AFR

Court No. - 76

Case :- CRIMINAL APPEAL No. - 648 of 1983

Appellant :- Balbir and others
Respondent :- State of U.P.
Counsel for Appellant :- Tej Pal Singh, A.Saran, Arimardan Singh, Arimardan Yadav, J.N. Singh, Jadu Nandan Yadav, O.P.Kulshrehtha, Rohit Tiwari
Counsel for Respondent :- A.G.A.

Hon'ble Saurabh Shyam Shamshery,J.

1. Heard Sri Pranvesh, Advocate holding brief of Sri Jadu Nandan Yadav, learned counsel for appellants, at length, on facts and law both, and learned A.G.A. for State.

2. This Criminal Appeal under Section 374 of Criminal Procedure Code *(hereinafter referred to as "Cr.P.C.")* has been filed by three appellants, namely, Balbir, Mohar Pal alias Chhakauri and Lala Ram against judgment and order dated 11.03.1983 passed by Sri D.C. Srivastava, Judge Special Court (Dacoity), Kanpur Dehat in Session Trial No. 467 of 1981 (State vs. Balbir and others) convicting appellants, Balbir and Lala Ram under Section 395 IPC and appellant, Mohar Pal alias Chhakauri under Sections 395 read with 397 IPC and sentencing appellants, Balbir and Lala Ram to five years rigorous imprisonment and appellant, Mohar Pal alias Chhakauri to seven years rigorous imprisonment.

3. As per first Informant, PW-1, Raj Kumar, the prosecution story is, that, in the intervening night of 26/27.06.1981 appellants alongwith four others committed dacoity in three houses in Village Badra Majra Bakauthia, Police Station Kakwan, District Kanpur Dehat. At about 11.00 O'clock four dacoits jumped into the Courtyard of First

Informant and opened door, which allowed other six dacoits to enter into the house. They started beating the inmates and looted belongings. PW-1 ran away and raised alarm. After committing dacoity in the house of First Informant all of them looted houses of Ochhey Lal and Ganga Ram in the same village. They also used firearm in the course of dacoity. As per prosecution story in the light of lantern, torches and fire of Pual, the witnesses saw the features of known dacoits and also recognized three known dacoits, who are appellants. In support of their case prosecution examined PW-1, Ram Kumar, scriber of complaint; PW-2, Sheo Singh, an eye witness of dacoity; PW-3, G.P. Thapalyal, Executive Magistrate, who conducted identification parade; PW-4, S.O. R.K. Verma; PW-5, Head Constable, Sri Krishan, who are formal witnesses and PW-6, SI, Ram Bilas, who was Investigating Officer of the case.

4. After filing of charge sheet charges were framed against appellants, who pleaded not guilty and and claimed to be tried on merits.

5. Trial Court after considering the evidence and other material on record convicted appellants, as mentioned above. Relevant finding of Trial Court are as follows:

> *"35. Thus, after considering the statements of these two witnesses an irresistible conclusion can be drawn that the three accused facing trial before me, were also amongst the decoits, who had committed dacoity in the night of occurrence, in the house of Raj Kumar. Since the evidence on record, does not justify two views, the view in favour of the accused in the circumstances of the case cannot be taken. The case of Kali Ram vs. State of H.P. AIR 1973 (S.C.) 2773 is thus distinguishable on facts.*

36. To sum up, it can be said that the prosecution has successfully established that the three accused committed dacoity in the house of Raj Kumar in the night of occurrence. It appears that after disclosure of a material fact by Raj Kumar in his cross-examination that accused Mohar Pal alias Chhakauri fired from his gun at the time of leaving his house, the charges under Section 395 IPC was amended against accused Mohar Pal alias Chhakauri and was regulated with charge under Section 397 IPC. I do not find any reason to disbelieve Raj Kumar on the point that Mohar Pal alias Chhakauri had used fire-arm, during the course of dacoity. The situation would have been different if the witness would have given voluntary statement on the point. On the other hand, the fact was brought on record by the effort of the defence counsel and to my mind, such statement, cannot be called as belated nor it can be rejected on ground of being un-reliable. Thus, to my mind, the prosecution has been successful in establishing the charge under Section 395 IPC against accused Balbir and Lala Ram and the charge under Section 395 read with Section 397 IPC against accused Mohar Pal alias Chhakauri. They have, therefore, to be convicted." (emphasis supplied)

6. Learned counsel for appellants submits that, even on merit, the prosecution is not able to prove its case beyond reasonable doubt as the witnesses are interested witnesses and no independent witness was examined. He submits that Trial Court has erroneously convicted appellants, who are three in numbers, under Sections 395 and 397 IPC, as they are less than five persons, which is against the essential ingredients of Section 391 IPC. In support of submission he placed reliance on Supreme Court's decisions in **Raj Kumar alias Raju vs. State of Uttaranchal (Now Uttarakhand) : (2008) 11 SCC 709** and **Manmeet Singh alias Goldie vs. State of Punjab : (2015) 7 SCC 167.**

7. Opposing the submission of learned counsel for appellants, learned A.G.A. appearing for State, has also relied on the above judgments to submit that in the present case Trial Court has convicted appellants by mentioning that they were part of the persons who committed dacoity. On the merit of case, he submits that PWs-1 and 2, who are eye witnesses, have supported prosecution case in its entirety and Trial Court has rightly convicted appellants.

8. Heard learned counsel for parties and perused the record.

9. Appellants are convicted under Sections 395 and 397 IPC which are reproduced as under:

> *"**395. Punishment for dacoity**.—Whoever commits dacoity shall be punished with imprisonment for life, or with 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."*

10. "Dacoity" is defined in Section 391 IPC, which is reproduced as under:

> *"**391. Dacoity**.—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".*

11. Supreme Court in **Raj Kumar alias Raju (supra)** has considered the issue in question in paras 21 and 35 of the judgment, which is relevant for present case and reproduced as under:

> *"21. It is thus clear that for recording conviction of an offence of robbery, there must be five or more persons. In absence of such finding, an accused cannot be convicted for an offence of dacoity. In a given case, however, it may happen that there may be five or more persons and the factum of five or more persons is either not disputed or is clearly established, but the court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not be able to convict them and order their acquittal observing that their identity is not established. In such case, conviction of less than five persons—or even one—can stand. But in absence of such finding, less than five persons cannot be convicted for an offence of dacoity."*
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> *"35. In the instant case, as observed earlier, there were six accused. Out of those six accused, two were acquitted by the trial court without recording a finding that though offence of dacoity was committed by six persons, identity of two accused could not be established. They were simply acquitted by the court. In our opinion, therefore, as per settled law, four persons could not be convicted for an offence of dacoity, being less than five which is an essential ingredient for commission of dacoity. Moreover, all of them were acquitted for an offence of criminal conspiracy punishable under Section 120B IPC as also for receiving stolen property in the commission of dacoity punishable under Section 412 IPC. The conviction of the appellant herein for an offence punishable under Section 396 IPC, therefore, cannot stand and must be set aside."*
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> (emphasis supplied)

12. The above judgment has been followed by Supreme Court in subsequent judgment in **Manmeet Singh alias Goldie (supra)** and relevant paras 32, 33 and 34 of the judgment are as under:

> *"**32.** With reference to the offence of dacoity under section 391, IPC in particular and the import of section 149, IPC, this Court in Raj Kumar vs. State of Uttaranchal 2008 (11) SCC 709 had propounded that in absence of a finding about the involvement of five or more persons, an accused cannot be convicted for such an offence. Their Lordships, however, clarified that in a given case it could happen that there might be five or more persons and the factum of their presence either is not disputed or is clearly established, but the Court may not be able to record a finding as to their identity resulting in their acquittal as a result thereof. It was held that in such a case, conviction of less than five persons or even one can stand, but in the absence of a finding about the presence or participation of five or more persons, less than five persons cannot be convicted for an offence of dacoity.*
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> *33. The above pronouncements do acknowledge the extension of the concept of collective culpability enshrined in Section 149 IPC in Section 396 IPC contemplating murder with dacoity. An assembly of five or more persons participating in the offence is thus the sine qua non for an offence under Section 396 IPC permitting conviction of any one or more members thereof even if others are acquitted for lack of their identity. In absence of such an assembly of five or more persons imbued with the common object of committing dacoity with murder, any member thereof cannot be convicted for the said offence irrespective of his/her individual act of murder unless independently and categorically charged for that offence.*
>
> *34. As adverted to hereinbefore above, the prosecution has completely failed in the instant case to either prove the participation*

of five or more persons in the commission of the offence or establish their identity. In that view of the matter having regard to the above principle of law as authoritatively laid down by this Court and in absence of a singular charge under Section 302 IPC against the appellant sans the assembly, we are of the unhesitant opinion that his conviction for dacoity with murder punishable under Section 396 IPC, in the facts and circumstances of the case, cannot be sustained in law. The attention of the courts below we understand had not been drawn to this vital and determinative facet of the case."

(emphasis supplied)

13. From the above mentioned judgments, it is clear that in case there is a conviction of less than five persons under Sections 395/ 397 IPC, Trial Court must arrive to a finding that there was involvement of five or more persons. In absence of such finding no conviction could be made out under aforesaid Sections. As rightly pointed out by the counsel for appellants that Trial Court has not recorded any such finding in this regard and it simply mentioned in the judgment that "three accused, facing trial before me, were also alongwith dacoits who committed dacoity in the house of Raj Kumar" and "prosecution has successfully established that the three accused committed dacoity in the house of Raj Kumar in the night of occurrence". In my opinion, the above mentioned finding is not sufficient to conclude that five or more persons were involved in the offence and not sufficient to convict appellants, who are three in numbers under the offence of dacoity.

14. In view of above, prosecution has completely failed, in the present case, either to prove the participation of five or more persons in commission of offence or establish their identity. Therefore, in my considered view the conviction and sentence of appellants is being

repugnant to letter and spirit of Sections 391 and 396 IPC, the same cannot be sustained.

15. In the result, appeal is allowed. Judgment and order dated 11.03.1983 passed by Sri D.C. Srivastava, Judge Special Court (Dacoity), Kanpur Dehat in Session Trial No. 467 of 1981 (State vs. Balbir and others), is hereby set aside. The appellants are acquitted of the charges and are hereby ordered to be set at liberty forthwith. The bail bonds stand discharged.

16. Lower Court record alongwith a copy of this judgment be sent back immediately to District Court concerned for compliance and further necessary action.

17. Before parting, this Court appreciates the assistance given by Sri Pranvesh, Advocate appearing for appellants, though he was initially hesitant to argue this appeal, being his first criminal appeal before this Court.

Order Date :- 09.07.2020
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(Saurabh Shyam Shamshery,J.)