. It is relevant to mention here that during the pendency of the present appeal, appellant no.1 Gopali and appellant no.4 Jang Bahadur reported to have died and on their behalf vide order dated 16.08.2017 the already stands abated.

27. In view of the facts and circumstances stated above, the appeal is allowed. The surviving appellant nos.2, 3, 5, 6 and 7, namely, Ram Kumar, Chhedi, Ganga Prasad, Shri Pal

and Om Prakash are acquitted from the charges under sections 395/397, 412 IPC. The appellants are on bail. Their bail bonds are cancelled. The sureties are discharged from their liabilities. They need not surrender, in case, they are not wanted in some other case.

28. Let a copy of this order be communicated to the court below forthwith and to send back the lower court record for compliance and necessary action.

Dated: April 12th,2019 **[Chandra Dhari Singh, J.]**
Prajapati/-