

(1993) 03 BOM CK 0044

In the Bombay High Court

Case No : Criminal Appeal No. 125 of 1980

Gama Dhama Vasave and others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 17-03-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 27, 300, 395, 396, 397

Citation : (1993) 3 BomCR 9 : (1993) 95 BOMLR 753 : (1993) CriLJ 3613

Hon'ble Judges : N.P. Chapalgaonkar, J;H.H. Kantharia, J

Bench : Division Bench

Advocate : Manoj S. Mohite, for S.R. Chitnis, for the Appellant; S.D. Rupwate, Assistant Public Prosecutor, for the Respondent

Judgement

H.H. Kantharia, J.—By a judgment and order dated December 29, 1979, in Sessions Case No. 40 of 1979, the learned Sessions Judge, Dhule, convicted the appellants (original accused Nos. 1 and 10 to 14) for offences punishable under Sections 395 and 396 and accused Nos. 1, 10, 12 and 13 u/s 398 of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for seven years for an offence punishable u/s 396 of the Indian Penal Code. No separate sentence was inflicted on them for offences punishable under Sections 395 and 398 of the said Code.

2. Being aggrieved, the appellants filed this appeal.

3. The relevant facts giving rise to the appeal are as under :

Kawli is a small village in Dhule District. Adjoining to this village is the village Korai. Walji Vesta (P.W. 5) and his deceased brother Shidya Vesta were the residents of village Kawli. They owned field bearing Survey No. 273 in the boundary of village Korai. They were cultivating this land separately in two half portions divided between them, the northern portion being in charge of Walji and the southern one in charge of Shidya. The present appellants and eight others

who were arraigned with them as accused persons are the residents of a nearby village called Khadku.

During the end of November 1978, Walji and his brother Shidya had reaped a harvest of Tur crop in their respective fields. The crop was still lying in their thrashing floors. Therefore, the two brothers and their sons and servants were guarding the reaped crop. Accordingly, during the night intervening 27th and 28th November 1978, Walji and his sons Bhamsing (P.W.2) and Jaysing (P.W.9) were at their thrashing floor whereas Shidya, his sons Bharatsing (P.W.6), Magan and Mahadu were in their field. There were also others including Manohar (P.W.10), Koma (P.W.11) and Kisan (P.W.7)

Sometime after midnight, it is alleged, 14 accused persons, all armed with sticks, dharias, spears, axes, bows and arrows, went there with an intention to commit theft of Tur belonging to Walji and Shidya. Their movements were felt and accordingly Walji and his sons went in that direction when they were attacked.

Walji fell down on being assaulted and his sons ran away. There were shouts and cries of "chor, chor" and, therefore, others including deceased Shidya and his son Bharatsing also woke up. Shidya rushed towards the field of Walji with a flash light and a weapon and in the light of an electric bulb he recognised some of the thieves as the residents of village Khadku and others being the sons of one Chandya and he remarked accordingly. The thieves attacked him. He fell down. The thieves, on account of the resistance put up, could not collect any amount of Tur but while belabouring the boys snatched and took away the chaddars and quilts of some of them. They also took away the torch of Shidya. In the meanwhile, Walji's sons returned to the scene of offence along with 20 to 25 villagers but by then the thieves had run away. Injured Walji and Shidya were put in a bullock-cart for taking them to a dispensary at village Khapar but shortly thereafter Shidya passed away. His dead body was kept in the house and Walji was taken to Khapar and thereafter to police station at Akkalkuwa.

At the Akkalkuwa Police Station, an occurrence report was received by the police outpost, Khapar and in the morning at about 8.00 a.m. Police Sub-Inspector Pawar (P.W.14) recorded the complaint of Bhamsing in which names of only four thieves were mentioned, being appellants Nos. 3 to 6 (accused Nos. 11 to 14). Accordingly, an offence was registered and further investigation was carried out during which 14 persons were arrested. At the instance of some of the accused persons stolen articles as well as weapons of assault were recovered u/s 27 of the Indian Evidence Act. The injured prosecution witnesses were medically treated and post-mortem examination on the dead body of Shidya was also carried out. Incriminating articles were also sent to the Chemical Analyser. On completion of the investigation on, a charge-sheet was filed against 14 accused persons in the Court of the learned Judicial Magistrate, First Class, Taloda, on February 13, 1979 who committed the case to the Court of Session at Dhule on March 22, 1979.

4. The learned trial Judge framed the charges under Ss. 395, 396 and 398 of the Indian Penal Code against all the 14 accused persons who denied the allegations made against them. A specific contention was raised by accused No. 13 that he was falsely involved because he had a dispute with one Rajya Godya of village Navagaon arising over a transaction of batai of Rajya Godya's land and non-payment of the share by the said Rajya Godya and at that time accused Nos. 11, 12 and 14 were with him and, therefore, they were also falsely involved. Accused Nos. 11, 12 and 14 contended that they had accompanied accused No. 13 when he went to Navagaon to demand his share of the crop from the said Rajya Godya. The other accused had taken a plea of denial simpliciter. None adduced defence evidence.

5. On appreciation of the evidence adduced before him, the learned Sessions Judge came to the conclusion that the present appellants were the members of the gang of dacoits and dacoity took place in the fields of Walji and Shidya when murder of Shidya was committed. He accordingly found the appellants guilty of offences punishable under Ss. 395 and 396 of the Indian Penal Code and further held that accused Nos. 1, 10, 12 and 13 were also liable for punishment under S. 398 of the Indian Penal Code. He accordingly sentenced them, as stated above, by the impugned judgment and order. The rest of the accused were acquitted of the charges levelled against them.

6. Now, although the prosecution examined number of witnesses who were present at the threshing floors of Walji and Shidya, the relevant evidence is only of four witnesses viz. Bhamsing (PW 2), Walji (PW 5), Bharatsing (PW 6) and Jaysing (PW 9). As a matter of fact, Bhamsing cannot be said to be an eye-witness to the incident but his evidence is relevant to corroborate the oral testimony of Walji who had stated soon after the incident about the involvement of accused Nos. 11, 12, 13 and 14. Therefore, we shall refer to his evidence. He deposed that at the relevant time some of the thieves caught hold of his father Walji and started beating him with sticks. He himself was hit with a stone. He and his brother Jaysing ran away out of fear. His evidence also shows that the thieves had beaten up Shidya with sticks. On his return with other villagers, his father Walji and uncle Shidya were put in a bullock-cart to take them to dispensary when his father had said that he had recognised Nos. 11, 12, 13 and 14 and named them. This witness candidly stated that he himself had not recognised any of the thieves.

7. The evidence of Walji shows that at the relevant time, during the night, he noticed movements of two persons coming from the side of Gorji Irya's field which he saw in the light of electric lamp in the north-east corner of Dhaku Daji's field. Thereupon, he woke up his sons and told them whether those two persons were thieves. Thereafter, he and his sons started going in the direction from where the movements were noticed. They did not see anybody and, therefore, started coming back to his field. Suddenly those persons (thieves) came out from the cotton crop of Gorji and raised whooping cries. They were 10

to 12 in number and were armed with sticks and something like dharias. He recognised accused No. 14 and also accused Nos. 11, 12 and 13 who had surrounded him. The thieves belaboured him and he fell down, he further deposed. He had with him bow and arrows which also fell down. His evidence thus involves accused Nos. 11 to 14.

8. The evidence of Bharatsing shows that, at about 1.00 a.m. on the night of the incident, when the shouts and cries were heard coming from the side of the field of his uncle Walji, his father Shidya asked him and his brother to be on the alert saying that probably there were thieves. He and others also noticed some movements and saw about 10 to 13 persons. He recognised accused No. 1 and accused No. 10 being the members of that gang. His evidence then shows that his father Shidya went towards the heap of husk with a flash light and said, addressing to those persons, "I know you, you are Chandya's sons". At that time accused No. 10 shot an arrow at his father which struck him on the hand near the elbow and accused No. 1 struck on the neck of his father with a spear. According to him, the other thieves were armed with sticks. His father fell down. His evidence shows the participation by accused Nos. 1 and 10 in the incident.

9. Jaysing deposed that, some time past midnight, his father Walji said, "Wake up, thieves have come". He and others went up to the common bandh between his field and the field of Gorji Irya on the eastern side but did not notice anybody. They, therefore, turned to come back to their mandav and when they had hardly covered some steps, suddenly cries and shouts were raised by the thieves who rushed at them. Jahagya (accused No. 14) gave stick blows to his father on the hand on account of which the bow and arrows fell down. Accused No. 14 then firmly held his father and accused Nos. 11, 12 and 13 surrounded him. He deposed that there were about 8 to 10 persons out of which Partya (accused No. 13) and Genya (accused No. 11) were armed with dharias and others had carried sticks and stumps with them. He thus identified accused Nos. 11 to 14 being the participants in the incident.

10. These witnesses who were subjected to fairly lengthy cross-examination could not be shaken in any manner and, therefore, we have absolutely no hesitation to accept their testimony that the present appellants, being accused Nos. 1 and 10 to 14 were the participants in the incident of dacoity. The presence of these witnesses at the place of the incident and at the relevant time was quite natural as they had gone there to take care of and protect their property viz. Tur.

March 17, 1993

11. Therefore, the learned Sessions Judge was not wrong in recording a conviction of the appellants for an offence of dacoity punishable under S. 395. However, he also recorded a conviction for an offence of dacoity with murder punishable under S. 396 which, in our view, in the facts and circumstances of this case, was not quite correct.

12. Section 396 of the Indian Penal Code provides that if any one of five or more persons, who are conjointly committing dacoity, every one of those persons shall be punished with death or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. In other words, for an offence punishable under S. 396, the prosecution has to prove three elements : (i) the commission of dacoity, (ii) that one of the accused committed murder, and (iii) that the murder was committed during the commission of dacoity. It is already held by us that the appellants did commit an offence of dacoity. The crucial question is whether one of the dacoits committed murder of Shidya. Mr. Rupwate, learned Additional Public Prosecutor, relying upon a judgment of a single Judge of the Allahabad High Court in case of Ram Singh v. State, 1971 All LJ 833 , submitted that the word "murder" used in Section 396 does not mean "murder" as defined in Section 300 and the mere fact that a death was caused during the commission of dacoity by one of the dacoits is sufficient to warrant a conviction of all the accused persons u/s 396. Before the Allahabad High Court, an argument was advanced on behalf of the accused-appellant that the words used in Section 396 of the Indian Penal Code are "commits murder" and, therefore, in order to make out a case u/s 396, the prosecution must prove that the act of causing death amounted to an offence of murder as defined in Section 300 of the said Code. The learned Judge of the Allahabad High Court in para 17 of his judgment observed : "I have given my careful consideration to the arguments raised but I fail to find any force therein. In the first instance I do not feel inclined to accept that the word "murder" used in Section 396, I.P.C. means "murder" as defined in Section 300, I.P.C. Dr. Sir Hari Singh Gaur in his book "Penal Law of India" (6th Edition) Vol., III, page 1802 said : "To begin with, any death caused by a dacoit in the course of dacoity would be murder for the exceptions which mitigate that crime are obviously inapplicable to an act committed by men who embark on a crime so atrocious as dacoity. Proof of murder would consequently consist of the proof of committing culpable homicide." With respect to the learned Judge of the Allahabad High Court, we are unable to persuade ourselves to agree with the view taken by him because if the Legislature intended to punish all the persons taking part in the commission of dacoity for a mere death caused by one of the dacoits, the Legislature would have used the words "commits death" in Section 396 and not the words "commits murder". The word "murder" used in Section 396 will have to be, therefore, construed, interpreted and understood as "murder" as one understands the same in Section 300. In other words, merely because "death" was caused of a victim of the offence of dacoity by one of the dacoits would not render all the offenders liable for punishment u/s 396 unless the said act of culpable homicide amounted to "murder" as defined in Section 300. Therefore, we find no force in the argument of Mr. Rupwate that the mere fact that death of Shidya was caused while committing dacoity in this case, all the offenders will be liable for punishment u/s 396. In this connection, we may usefully quoted the observations made by a Special Bench of three Judges of the Calcutta High Court in case of Pran Krishna Chakravarty and Others Vs. Emperor, , that "the intention

of the dacoits was not to kill but only to disable people from offering resistance either by their acts or by their shouts and as such they were guilty not u/s 396, but only u/s 395". In the case before the Special Bench of the Calcutta High Court, the evidence was that each of the gunners had a light man attached to him to aid him in his operations. It was contended on behalf of the Crown (State) that this arrangement was made in order that the shooting might be deliberately made at a vital part of the victim. The learned Judges of the Calcutta High Court were unable to accept the said suggestion because, according to them, none was shot on the upper part of the body and, on the other hand, such shots as were inflicted were directed towards a comparatively lower part and the flash of the torchlight was intended to spot out the victim and for no other purpose. Their Lordships of the Calcutta High Court held, "In the circumstances to which we have referred we are unable to hold that the man who fired the gun knew that the act was so imminently dangerous that it must in all probability have caused death or that the act would cause such bodily injury as was likely to cause death, element which are contemplated by Cl. 4 of Section 300, I.P.C. In our opinion, therefore, the act did not amount to "murder" within the meaning of the Indian Penal Code. The result is that the conviction which the learned Commissioners have recorded under Sub-section 395 and 396, I.P.C., cannot be sustained and such of the persons who may be found guilty of the offence of dacoity will have to be convicted u/s 395, I.P.C. instead." With respect to the three Hon"ble Judges of the Calcutta High Court, we agree with the view taken by them and hold that in order to secure a conviction u/s 396, the prosecution should prove "murder" within the meaning of Section 300 and not merely a "death" of the victim of the offence of dacoity.

13. Bearing in mind this position in law, let us see whether in the instant case, the prosecution adduced satisfactory medical evidence from which it can be held that murder of Shidya was committed. Dr. Ratanlal Jayswal (PW 3) had carried out post-mortem examination on the dead body of Shidya Vesta Vasave at the Cottage Hospital, Taloda. On external examination, he observed the following injuries noted in Column 17 of the post-mortem report (Exh. 23) :

- "1. Incised wound 1/2" x 1/4" bone deep on the left cheek.
2. Abraded contusion, size 2" x 1" on the left side of the chest above the nipple.
3. A penetrating wound 1/2" x 1/4" muscle deep i.e. 1 1/2" in depth, on the posterior aspect of the right arm.
4. Abraded contusion 1" x 1" on the back, left side.
5. Contused lacerated wound 2" x 1/2", muscle deep in the parietal (scalp) region in the midline.
6. Abraded contusion 1" x 1" on the left arm, anteriorly.
7. On palpation a boney cripitation on the left cheek showing the fracture of the left ramus of the mandible. On exploration communitied fracture of the left ramus

of the mandible was detected."

The injuries were ante mortem.

The internal examination revealed that the right and left temporal muscles were found contused and nothing particular was observed in the scalp. In the region of brain bilateral sub-dural haematoma extending around the brain and over the brain stem was found. The brain was congested and swollen.

The cause of death, in his opinion, was coma following intracranial haemorrhage.

He further deposed that the internal injury in the left and right temporal region of the head was corresponding with the external injuries Nos. 5 and 7. Injury at Serial No. 1 being an incised wound was, in his opinion, caused by some sharp edged object and injury No. 3 must have been caused by some object having a sharp point. Injuries Nos. 2, 4, 5, 6 and 7 could be caused by some hard and blunt object, he further opined.

14. Now, Dr. Ratanlal Jayswal does not depose as to which injury, that might have been caused by one of the dacoits, was responsible for intracranial haemorrhage. Further, the evidence of the eye-witnesses does not show that a particular injury which might have caused intracranial haemorrhage was inflicted by one of the appellants. It is common knowledge that intracranial haemorrhage could be caused on account of a fall. The evidence in this case shows that samples of the viscera of the deceased were taken and sent to the Assistant Chemical Analyser whose report (Exh. 25) further shows that the viscera and a piece of intestine with its contents and a piece of liver, spleen and kidney of Shidya Vesta Vasave indicated positive detection of ethyl alcohol to the extent of 0.156% w/w and 0.126% w/w respectively. From this, it is crystal clear that at the time of the incident, the deceased was drunk and was under the influence of liquor. A possibility, therefore, cannot be ruled out that the deceased might have fallen down, being in drunken state of mind, and received the head injury on account of which there was intracranial haemorrhage. A person in such an intoxicated state of mind, while running after thieves, may fall down with such force as to receive the head injury of the type which deceased Shidya received here resulting into intracranial haemorrhage which was responsible for his death. Be that as it may, Dr. Ratanlal Jayswal did not state in his evidence that any of the seven external injuries received by the deceased either singly or jointly was sufficient in the ordinary course of nature to cause death. Further, the evidence does not show that any of the appellants had the intention to cause death of Shidya or such bodily injury which would result into his death or that any one of them knew that the injury was so imminently dangerous that it must in all probability cause the death of Shidya or was likely to cause his death. The elements contemplated in Section 300 of the Indian Penal Code, therefore, were not established by the prosecution in this particular case. It may be that with a view to meet the resistance put up by Shidya and others, the dacoits did inflict some injuries on Shidya but that by itself would not mean that it was done with

an intention to cause his death or to cause such bodily injury that was likely to cause his death. The facts and circumstances obtaining in this case do not warrant such a conclusion. That being so, we are unable to hold that the prosecution here proved "murder" as contemplated within the meaning of Section 300 of the Indian Penal Code. The appellants, therefore, could not have been convicted by the learned Sessions Judge for an offence of dacoity with murder punishable u/s 396.

15. The learned Sessions Judge then committed an error of convicting accused Nos. 1, 10, 12 and 13 for an offence punishable u/s 398. Section 398 envisages that if, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which the offender shall be punished shall not be less than 7 years. This is not a case of attempting to commit either dacoity or robbery. We have already held that this is a case of concluded offence of dacoity. Therefore, instead of recording a conviction u/s 398, the learned Sessions Judge should have well advised himself to refer to and rely upon Section 397 which provides for minimum sentence of 7 years 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 causes death or grievous hurt to any person. Thus, at the time of committing dacoity, if any of the appellants had used deadly weapon or had caused grievous hurt to any person or attempted to cause death or grievous hurt to any person, he would have been liable to be sentenced for not less than 7 years. It is no doubt true that injury No. 7, stated above, sustained by deceased Shidya was a fracture and, therefore, a grievous hurt but the evidence does not show that any of the appellants was responsible for causing the said injury. We have also on the record the evidence of Dr. Laxman Patil (PW 4) which shows that on November 30, 1978, he had medically examined five injured persons sent to him by Akkalkuwa Police Station. Magan Shidya Vasave complained to him of pain in the left arm but there was no external injury sustained by him. Bhamsing Walji Vasave had a swelling over the left forearm, 2" x 1 1/2", elongated in shape, margins defused which was a simple injury. Manohar Kathu Valvi had (i) abrasions, two in number, minor, situated on the left cheek at the angle of the mandible, (ii) abrasion, minor, situated on the dorsum of the left fore-hand, mid-way, and (iii) swelling, size 2 cms. x 1 cm. situated over the right hand on the dorsal aspect, margin defused. He also complained of pain in the left leg but no external injury was seen. Kisan Vanji Vasave had no external injury but complained of pain in the back and in the right thigh. Mahadu Shidya Vasave had (i) abrasion, 1/2 cm. x 1/2 cm. over the dorsal aspect of the right fore-hand, 4 1/2" proximally at the wrist joint, scap formation was seen, (ii) swelling over right forearm, dorsal lateral aspect, no discolouration was seen and the margins of the swelling had defused, and (iii) abrasion 1/2 cm. x 1/2 cm. on the right side on the mid scapular region, scap formation was seen. Walji Vesta Vasave had suffered three injuries (i) contused lacerated wound, 4 1/2 cm. x 1/2 cm. x 1/4 cm. situated on the head on the left side, 10 cms. superior to the upper attachment of the left ear, legs not even, (ii)

abrasion, 1 cm. x 1 cm. situated over the dorsum at the base of the right index finger, and (iii) abrasion 2 cms. x 1 cm. situated over the back on the upper area of the left scapular region. Dr. Patil has not deposed that any of the injuries sustained by any of the above-mentioned persons was a grievous hurt. In other words, none of the appellants had caused grievous hurt to any person or attempted to cause death or attempted to cause grievous hurt to any one of them. Further, there is no evidence for conclusive proof that at the time of committing dacoity any of the appellants had used deadly weapon. Bharatsing deposed that accused No. 1 had used spear. However, we are not inclined to accept his uncorroborated testimony on this aspect of the matter. The learned Sessions Judge held that accused No. 10 has used a spear but the evidence of Bharatsing shows that accused No. 10 had not used spear but bow and arrow. There is nothing on the record to show that the bow and arrow used by accused No. 10 was a deadly weapon. The deadly weapon about which the prosecution speaks must be a deadly weapon in reality and not of imagination or conjecture. The learned trial Judge held that accused Nos. 12 and 13 had dharias with them. There is no evidence that accused No. 12 had used dharia but the evidence of Jaysing shows that accused No. 13, who had a dharia with him, did not use the same but only the stick portion of it. The long and short of all this evidence is that none of the appellants and much less accused Nos. 1, 10, 12 and 13 had used deadly weapons. Therefore, they could also not be convicted for an offence punishable u/s 397.

16. It may be pointed out here that the evidence of panch witness Shaha Savar Ahmed (PW 13) read with that of the investigating officer, Mahendrasing Pawar (PW 14) shows that at the instance of some of the appellants some articles of stolen goods such as chaddar and quilts etc. and some weapons of assault were recovered u/s 27 of the Indian Evidence Act. However, we are slow in accepting this evidence for the simple reason that Shaha Savar Ahmed admitted in clear terms that before he entered into the witness box in this case, he had acted five times earlier as a panch witness in the Sessions Court. Investigating Officer Mahendrasing Pawar also admitted in the cross-examination that this panch witness had appeared as a witness in 3 or 4 cases as a panch. Panch witness Shaha Savar Ahmed was, therefore, a professional panch readily available to the police and it was unfair on the part of the investigating officer to have made use of him as a panch witness in this serious case.

17. Thus, re-appreciating and reviewing the entire relevant evidence, in our judgment, the prosecution here brought home the guilt to the appellants for an offence of dacoity simpliciter punishable u/s 395 of the Indian Penal Code. Their conviction for an offence of dacoity punishable u/s 395 of the Indian Penal Code is thus correct and is confirmed. However, they are acquitted of an offence of dacoity with murder punishable u/s 396 of the Indian Penal Code and accused Nos. 1, 10, 12 and 13 are acquitted of an offence of attempt to commit robbery or dacoity armed with deadly weapon punishable u/s 398 of the Indian Penal Code. The sentence of seven years rigorous imprisonment inflicted on the

appellants u/s 396 of the Indian Penal Code is also set aside. We are informed that the appellants have already remained in jail for 4 months while in custody. In view of the fact that already more than 14 years have passed by after the incident that took place on November 28, 1978 and further in view of the fact that the property stolen by them was quite insignificant, being chaddars and quilts etc. of hardly any value, we are not inclined to send them to jail again by inflicting more sentence than what they have so far undergone.

18. In the result, the appeal is partly allowed. The appellants are acquitted of offence punishable u/s 396 of the Indian Penal Code. And accused Nos. 1, 10, 12 and 13 are also acquitted of an offence punishable u/s 398 of the Indian Penal Code. The sentence of rigorous imprisonment of seven years inflicted upon the appellants u/s 396 of the Indian Penal Code is set aside. We confirm their conviction for an offence of dacoity simpliciter punishable u/s 395 of the Indian Penal Code and sentence each of them to rigorous imprisonment for four months. They have already remained in jail for 4 months for which period they are entitled to set off u/s 428 of the Criminal Procedure Code and hence we order that their bail bonds shall stand cancelled.

19. Appeal partly allowed.