

(1985) 01 PAT CK 0001
In the Patna High Court
Case No : Criminal Appeal No. 360 of 1979

Kanhaiya Nonia and Others	Vs	APPELLANT
The State of Bihar		RESPONDENT

Date of Decision : 05-01-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 218, 219, 220, 221, 222
Penal Code, 1860 (IPC) — Section 302, 34, 390, 391, 395

Citation : (1985) PLJR 492

Hon'ble Judges : S.H.S. Abidi, J; P.S. Mishra, J

Bench : Division Bench

Advocate : Nagedra Rai, R.K. Shahi and Ramakant Sharma, for the Appellant;
G.P. Jaiswal for the State, for the Respondent

Judgement

P.S. Mishra, J.—The appellants have been convicted by the Sessions Judge of Rohtas, Sasaram, u/s 396 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life. There were five more accused, who were tried along with the appellants but they have been acquitted. On the night of 26/27.6.1977 several dacoits entered into the house of Ram Naresh Sah in village Kusumhra Tola, P.S. Nasriganj, district Rohtas and looted away the valuables. Amongst those who committed dacoity, the appellants and five others were identified and according to the first information report, appellant No. 1 Kanhaiya Nonia killed Ram Naresh Sah. The first information report was lodged by Jai Sah (P.W. 8) the victim's uncle. He is not an eye witness of the occurrence except that he heard noise and came from the Baithka, where he was sleeping and saw 10-12 dacoits Seeing away from north to south from his house.

2. After investigation of the case, the police submitted charge sheet u/s 396 of the Indian Penal Code. After cognizance and commitment, the appellants and other accused persons were tried before the Sessions Judge of Rohtas, Sasaram. They have been found guilty of the offence u/s 396 of the Indian Penal Code and they have been, accordingly, convicted and sentenced to undergo rigorous

imprisonment for life.

3. The appellants and other accused persons in their defence in course of their trial maintained that they have been falsely implicated and according to them the fact and circumstances of the case only indicated that Ram Naresh Sah had not been killed in the house in the manner as alleged and the accused persons have been falsely implicated. They also maintained that there is no independent witness of the occurrence and the prosecution case suffers from legal infirmities.

4. The prosecution examined fourteen witnesses. Of them P.W. 1 Mahendra Sah (the victim's brother) Lallu Sah (P.W. 2) (another brother of the deceased) Maheshwari Devi (P.W. 3) (Lallu Sah's wife) Taramani Devi (P.W. 4) (the victim's sister) and Munshi Sah (P.W. 6) (a nephew of the victim) are the eye witnesses. Besides them, Dhanbanti Devi (P.W. 5) and Anarkali (P.W. 7) (the other two inmates of the house of the victim) were tendered for evidence Besides the informant (P.W. 8), Parman Sah (P.W. 9), the victim's father has also deposed, but he is not an eye witness and has given only hear-say evidence.

5. Dr. Akhilesh Chandra (P.W. 10) who was posted at Sasaram Hospital as Deputy Superintendent on 28.6.1977 held post mortem examination over the dead body of Ram Naresh Sah. He found ante-mortem injury on the person of the deceased and, accordingly, opined that he had died due to the injuries caused to him. The evidence of the eye witnesses shows that a dacoity was committed in the house on the night of the alleged date of occurrence. P.W. 1 has stated that he was sleeping in the Dhawa in the night. The dacoits scaled over the thatch roof and came in the Angan. They also opened the north exit door to facilitate entry of other dacoits. He got up on hearing unusual sounds. The dacoits however asked him to remain silent. He has stated that the dacoits looted away the ornaments and other articles of the house and went away. Thereafter, he has deposed that Kanhaiya Nonia and two other dacoits, Arjun Nonia (appellant No. 2) and Dasai Nonia (appellant No. 3) came again, Kanhaiya Nonia had some talks with Ram Naresh Sah and shot at him causing injuries. Ram Naresh Sah died to the said injuries. Lallu Sah (P.W. 2) has stated that he was sleeping in the house when the dacoits came into the house; they slapped him on his head; he saw four-five dacoits in the court yard and two dacoits standing near him. Among the two dacoits he identified Kanhaiya Nonia (appellant No. 1) and Arjun Nonia (appellant No. 2), he also identified Parshuram Koiri who has since been acquitted. He has stated that Kanhaiya Nonia had a gun and Arjun had a farsa. He has further said that the dacoits had looted away valuables from his house. He has described the manner of dacoity in some details. After the dacoits went out of the house, according to him Kanhaiya Nonia, Arjun Nonia and Parshuram Koiri again returned and Kanhaiya shot, at Ram Naresh Sah in Dhaba. Both P.W. 1 and P.W. 2 have laid that Ram Naresh Sah cried out that Kanhaiya Nonia, Arjun Nonia and Parshuram Koiri had killed him. P.W. 3, Maheshwari Devi) has also stated that two dacoits had entered into her room. She identified Kanhaiya Nonia, who was carrying gun. She had further stated that the dacoits carried away boxes etc. and

one tin of Ghee. According to her deposition also, three of them again returned back and Kanhaiya Nonia shot at Ram Naresh Sah, who fell down injured crying that Dasain, Arjun and Kanhaiya had killed him. P.W. 4, Taramani Devi has deposed that when dacoits came into the house, they chided her and demanded key from her. She handed over the key to them and when they threatened her, she told them that she had kept valuables in the Pachhivari Kotha. She baa also deposed that after committing the dacoity, when the dacoits went out of the house, three of them returned. She identified them as Kanhaiya, Dasain and Arjun. Kanhaiya shot at her brother and her brother died due to the said injuries. She has also stated that the dacoits had taken Balis from her ears and a ring from her nose. P.W. 6, Munshi Sah has similarly deposed and has claimed to have indentified Kanhaiya Nonia with a gun and Arjun Nonia and Dasain Nonia. He has stated that Ram Naresh Sah was sitting on a cot. He was shot from a close range of one cubit by one of the dacoits. He has further stated that Kanhaiya Nonia had uttered that they had come to kill Ram Naresh" Sah.

6. The first informant, as I have already noticed, is not an eye witness, but he arrived soon after the dacoits fled away and found Ram Naresh Sah lying dead and the house in shambles after the loot by the dacoits.

7. Mr. Balbhadra Prasad Singh, learned counsel, appearing for the appellants has questioned the veracity of the prosecution witnesses, particularly the eye witnesses only on two grounds, namely, (1) there is no independent witness of the dacoity. All the eye witnesses are family members. They have a common animus and common cause to serve. Their evidence should not be relied upon, and (2) the night, in which the dacoity took place, was a dark night. These witnesses were sleeping in different parts of the house when the dacoits allegedly arrived. They have not said how they could identify the dacoits in the dark night except deposing in court that the dacoits were using torches and in the light of their torches they identified them. A story about a lantern has been introduced in the deposition of some of the witnesses, but no lantern has been produced and the evidence in this regard is not trustworthy.

8. True, the witnesses are all related to each other and are close relations of the victim who was killed in the night of 26/27.6.1977. But who else could be found in the house, except the members of the family during the late night when the dacoits forced their entry 1 They alone could be there and could have seen the occurrence. Their evidence can not be rejected merely because no independent witness has supported their statements. The caution which is applied to the evidence of the close relations, of course, shall require a close scrutiny of the evidence, but there is nothing in their testimony, upon which it can be said that they had any reason to falsely allege that decoity took place in their house and Kanhaiya Nonia fired a gun shot at Ram Naresh Sah and killed him. The evidence about the identification is consistent. If the witnesses, who are rustic villagers, had not themselves gone to the police with the disclosure that they had identified the dacoits in the light of their torches which they were using and/or in the light

of a lantern they had identified the dacoits that cannot be held to be sufficient for rejecting their testimony as to the identification of the dacoits. The night was dark. The dacoits could not make their way without having some means of light with them. The witnesses, when asked in the cross-examination, have said that the dacoits were carrying torches in their hands and they saw their faces in the torch light flashed by them. P.W. 6 in particular, when asked in the cross-examination, has said that the dacoits were carrying torches and they were shifting the light from one face to another and while doing so the light fell on the face of the dacoits. He has deposed that he had identified the dacoits in such torch light besides the light of the lantern burning in the house.

9. I am not inclined to disbelieve the prosecution case on the question of identification of the appellants merely because there has been no statement before the police about identifying the dacoits in the torch light and/or in the light of the lantern burning in the house or in that matter merely because the lantern was not seized by the police and was not produced as material exhibit in the trial court. There is nothing else to doubt the testimony of the prosecution witnesses. It is also not possible to accept Mr. Singh's contention that only three appellants, who are said to have been identified can not complete the minimum number of five to make their offence punishable u/s 395 or 396 of the Indian Penal Code. The prosecution has been able to establish on the basis of the evidence of the witnesses, referred to above by me, that the appellants along with several other persons committed dacoity in the house of Ram Naresh Sah.

10. A question, however, has arisen on account of the narration of the events taking place in the house of Ram Naresh Sah. The eye witnesses have deposed that after committing dacoity the dacoits went away. After they went away, three of them returned, namely, the appellants (except P.W. 2) who has named Kanhaiya Nonia and Arjun Nonia and not Dasai, but has named Parshuram Koiri). These three went straight to Ram Naresh Sah. Kanhaiya Nonia said that they had come to kill him and fired at him causing injury in this stomach. Ram Naresh Sah died due to the said injury.

11. Mr. Balbhadra Prasad Singh, learned counsel appearing for the appellants, has submitted that the offence of killing is not connected with the offence of dacoity, which stood completed when the dacoits after committing the dacoity left the victim's house. If three persons thereafter re-entered the house and went to Ram Naresh Sah to kill, they did so independently and the offence of assault committed by them was not to facilitate the commission of theft and the offence of killing was not for that end. He has drawn our attention to the express language of the law in section 396 of the Indian Penal Code which says.

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 imprisonment for life, or rigorous imprisonment for a term which may extend to ten years and shall be liable to fine

He has pointed out that in conjointly committing dacoity, if murder is committed in so committing dacoity, then only section 396 of the Indian Penal Code shall be attracted and not otherwise. He has also drawn our attention to sections 395, 391 and 390 of the Indian Penal Code to show that for constituting dacoity five or more persons conjointly would either be shown to have attempted to commit a robbery or to have committed robbery and to constitute robbery, it must be shown that in order to commit either theft or extortion or in committing theft or in carrying away or attempting to carry away the property, the offender for that end voluntarily caused or attempted to cause to any person death or hurt or wrongful restraints. In other words Mr. Singh has contended that the two offences disclosed in the evidence of the prosecution witnesses are distinct and separable namely the offence of dacoity and the offence of murder. He has, however, fairly accepted the legal position that if the appellants along with others, their number exceeding five forcibly entered into a dwelling house and committed theft under the threat of assault offence of dacoity is made out. But once that part of the case is separated from the re-entry of the three appellants, as alleged by the prosecution, into the house and Kanhaiya Nonia killing Ram Naresh Sah, according to Mr. Singh, murder was not caused in committing or in attempting to commit dacoity. He has further developed his submissions to contend before us that the charge u/s 396 of the Indian Penal Code must fail on these facts and the only charge, for which these appellants, if at all, can be convicted is one u/s 395 of the Indian Penal Code. He has further submitted that since the appellants have not been tried for the charge u/s 302 of the Indian Penal Code, their conviction u/s 396 of the Indian Penal Code cannot be converted into one u/s 302 of the Indian Penal Code as the charge u/s 302 is not a minor charge to the charge u/s 396 of the Indian Penal Code. This, according to Mr. Singh, will, therefore, confine the case only to the charge u/s 395 "of the Indian Penal Code a charge minor to the charge u/s 396 of the Indian Penal Code.

12. Mr. Jaiswal, learned counsel for the State, on the other hand, has submitted that it is not possible to separate the two acts as Mr. Singh has suggested, because the dacoity was still going on when the appellants returned to accomplish the killing of Ram Naresh Sah. He has also submitted that in any view of the charge u/s 396 of the Indian Penal Code can be converted to 302 of the Indian Penal Code and Kanhaiya Nonia cannot escape the charge u/s 302 of the Indian Penal Code and the other two appellants, namely, Arjun Nonia and Dasain Nonia cannot escape the charge u/s 302/34 of the Indian Penal Code.

13. It is not possible, however, to accept the contention of Mr. Jaiswal that the two transactions, namely, of committing the dacoity and committing the murder are so interlinked that they constitute a common transaction. The two transactions are apparently distinguishable. In the former, the dacoits came, committed certain overt acts and accomplished the theft by removing the valuables from the house of Ram Naresh Sah. They did use some force in course of the commission of dacoity. But after the dacoity was accomplished, according to the evidence of the prosecution, they went out and thereafter only three of

them namely the appellants returned and Kanhaiya killed Ram Naresh Sah. It is difficult to hold that the dacoits had any pre concert or knowledge of Kanhaiya Nonia and the other appellant re-entering the house and committing the murder. While the first act of dacoity was completed before Kanhaiya Nonia and the other appellants decided to re-enter, which fact is inferable from the obvious circumstance of the appellants together re-entering the house, killing by Kanhaiya Nonia, was an act independent of the dacoity committed in the house of Ram Naresh Sah. There had been no act of dacoity either going on when Kanhaiya Nonia killed Ram Naresh Sah or done subsequently by either the appellants or any other dacoit.

14. In *Madhusingh Kaiharta and Others Vs. Emperor*, a special Bench of the Calcutta High Court considered, whether an accused committing robbery charged u/s 396 having been found to have not committed the murder to facilitate the dacoity, can be convicted u/s 302 of the Indian Penal Code or not. Rankin C. 1, speaking for the court has said.

..It is quite clear that the charge under S. 302 is not a minor charge to the charge under S. 396. The charge under S. 396 is a charge under which a person who has not committed murder is liable to be held to commit murder because he is a member of the gang of dacoits in the course of which some body else committed murder.....

In *Madhu Singh Kaithartal's* case, there were live accused who were charged u/s 396 of the Indian Penal Code. The prosecution case was that the accused persons had met on the day before the occurrence and at a time previous to that to arrange the murder for the purpose of robbery. There being very little evidence except the confession of a accused, the jury came to a clear finding that the evidence of conspiracy on the previous occasion was insufficient and they acquitted all the accused persons on the charge of conspiracy. They also found that it was not made out that as many as five persons had taken part in the occurrence at all, the result being that 395 of the Indian Penal Code was entirely inapplicable to the case. Considering the substantive question, they found evidence of murder, yet because (according to the Special Bench) the charge u/s 302 is not minor to that u/s 396 of the Indian Penal Code, the court directed for a re-trial upon a substantive charge u/s 302 of the Indian Penal Code. The Supreme court in *Corporation of Calcutta Vs. Mulchand Agarwalla*, in its majority judgment has considered the question of law as to the framing of the charge, trial of the accused and the scope of the provisions under which a person charged for a minor offence cannot be convicted for a major offence as contained in the Code of Criminal Procedure, 1898 now under the Code of the Criminal Procedure 1973 as contained in section 218 to 224, particularly section 222) and has said :

The omission to frame a charge is a grave defect and should be vigilantly guarded against. In some cases, it may be so serious that by itself it would vitiate a trial and render it illegal, prejudice to the accused being taken for

granted. In the main, the provisions of section 535 would apply to cases of inadvantage to frame a charge induced by the belief that the matter on record is sufficient to warrant the conviction for a particular offence without express specifications and where the facts proved by the prosecution constitute a separate and distinct offence but closely relevant to and springing out the same set of facts connected with the one charged.

In another case AIR 1976 400 (SC) on facts similar to one before us, the Supreme Court has said.

There is, therefore, considerable force in the contention urged on behalf of the appellant before us that, in the facts and circumstances of the present case, the transaction of dacoity had ended the moment the dacoits took to their heels and another and a separate transaction took place when the appellant shot at Mandal while crossing the ditch of the Pipra Farm and that, therefore, the appellant could not be convicted of having committed the offence u/s 396, Indian Penal Code, Learned counsel for the appellant strenuously contended that the conviction of the appellant u/s 396, Indian Penal Code should be quashed and that in view of the concurrent findings of fact recorded by both the courts below conviction should be altered to one u/s 395, Indian Penal Code.

Proceeding further, however, the court has said,

It is however, unnecessary to do so because in the facts and circumstances of the present case the appellant is liable to be convicted of the offence u/s 302, Indian Penal Code without anything more. The charge u/s 396, Indian Penal Code comprised of two ingredients (1) the commission of the dacoity, and (2) the commission of the murder in so committing the dacoity. The first ingredient was proved without any doubt and was not challenged by the learned counsel for the appellant. The second ingredient also was proved in any event as regards the commission of the murder because the attention of the accused was focussed not only on the commission of the offence while committing dacoity but also on the individual part which he took in the commission of that murder. So far as he was concerned, he knew from the charge which was framed against him that he was sought to be made responsible not only for the commission of the dacoity but also for the commission of the murder in committing such dacoity. The evidence which was led on behalf of the prosecution specifically implicated him and he was named by prosecution witnesses as the person who shot at Mandal while crossing the ditch of the Pipra Farm. His examination u/s 342 of the Criminal Procedure Code also brought out that point specifically against him and he was questioned in that behalf.....

15. It seems, therefore, that in view of the law laid down by the Supreme Court that the facts of this case should be carefully considered in order to decide whether the appellants were made aware of the charge of murder and the charge although included in the charge u/s 396 of the Indian Penal Code caused no prejudice to them in their defence. While considering the question in such a

situation whether the accused should be held guilty or not, it is necessary to bear in mind that every reasonable presumption must be made in favour of the accused; he must be given the benefit of every reasonable doubt; the same broad principles of justice and fair play must be applied when determining that matter of prejudice as attached to guilt. The test, therefore will be :--

Whether the accused had a fair trial, whether he knew for what he was tried for, whether charges were explained to him fairly and clearly and whether he was given full and fair chance to defend himself.

If all these elements are there and no prejudice is shown there shall be no illegality in converting the conviction from one u/s 396 to the Indian Penal Code.

16. Back to the facts of the instant case, it is noticeable that the appellants were charged in the following words,

You all committed dacoity and that in the commissin of the said dacoity murder of Ram Naresh Sah was committed by Kanhaiya Nonia one of the member of dacoits conjointly committing dacoity.

The charge is straight and clear enough so far Kanhaiya Nonia is concerned that he committed murder of Ram Naresh Sah while committing the dacoity along with other appellants and other co-accused, who have been acquitted by the learned Sessions Judge. Those who committed dacoity along with Kanhaiya Nonia, but since on the facts proved the murder was not committed in so conjointly committing the dacoity, may suggest that in their case a failure of Justice may take place, if they are convicted without trial u/s 302/34 or 302/149 of the Indian Penal Code. Kanhaiya Nonia, however, cannot say so. In his case, as pointed out in Shyam Behari's case (supra) the evidence which was led on behalf of the prosecution specifically implicated him and he was named by the prosecution witnesses as the person who killed Ram Naresh Sah. In his examination u/s 313 of the Code of Criminal Procedure also, he was specifically asked to answer the allegation that he committed the murder of Ram Naresh Sah. The defect in the charge is only clerical and shows only inadvertence of not separating the charge of murder with the charge of dacoity. No reasonable presumption is available to him to suggest that he had no fair trial and that the charge that he killed Ram Naresh Sah was not explained to him fairly and clearly. He had full opportunity to defend himself and to show that he was not guilty of murdering Ram Naresh Sah. But so far the appellants nos. 2 and 3 Arjun Nonia and Dasain Nonia are concerned there is nothing in the charge, as quoted above, to suggest that their participation in the murder of Ram Naresh Sah was explained to them and evidence in this behalf was brought to their notice, they were not asked even u/s 313 of the Code of Criminal Procedure to state whether they along with Kanhaiya Nonia re-entered and after so reentering they participated in the murder or they shared the common intention of Kanhaiya Nonia to kill Ram Naresh Sah. They were not made aware of the substance of the charge of the murder against them. They, in my view, therefore, cannot be

convicted for the charge u/s 302/34 of the Indian Penal Code without a re-trial.

17. Since I am of the view that the appellants participated in, the dacoity along with several other persons exceeding the requisite number of five persons for the said offence, I hold the app Hints guilty u/s 395 of the Indian Penal Code, but since in my view the murder of Ram Naresh Sah took place after the transaction of dacoity ended they in my judgment, cannot be held guilty for the offence u/s 396 of the Indian Penal Code.

18. The case of appellant, Kanhaiya Nonia, however, stands on a different footing. On the facts and in the circumstances of the case he is liable to be committed for the offence under-section 302 of the Indian Penal Code without anything more. For the other appellants a retrial will introduce new elements and evidence which has not yet been expressed anywhere. A charge introducing new elements of participation by appellant nos. 2 and 3 namely, Arjun and Dasain will have to be introduced and fresh evidence will have to be taken, if a retrial is directed for them. The case has lingered on for several years and re-trial after nine years shall be too harsh to order. In the result, the appeal is allowed in part. The conviction of the appellants u/s 396 of the Indian Penal Code is set aside, but they are convicted u/s 395 of the Indian Penal Code. Appellant No. I Kanhaiya Nonia is further convicted u/s 302 of the Indian Penal Code. Since Kanhaiya Nonia had been sentenced to undergo rigorous imprisonment for life for his conviction u/s 396 of the Indian Penal Code, the same sentence is imposed upon him for the conviction u/s 302 of the Indian Penal Code. All the appellants who are convicted u/s 395 are sentenced to undergo rigorous imprisonment for a term of 10 years each. In the case of Kanhaiya Nonia the sentence for the offence u/s 395 of the Indian. Penal Code shall run concurrently with the sentence of life imprisonment for the offence u/s 302 of the Indian Penal Code. The bail bonds of the appellants are hereby cancelled. They shall now be taken in custody accordance with law.

S.H.S Abidi, J.

I agree.