

In the High Court of Punjab and Haryana at Chandigarh

Date of decision: 5.6.2015

1. CRA-S-346-SB of 2004

Manjit Singh @ NikkiAppellant

Versus

State of PunjabRespondent

2. CRA-S-482-SB of 2004

Baldev Singh @ BilluAppellant

Versus

State of PunjabRespondent

3. CRA-S-987-SB of 2004

Lakhbir Singh @ LakhiAppellant

Versus

State of PunjabRespondent

4. CRA-S-506-SB of 2004

Subkhbir Singh @ Sonu and othersAppellants

Versus

State of PunjabRespondent

5. CRA-S-385-SB of 2004

Gurwinder Singh @ GoldyAppellant

Versus

State of PunjabRespondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Naresh Prabhakar, Advocate,
for the appellants in CRA-S-346-SB- 2004,
CRA-S-482-SB-2004, CRA-S-506-SB-2004 and
CRA-S-385-SB-2004.

Mr. D.S.Sandhu, Advocate,
for the appellants in CRA-S-987-SB-2004.

Mr.A.S.Kler, DAG, Punjab.

- 1. *Whether Reporters of local papers may be allowed to see the judgment ?***
- 2. *To be referred to the Reporters or not ?***
- 3. *Whether the judgment should be reported in the Digest?***

RAJ MOHAN SINGH, J.

1. Vide this common judgment, above mentioned five appeals are being disposed of as these have arisen out of one FIR bearing No. 97 dated 10.6.2003 registered under Sections 399/402 IPC at Police Station Subhanpur District Kapurthala.

2. Nine accused were sent to trial for the offence under Sections 399/ 402 IPC on the allegations that on 10.6.2003 at about 3.45 A.M., police party headed by SI Amrik Singh, SHO Police Station Subhanpur along with other police officials was on patrolling duty and had installed a *naka* in the area of Nadala Chowk, where the Investigating Officer received a secret information to the effect that accused persons had gathered in an abandoned brick kiln in village Thikriwal and were duly armed with weapons and were planning to commit dacoity in UCO Bank, Bholath, if raided, they could be apprehended. Finding

the aforesaid information to be reliable, FIR was registered. The police party proceeded to the abandoned site of brick kiln. One Swarn Singh was joined as independent witness. Raid was conducted and accused were apprehended. Recoveries were effected from their person.

3. From accused-appellants Lakhbir Singh, Gurwinder Singh, Balwinder Singh, Sukhbir Singh, Amrik Singh and Shiv Dayal Singh, country made pistols along with live cartridges were recovered. Different police parties initiated different proceedings in respect of accused. From accused-appellants Satpal Singh, Balbir Chand and Manjit Singh, iron rod, *datar* and *dang*, Ex. P-1 to P-3, were recovered respectively. Police also recovered motorcycles, mobile phones and cash amount from the accused at different spots.

4. During the course of investigation, police recorded disclosure statements of accused. According to disclosure statement of appellant Satpal Singh, an amount of ₹ 20,000/- was recovered at his instance. From Manjit Singh, T.V. set and earrings were recovered. From Amirk Singh and Baldev Singh an amount of ₹ 70,000/- each was recovered. From Shiv Dayal Singh, an amount of ₹ 32,000/- was recovered and from Lakhbir Singh, an amount of ₹ 30,000/- was recovered, as per their disclosure statements.

5. After investigation, challan was presented and case

was committed to Court of Sessions. Charges were framed under Sections 399/ 402 IPC and the accused pleaded not guilty and claimed trial.

6. Prosecution got examined SI Amrik Singh as PW-1, Kabul Singh as PW-2, HC Harmail Singh as PW-3, Constable Paramjit Singh as PW-4, HC Dharminster Singh as PW-5, Jaswant Singh as PW-4A and SI Rashminder Singh as PW-6.

7. The statements of accused were recorded under Section 313 Cr.P.C. and thereafter, accused entered into defence. They got examined Bhajan Singh as DW-1, Tarsem Lal as DW-2, Raghbir Singh as DW-3, Balwant Singh as DW-4, Bhupinder Singh as DW-5, Kamaljit Kaur as DW-6, Thakar Dass as DW-7, Santokh Singh as DW-8 and Amrik Singh as DW-9.

8. Trial Court proceeded to acquit the accused for the offence under Section 399 IPC but at the same time convicted them under Section 402 IPC. Accused were accordingly sentenced to undergo RI for four years along with fine of ₹ 1,000/- each under Section 402 IPC.

9. Before appreciating the rival contentions of both sides, it is necessary to have a glance on offences under Sections 399/ 402 IPC.

Sections 399 and 402 IPC are reproduced herein below:-

“399. Making preparation to commit dacoity.

Whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

402. Assembling for purpose of committing dacoity.

Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.”

10. Trial Court acquitted the accused under Section 399 IPC after finding that there was no preparation to commit dacoity.

11. Para 23 of the judgment recorded by the trial Court is reproduced herein as under:-

“ The offence under Section 402 IPC is constituted if it is proved that five or more persons were assembling for the purpose of committing dacoity and when these persons do overt act towards the commission of the dacoity the provisions of section 399 IPC were attracted. As discussed above the prosecution witnesses tried. to bring an improvement

regarding overhearing the talk between the accused for plan to commit the dacoity in UCO Bank Bholath which fact is found missing in their earlier statements and it being an improvement during trial, cannot be relied upon. So in these circumstances it is observed that the prosecution had failed to prove any overt act on the part of the accused towards the preparation to commit dacoity and as such, the charge under section 399 IPC is not sustainable against the accused in the facts and circumstances of the present case.”

11. Trial Court proceeded to convict the accused-appellants for the offence under Section 402 IPC on the ground that the accused belonging to different villages assembled in the *abadi* of the village early in the morning at about 5.00 A.M. and this circumstance was indicative of one object of their assembly at a secluded place that too armed with deadly weapons.

12. I have heard arguments of both the parties. In order to appreciate culpability in terms of Section 402 IPC, necessary evidence has to be appraised.

13. Apparently, no dacoity took place. It is only the stage of assembly or preparation, the accused were allegedly apprehended by the police and alleged recoveries are shown to have been effected. The recoveries effected from the accused

cannot be co-related with the present case because no dacoity had been committed by the accused. The alleged recoveries effected from the accused persons should relate to their complicity in some past events and for that, prosecution was obligated to co-relate the complicity of accused vis-a-vis previous cases in which recoveries are shown to be booty of previous cases. Mere possessing of some money does not amount to commission of either theft, extortion or robbery/dacoity.

14. Learned counsel for the appellants have submitted that the alleged recoveries of articles were belonging to the accused. These articles were not the stolen property, nor it was a case of prosecution. Mobile phones and the motorcycles, so recovered, belonged to the accused. No call details were matched in order to prove connectivity in respect of any previous dacoity. According to Section 110 of the Evidence Act, the burden of proof as to ownership is on the person, who affirms that he is not the owner. In view of aforesaid, heavy onus was on the prosecution to prove that the motorcycles and other recoveries effected from the appellants/ accused were not belonging to the accused, rather the same were booty of any dacoity committed by them in the past. No details of past cases have been proved on record to show any connectivity vis-a-vis the alleged recoveries. The prosecution has failed to discharge

the onus to prove that any article allegedly recovered from the accused was subject matter of any theft or extortion much less the case property being related to this case.

15. The alleged recoveries of iron rod (Ex.P-1), *datar* (Ex.P-2) and *dang* (Ex.P-3) from accused-appellants Satpal Singh, Balbir Chand and Manjit Singh respectively were not even sealed. No slip was put on these weapons. These weapons are common items in everybody's house and, therefore, link evidence was statedly missing.

16. According to testimony of PW-1, Investigating Officer SI Amrik Singh, accused Satpal Singh, Manjit Singh and Balbir Chand were arrested by him. Other accused were not arrested by him. So as the statement of PW-2, Constable Kabul Singh. PW-3, HC Harmail Singh arrested accused Baldev Singh. PW-5, HC Dharminder Singh and PW-6, SI Rashminder Singh are alleged to have arrested accused Shiv Dayal Singh. The aforesaid depositions of prosecution witnesses show only arrest of Satpal Singh, Manjit Singh, Balbir Chand, Baldev Singh and Shiv Dayal Singh. Other prosecution witnesses did not depose anything about the factum of arrest of remaining accused persons.

17. Sarwan Singh was joined as independent witness after receipt of secret information. Said independent witness, who was associated by the prosecution throughout in the

capacity of eye witness, witness of recoveries and arrest, was left out and given up without getting him declared hostile by the trial Court, on the request of Public Prosecutor. The plea of prosecution that he was won over by the accused does not stand to reasons. Nobody can be impeached without hearing him. Examination of Sarwan Singh was sine-qua-non before impeaching him being won over and thereafter he could have been declared as hostile that too by the trial Court on the request of Public Prosecutor and could have been subjected to cross-examination also.

18. The prosecution case is based on secret information. The investigating officer did not record reasons to believe for arriving at the conclusion that the accused were in fact making preparation to commit dacoity after assembling in a secular place of abandoned brick kiln. In the absence of reasons to believe recorded by the Investigating Officer, the raid and subsequent arrest of the accused are to be viewed without any basis, particularly when the sole independent witness, who allegedly associated with the police party, was not examined on the alleged plea of being won over.

19. Recovery of currency, household items and wearing apparels were claimed to be booty of some past event, which according to the accused were their own belongings. The defence witnesses examined in this context specifically deposed

before the trial Court that the accused were apprehended from their house 2-3 days prior to the alleged occurrence. All the defence witnesses stated with regard to recovery of amount in question from their house. DW-2 Tarsem Lal claimed that police had taken away ₹ 32,000/- from the house of appellant Shiv Dayal. DW-4 Balwant Singh, father of accused Lakhbir Singh, claimed that police had taken away ₹ 30,000/- from his house, which he brought by working abroad. Similarly, DW-5 Bhupinder Singh and DW-6 Kamaljit Kaur also stated that the police had taken away T.V set and pair of gold earrings from the house of appellant Manjit Singh without disclosing anything.

20. Prosecution has stretched the probability to the extent of knowing the source of said amount being in the house of accused persons. The defence evidence which was produced by the accused remained unshattered in terms of its evidentiary value. The defence evidence cannot be doubted in the context of case being only under offence under Section 402 IPC. The alleged amount, as per prosecution, could not be connected to any antecedent activity of the accused where the said booty was taken away by the accused persons. In the event of link evidence, it was not desirable for the prosecution to question the availability of amount in the house of accused because no dacoity has taken place in the present case.

21. Statement of PW-1 Amrik Singh specifically pointed

out that in order to apprehend the accused persons, seven different teams were constituted. The basic structure of those constituent members of the team could not be elaborated on record with reference to police officers arresting different accused and effecting different recoveries from them. Recoveries Ex.P-1 to Ex.P-3 were allegedly recovered by PW-1 vide recovery memos PW1/B, PW1/C and PW1/D. The witness further stated that the recoveries were also effected from other accused persons and separate proceedings were initiated against them. Recoveries of mobile phones and motorcycles from accused Gurwinder Singh, Shiv Dayal and Sukhbir Singh and one scooter from accused Baldev Singh could not be proved for want of link evidence.

22. The alleged recoveries effected from accused in pursuance to alleged disclosure did not co-relate to the culpability alleged against the appellants. Mere assembly and even without making preparation or pre-intention or motive or setting out modalities to achieve their evil design of committing dacoity is not enough to prove offence punishable under Section 402 IPC. Once the accused were acquitted under Section 399 IPC, assembly for the purposes of committing dacoity would also fall through because for committing dacoity some preparation is always required to be done. Once the initial preparation part to bring out culpability is missing, mere assembly for committing

such dacoity cannot be presumed by any stretch of imagination.

Trial Court seems to have misdirected itself in this context.

23. Learned counsel for the appellants cite **Jahangir vs. State of Haryana 1996 (2) RCR (Crl.) 433**; **Kuldip Singh vs. State of Haryana 2002 (4) RCR (Crl.) 103**; **Jasbir @ Banti @ Jasbir Singh vs. State of Haryana 2011 (1) RCR (Crl.) 626** and **Dadu @ Indraka vs. State of M.P.U 2003 (2) RCR (Crl.) 548** to contend that the prosecution is always under legal obligation to prove each and every ingredient of offence beyond reasonable doubt. The recovery effected from the place has to be witnessed by some independent witness. The recovery of fire arm allegedly effected without corroborating the plea by way of independent corroboration has to be viewed with suspicion. Since the alleged recoveries have not been witnessed by independent witness, therefore, recoveries could not be believed. The alleged recoveries of fire arm and cartridges from the possession of the accused could not be further highlighted with reference to any evidence with regard to working condition of the weapons and the cartridges being alive or not. In view of that the conviction could not be recorded without such incriminating feature of the weapons and cartridges involved therein.

24. The alleged recoveries in the form of *dang*, *datar* and iron rod could not be sealed and due to missing matching

configuration, link evidence could not be established from record.

25. Learned counsel for the appellants further cite **Baldev Singh vs. State of Haryana 1988 (12) RCR (Crl.) 629** to show that since the conviction is under Section 402 IPC and Arms Act, therefore, without further evidence no inference can be drawn that the persons allegedly assembled at the abandoned site were, in fact, for the purposes of committing dacoity. Their assembly could not be ruled out for other purposes even for committing other crime but not certainly for the offence under Section 402 IPC.

26. In case titled **Bagga @ Bangu vs. State of Haryana 2011 (2) RCR (Crl.) 238**, this Court observed that it is very difficult to believe that the accused had assembled in deserted brick kiln and were speaking so loudly that police party could hear the conversation. In the case in hand, even the conversation could not be over heard by the police party and acquittal has been recorded under Section 399 IPC. Since offence under Section 399 IPC being closely corresponding to offence under Section 402 IPC, therefore conviction under Section 402 IPC is equally not sustainable.

27. After giving thoughtful consideration to the aforesaid submissions, this Court is of the opinion that the offences alleged against the appellants were under Sections 399 and 402

IPC. Accused have been acquitted under Section 399 IPC. The assembly for committing dacoity should have a reasonable nexus with making preparation to commit dacoity, therefore, the evidence on record is not sufficient to presume ingredients of offence under Section 402 IPC. The alleged recoveries effected from the persons have no reasonable connectivity with that of past incidents showing any antecedent behaviour of criminal activity of the accused. No such evidence has come on record to prove connectivity. The weapons were not proved to be sealed and the identity of the same could not be established on record. The country made pistols and cartridges even though taken in possession, but did not provide any incriminating link evidence in the context whether cartridges were alive or not. The only eye witness Sarwan Singh was impeached without being declared hostile and without being examined and cross-examined.

28. In view of aforesaid, this Court feels that the prosecution has failed to bring home the guilt of the accused to the hilt. Consequently, these appeals are allowed. Conviction and sentence of the appellants is set aside. They are acquitted of the charges framed against them.

(RAJ MOHAN SINGH)
JUDGE

June 05, 2015
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