A RAJ KUMAR @ RAJU

v.

STATE OF UTTARANCHAL

(Criminal Appeal No. 855 of 2007)

APRIL 7, 2008

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(C.K. THAKKER AND D.K. JAIN, JJ.)

Penal Code, 1860; Ss.302, 396 and 412 r/w s.120B:

Dacoity, murder and conspiracy – Accused persons C *armed with weapons allegedly committed dacoity, looted articles and also committed murder of wife of PW1 – F.I.R. – Investigation – Investigating Officer submitted charge-sheet against six accused persons for committing the offences punishable u/ss. 396 and 412 r/w s.120-B, IPC – Acquitting* D *accused Nos. 5 & 6, trial Court found accused Nos. 1 to 4 guilty for committing the offence of dacoity punishable u/s.396, IPC but acquitted them of the charges for committing the offence punishable u/s.412 and also u/s.120-B, and sentenced them accordingly – Conviction and sentence affirmed by* E *Division Bench of the High Court – Correctness of – Held: Incorrect – In case, factum of five or more persons is either not disputed/clearly established and the Court acquitted some of them as their identity not established, the conviction of even less than five accused could stand – But in the absence of such a finding, less than five accused persons can not be* F *convicted for committing an offence of dacoity – In the instant case, though charges were framed against six accused persons, but even the trial Court was not convinced with prosecution evidence about complicity of all the accused and granted benefit of doubt to two of them – Once the Court doubts* G *presence and participation of two out of six accused and granted benefit, there would be less than five persons, and therefore, no conviction could be recorded against them for committing an offence punishable u/s.396, IPC – Moreover, in the absence of the finding that the identity of two accused*

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not established, conviction of appellant for committing the offence of dacoity cannot stand – Hence, set aside.

According to the prosecution, PW1 filed a complaint at the Police Station informing that on the fateful day, when he reached his house in the afternoon, he found four persons armed with weapons dragging the body of his wife soaked in blood. On seeing him, the accused fled away. The accused had allegedly looted the household articles and committed the murder of his wife. PW3, PW5 and PW6 also witnessed the accused running away. Police registered an F.I.R. , started investigation, arrested the accused and recovered certain articles from them. After completion of the investigation, charge-sheet was submitted by the Investigating Officer against six accused persons for committing the offence punishable u/Ss. 396 and 412 r/w S.120-B, IPC. Trial Court acquitted the accused persons of the charge for committing an offence punishable u/s.120-B and also u/s.412, IPC since prosecution has failed to prove the charges. However, the trial Court found accused Nos. 1 to 4 guilty of committing the offence of dacoity punishable u/s.396, IPC, convicted them and ordered to undergo rigorous imprisonment for ten years and to pay fine, but acquitted accused Nos. 5 & 6 as the charge was not established against them. Appeal preferred thereagainst by the convicts was dismissed by the High Court. Hence, the present appeal.

Accused-appellant contended that both the Courts below have committed an error in convicting the appellant for an offence punishable under s.396, IPC; that charge was framed for an offence punishable under s.396, IPC against the appellant along with other five accused. When the trial Court acquitted two of them, no conviction could have been recorded of the remaining accused for an offence punishable under s.396, IPC; that in view of acquittal of two out of six persons, both the Courts were wrong in invoking and applying s.396, IPC. On that ground

A alone, the order of conviction and sentence deserves to be set aside; that all the accused were charged for criminal conspiracy but they were acquitted for an offence punishable under s.120B, IPC and the said order was not challenged by the State; that all the accused were charged
B for an offence of dishonestly receiving property stolen in the commission of dacoity, punishable under s.412, IPC, but even on that count, the trial Court acquitted them and the said order also has attained finality; and that the appellant was never charged for commission of an
C offence of murder of deceased punishable under s.302, IPC and the Courts went wrong in convicting him under s.396, IPC.

State submitted that it is true that all the accused were acquitted by the trial Court for committing an offence
D punishable under s.120B, IPC and also acquitted of an offence punishable under s.412, IPC; that out of six accused, two were acquitted by the trial Court by giving benefit of doubt and hence there were less then five accused before the Court. But from the prosecution
E evidence and particularly from the evidence of PW1-1, PW3, PW5 and PW6, the Courts below were convinced that there was dacoity in the house of PW1 and during the course of committing dacoity, the accused killed the wife of PW1 and convicted the appellant under s.396, IPC.
F That the impugned order cannot be said to be illegal or unlawful. Alternatively, the accused had committed murder of the deceased and they can independently be convicted for an offence punishable under Section 302, IPC simpliciter.

G Allowing the appeal, the Court

HELD: 1.1 The appeal deserves to be allowed. It is not in dispute that charges were framed against six persons but even the trial Court was not convinced with
H the prosecution evidence about complicity of all the

accused and granted benefit of doubt to two of them. The trial Court did not record a finding that there were six persons who committed dacoity and out of them, two accused could not be identified but the remaining four were identified, and came to the conclusion that it was proved that there were six accused and all of them committed the offence of dacoity but in view of insufficient evidence as to identity, two of them were required to be acquitted. In such case, conviction of less than five accused can be sustained in accordance with law. But, once the Court doubts the presence and participation of two out of six accused and grants benefit to them, there are less than five persons and no conviction can be recorded for an offence under Section 396, IPC against them. (Para – 13) [1225-A, B, C, D]

1.2 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. (Para – 19) [1227-D, E]

Ram Lakhan vs. State of Uttar Pradesh, (1983) 2 SCC 65 and *Saktu & Anr. vs. State of U.P.,* (1973) 1 SCC 202 – relied on.

2. In the instant case, 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. 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 for an offence punishable

under Section 396, IPC, therefore, cannot stand and must be set aside. Hence, the conviction of the appellant for an offence punishable under Section 396, IPC is set aside and he is ordered to be acquitted. Since the appellant is in jail, he is ordered to be released forthwith if his presence is not required in any other case. (Paras – 34 and 35) [1233-F, G; 1234-A, B]

Dalip Singh & Ors. vs. State of Punjab **(1954) SCR 145;** *Mohan Singh vs. State of Rajasthan*, **(1962) Supp 3 SCR 848;** *Krishna Govind Patil vs. State of Maharashtra,* **(1964) 1 SCR 678;** *Ram Bilas Singh vs. State of Bihar,* **(1964) 1 SCR 775;** *Maina Singh vs. State of Rajasthan,* **(1976) 2 SCC 827;** *Ram Dular Rai vs. State of Bihar,* **(2003) 12 SCC 352 : JT (2003) 9 SC 301 and** *Shyam Behari vs. State of Uttar Pradesh,* **AIR (1957) SC 320 – relied on.**

Ramdeo Rai Yadav vs. State of Bihar, **(1990) 2 SCC 675: JT 1990 (1) SC 356 and** *Anshad & Ors. vs. State of Karnataka,* **(1994) 4 SCC 381 : JT 1993 (3) SC 324 – distinguished.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 855 of 2007.

From the Judgment and order dated 16/10/2006 of the High Court of Uttaranchal at Nainital in Crl. Appeal No. 315/ 2001

Sushil Kumar, Praveen Kumar Rai, Vinay Arora and Abhisth Kumar for the Appellant.

B.N. Jha and J.K. Bhatia for the Respondent.

The Judgment of the Court was delivered by

C.K. THAKKER, J. 1. This appeal is filed by Raj Kumar @ Raju-accused No.1 in Sessions Trial No. 14 of 1983. He was convicted for an offence punishable under Section 396 of the Indian Penal Code (IPC) along with three other accused and ordered to undergo rigorous imprisonment for ten years and to pay fine of Rs.2,000, in default of payment of fine, to

undergo additional imprisonment for one year. The said order was passed by the II Addl. Sessions Judge, Nainital on August 9, 1985. The appellant preferred an appeal against the said judgment and order which was registered as Crimial Appeal No. 2128 of 1985 in the High Court of Allahabad and was re-numbered as Criminal Appeal No. 315 of 2001 in the High Court of Uttaranchal at Nainital and was dismissed by the High Court on December 16, 2006.

2. The case of the prosecution was that on September 24, 1982 one Tilak Raj-PW1 submitted a written report at Police Station, Khatima stating therein that when he reached his house for taking lunch at about 12.30 p.m., he saw Raj Kumar @ Raju, Pushpendra Singh, Swadesh Chandra @ Gappu and Nirankar in his house. All the accused were dragging his wife who was soaked in blood. According to Tilak Raj, on seeing him, the accused fled away. Though he tried to catch hold of them, Pushpendra Singh pushed at his chest due to which he fell down. He raised hue and cry. According to the complainant Raj Kumar, Swadesh Chandra @ Gappu and Nirankar were holding knives. All the accused committed loot of articles from his house and also committed murder of his wife Kamlesh Kumari. Rajendra Kumar-PW6, Purshottam Lal-PW3, Prem Kumar-PW5 and other persons who came there, also saw the accused running away. The first information was recorded and investigation was conducted. Accused were arrested and certain articles were also recovered from them. On completion of investigation, charge-sheet was submitted by the Investigating Officer against four accused referred to above and two others, namely, Mohan Lal and Balram Singh for offences punishable under Sections 396 and 412 read with Section 120B, IPC. The case was committed by the Magistrate to learned II Addl. Sessions Judge. Charge was framed and the accused were asked whether they pleaded guilty upon which they denied to have committed any offence and claimed to be tried.

3. In order to prove the case against the accused, the prosecution examined 13 witnesses. Out of them Tilak Raj-PW1,

A informant and husband of deceased Kamlesh Kumari was an eye-witness who supported the case of the prosecution. According to him, he saw all the accused dragging dead body of his wife Kamlesh Kumari from kitchen. He wanted to catch hold of the accused but could not do so as Pushpendra Singh
B pushed him and resultantly he fell down. It was also his case that on hearing his cries, PW3-Purshottam Lal, PW5-Prem Kumar and PW6-Rajendra Kumar reached at the scene of offence and saw all the accused running away. After the arrest of accused, looted property and weapons of offence, namely,
C knives were recovered.

4. It was also the case of the prosecution that there was a conspiracy to commit dacoity by all the accused on the previous day *i.e.* September 23, 1982. To prove conspiracy, the prosecution examined PW7-Kishan Lal-real brother of PW1-
D Tilak Raj. PW11-Dr. J.K. Goel who performed post-mortem of deceased Kamlesh Kumari on September 25, 1982 was examined to prove injuries sustained by the deceased and to establish that she died due to those injuries.

5. The case of the accused under Section 313 of the Code
E of Criminal Procedure, 1973 was of total denial. In support of their case, the accused examined DW1-Dr. Joshi and DW2-Laxmi Datt.

6. The trial Court, after appreciating the evidence on
F record, held that it was not proved by the prosecution that there was conspiracy between the accused to commit dacoity. So far as charge for committing an offence punishable under Section 120B, IPC is concerned, the trial Court acquitted them. Likewise, the trial Court held that since recovery effected by the prosecution
G was not in consonance with law, it could not be said that stolen articles of dacoity were found from the accused and consequently charge for an offence punishable under Section 412, IPC also could not be said to be established. All the accused were, therefore, acquitted.

H 7. The Court, however, held that as far as commission of

an offence punishable under Section 396 was concerned, from the evidence of PW1-Tilak Raj and PW3-Purshottam Lal, PW5-Prem Kumar and PW6-Rajendra Kumar, it was clearly established. According to the Court, however, an offence punishable under Section 396, IPC was established against accused Nos. 1 to 4 Raj Kumar @ Raju-A1, Pushpendra Singh-A2, Swadesh Chandra @ Gappu-A3 and Nirankar-A4. It was not established that Mohan Lal-A5 and Balram Singh-A6 were also present and party to the crime. They were, therefore, ordered to be acquitted.

8. All the four convicted accused preferred appeal and the High Court, as stated above, confirmed the order of conviction and sentence recorded by the trial Court and dismissed the appeal.

9. Notice was issued by this Court in the present appeal instituted by accused No.1-Raj Kumar @ Raju on February 9, 2007. On July 9, 2007, leave was granted. Bail, however, was refused. In view of the said fact, the matter was placed for final hearing and that is how the matter is before us.

10. We have heard learned counsel for the parties.

11. The learned counsel for the appellant contended that both the Courts have committed an error in convicting the appellant for an offence punishable under Section 396, IPC. It was submitted that charge was framed for an offence punishable under Section 396, IPC against the appellant along with other five accused. When the trial Court acquitted two of them, no conviction could have been recorded of the remaining four accused for an offence punishable under Section 396, IPC. It was submitted that for conviction of accused under Section 396, IPC, there must be five or more persons and in view of acquittal of two out of six persons, both the Courts were wrong in invoking and applying Section 396, IPC. On that ground alone, the order of conviction and sentence deserves to be set aside. It was also submitted that all the accused were charged for criminal conspiracy but they were acquitted for an offence punishable

A under Section 120B, IPC and the said order was not challenged by the State. Again, all the accused were charged for an offence of dishonestly receiving property stolen in the commission of dacoity, punishable under Section 412, IPC, but even on that count, the trial Court acquitted them and the said order also has
B attained finality. In the light of the above facts, conviction of the appellant under Section 396, IPC is clearly illegal and requires to be set aside. It was stated by the learned counsel that the appellant was never charged for commission of an offence of murder of deceased Kamlesh Kumari, punishable under Section
C 302, IPC and the Courts went wrong in convicting him under Section 396, IPC. The counsel submitted that the appeal deserves to be allowed by setting aside the order of conviction and sentence recorded by the trial Court and confirmed by the High Court.

D 12. The learned Government Pleader, on the other hand, supported the order of conviction and sentence by both the Courts. He submitted that it is true that all the accused were acquitted by the trial Court for committing an offence punishable under Section 120B, IPC (criminal conspiracy). It is also true
E that they were acquitted of an offence punishable under Section 412, IPC (for dishonestly receiving or retaining property stolen in commission of dacoity). It is equally true that out of six accused, two were acquitted by the trial Court by giving benefit of doubt and hence there were less then five accused before
F the Court. But from the prosecution evidence and particularly from the evidence of PW1-Tilak Raj, PW3-Purshottam Lal, PW5-Prem Kumar and PW6-Rajendra Kumar, the Courts below were convinced that there was dacoity in the house of PW1-Tialk Raj and during the course of committing dacoity, the accused killed
G Kamlesh Kumari, wife of PW1-Tilak Raj and convicted the appellant under Section 396, IPC. That order cannot be said to be illegal or unlawful. Alternatively, the learned counsel contended that the accused had committed murder of Kamlesh Kumari and they can independently be convicted for an offence
H punishable under Section 302, IPC *simpliciter*. He, therefore,

submitted that the appeal deserves to be dismissed. A

13. Having heard learned counsel for the parties, in our opinion, the appeal deserves to be allowed. It is not in dispute that charges were framed against six persons but even the trial Court was not convinced with the prosecution evidence about complicity of all the accused and granted benefit of doubt to B two of them. It may be stated that the trial Court did not record a finding that there were six persons who committed dacoity and out of them, two accused could not be identified but the remaining four were identified and came to the conclusion that it was proved that there were six accused and all of them C committed the offence of dacoity but in view of insufficient evidence as to identity, two of them were required to be acquitted. In such case, conviction of less than five accused can be sustained in accordance with law. But, once the Court doubts the presence and participation of two out of six accused and D grants benefit to them, there are less than five persons and no conviction can be recorded for an offence under Section 396, IPC against them. Let us consider the legal position on this aspect.

14. Chapter XVII (Sections 378 to 462) deals with offences E against property. Sections 378 to 382 relate to theft. Sections 383 to 389 concern offences of extortion. Sections 390 to 402 deal with robbery and dacoity. Section 391 defines dacoity and it reads thus:

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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 G attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

15. Whereas Section 395 provides punishment for dacoity, H

A Section 396 prescribes penalty for an offence of dacoity with murder. The said section reads thus:

396. Dacoity with murder

If any one of five or more persons, who are conjointly
B 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 also be liable to fine.

C 16. In *Ram Lakhan v. State of Uttar Pradesh,* (1983) 2 SCC 65, this Court held that conviction for an offence of dacoity of less than five persons is not sustainable. In that case, the appellant was convicted for an offence punishable under Section 395, IPC and sentenced to seven years rigorous imprisonment.
D FIR was registered against nine persons. The trial Court, however, acquitted five persons and convicted four. On appeal, the High Court acquitted three persons out of four and conviction of one of the accused, appellant before this Court, was upheld. This Court, while allowing the appeal and acquitting the
E accused, held that before an offence under Section 395 can be made out there must be an assembly of five or more persons. On the findings of the courts below, it was manifest that only one person was left, who could not be convicted for an offence under Section 395.

F 17. In *Saktu & Anr. v. State of U.P.,* (1973) 1 SCC 202, the case of the prosecution was that 15-16 persons entered the house of one Jwala Prasad and looted the property. First Information Report was lodged by the informant-Jwala Prasad. All the accused were charged for offences punishable under
G Sections 395, 397 and 412, IPC. The trial Court acquitted one of the accused. In appeal, the High Court of Allahabad acquitted some other accused but convicted three accused (Nos. 1, 6 & 7).

18. It was contended before this Court that as the High
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Court found that only three persons had participated in the occurrence, there was an error in convicting them for dacoity, since the offence of dacoity could not be committed by less than five persons. This Court, however, negatived the contention observing as under:

> "The charge in the instant case is that apart from the named seven or eight persons, there were five or six others who had taken part in the commission of the dacoity. The circumstance therefore that all except the three accused, have been acquitted by the High Court will not militate against the conviction of those three for dacoity. ***It is important that it was at no time disputed that more than thirteen or fourteen persons had taken part in the robbery. The High Court acquitted a large number of the accused because their identity could not be established.*** The High Court, however, did not find that the group which committed robbery in the house of Jwala Prasad consisted of less than five persons". (emphasis supplied)

19. 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.

20. A similar situation arises in dealing with cases of 'unlawful assembly' as defined in Section 141, IPC and the liability of every member of such unlawful assembly for an offence committed in prosecution of common object under Section 149,

A IPC. Section 141 indicates that an assembly of five or more persons can be said to be 'unlawful assembly', if common object of the persons comprising such assembly is as mentioned in the said section. Section 149 declares that if an offence is committed by any member of unlawful assembly in prosecution
B of common object of that assembly, every member of such assembly is guilty of that offence.

21. In *Dalip Singh & Ors. v. State of Punjab,* 1954 SCR 145, it was held that if the prosecution fails to establish that the appellants were five or more in number, Section 149, IPC cannot
C be applied. But the Court held that it is not essential that five persons must always be convicted for invocation of the said provision. Where it is possible to conclude that though five or more persons were '***unquestionably***' at the place of offence and the identity of one or more was in doubt, conviction of less
D than five persons with the aid of Section 149, IPC would be legal and lawful.

22. Speaking for the Court, Bose, J. stated:

"Before section 149 can be called in aid, the court must
E find with certainty that there were at least five persons sharing the common object. ***A finding that three of them "may or may not have been there" betrays uncertainty on this vital point and it consequently becomes impossible to allow the conviction to rest***
F ***on this uncertain foundation***.

This is not to say that five persons must always be convicted before section 149 can be applied. There are cases and cases. ***It is possible in some cases for Judges to conclude that though five were unquestionably there***
G ***the identity of one or more is in doubt. In that case, a conviction of the rest with the aid of section 149 would be good***. But if that is the conclusion it behaves a court, particularly in a murder case where sentences of transportation in no less than four cases have been
H enhanced to death, to say so with unerring certainty. Men

cannot be hanged on vacillating and vaguely uncertain conclusions". (emphasis supplied)

23. Again, in *Mohan Singh v. State of Rajasthan,* (1962) Supp 3 SCR 848, two of the five persons who were tried together for offences punishable under Section 302 read with Sections 147 and 149, IPC were convicted. In the charge, those five accused persons and none others were mentioned as forming unlawful assembly and the evidence led in the case was confined to them. The question was whether two persons could be convicted by applying Section 149, IPC. The Court, referring to *Dalip Singh*, stated:

"Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the court less than five persons to be tried, then Section 149 cannot be invoked. Even in such cases, it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under section 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under section 149 because on the evidence the court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five".

A 24. Similarly, in *Krishna Govind Patil v. State of Maharashtra,* (1964) 1 SCR 678, after referring to *Mohan Singh,* the Court observed:

> "It may be that the charge discloses only named persons; it may also be that the prosecution witnesses named only
B the said accused; but there may be other evidence, such as that given by the court witnesses, defence witnesses or circumstantial pieces of evidence, which may disclose the existence of named or unnamed persons, other than those charged or deposed to by the prosecution witnesses,
C and the court, on the basis of the said evidence, may come to the conclusion that others, named or unnamed, acted conjointly along with one of the accused charged. But such a conclusion is really based on evidence".

D 25. In yet another decision in *Ram Bilas Singh v. State of Bihar,* (1964) 1 SCR 775, this Court said:

> "The decisions of this Court quoted above thus make it clear that where the prosecution case as set out in the charge and as supported by the evidence is to the effect
E that the alleged unlawful assembly consists of five or more named persons and no others, and there is no question of any participation by other persons not identified or identifiable it is not open to the court to hold that there was an unlawful assembly unless it comes to the definite
F conclusion that five or more of the named persons were members thereof. Where, however, the case of the prosecution and the evidence adduced indicates that a number in excess of five persons participated in the incident and some of them could not be identified, it would
G be open to the court to convict less than five of the offence of being members of the unlawful assembly or convict them of the offence committed by the unlawful assembly with the aid of Section 149, I.P.C. provided it comes to the conclusion that five or more persons participated in the incident".

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26. In *Maina Singh v. State of Rajasthan,* (1976) 2 SCC 827, the appellant was charged along with four others under Section 302 read with Section 149, IPC. Only the appellant was convicted and the rest were acquitted. He was convicted under Section 302 read with Section 34, IPC. There was no indication either in the FIR or in the evidence that any other person unnamed or unidentified other than the five charged, to have participated in the crime. The appellant challenged his conviction. A B

27. Setting aside the conviction for an offence punishable under Section 302 read with Section 34, IPC, this Court held that if in a given case, the charge discloses only the named persons as co-accused and the prosecution witnesses confine their testimony to them, even then it would be permissible to come to a conclusion that others, named or unnamed, besides those mentioned in the charge or the evidence of the prosecution witnesses, acted conjointly with one of the charged accused if there is other evidence to lead to that conclusion, ***but not otherwise***. C D

28. In *Ram Dular Rai v. State of Bihar,* (2003) 12 SCC 352 : JT 2003 (9) SC 301, this Court said; E

> "Coming to the question whether Section 149 has application when presence of more than five persons is established, but only four are identified, Section 149 does not require that all the five persons must be identified what is required to be established is the presence of five persons with a common intention of doing an act. If that is established merely because the other persons present are not identified that does not in any way affect applicability of Section 149, IPC". F

29. The learned counsel appearing for the State, however, referred to *Ram Shankar Singh & Ors. v. State of Uttar Pradesh,* AIR 1956 SC 441. In that case, six accused were placed on trial for an offence of dacoity. Three of them belonged to complainant's village whereas remaining three belonged to adjoining village. The trial Court convicted all the six accused. G H

A The High Court, however, acquitted three accused and convicted the remaining three under Section 395, IPC. This Court held that the High Court erred in making a distinction between the three accused belonging to the complainant's village while the remaining three belonged to an adjoining village. This Court B observed that the High Court, having come to the conclusion that three out of six accused were not guilty, should have gone into the question whether there was satisfactory evidence to show that the three remaining accused could be convicted under Section 395, IPC on the charge as framed. This Court further C held that the charge was framed against six persons and they were placed on trial. It did not indicate that those six persons along with other unknown persons committed dacoity. On the finding arrived at by the trial Court that all the six persons committed the offence of dacoity punishable under Section 395, D IPC, nothing more was necessary. When the High Court set aside conviction of three accused and acquitted them out of six persons jointly tried, it was left only with three appellants as the persons concerned with the crime. The High Court, in the circumstances, according to this Court, ought to have considered whether there was satisfactory evidence to show E that the three appellants could be convicted of the lesser offence of robbery under Section 392, IPC if there was evidence to show that they had committed acts of theft and used violence while committing the theft.

F 30. In the case on hand, both the Courts below have considered the case of the prosecution and acquitted two accused completely. Moreover, all the accused were acquitted for commission of offence of criminal conspiracy as also of receiving stolen property in commission of dacoity and the said G acquittal has attained finality.

31. *Shyam Behari v. State of Uttar Pradesh,* AIR 1957 SC 320 also does not carry the matter further. There, a finding was recorded that the accused and his companions, who were more than five, attempted to commit dacoity but they failed in H their attempt as the villagers raised hue and cry. Residents of

village reached at the place and the miscreants ran away without collecting booty. They were chased by some persons and caught one of the dacoits. He fired a pistol shot which hit a villager who subsequently died. This Court held that the offence of dacoity was complete and it ended the moment the dacoits took to their heels and another and a separate transaction took place when one of the accused shot at a villager. Hence, even though he could not be convicted of having committed an offence under Section 396, IPC, he could be convicted for an offence under Sections 395 and 302, IPC.

32. *Ramdeo Rai Yadav v. State of Bihar,* (1990) 2 SCC 675 : JT 1990 (1) SC 356 is clearly distinguishable. In that case, charge was framed against the accused for commission of offence punishable under Section 396, IPC but alternative charge was also framed for an offence punishable under Section 302, IPC. In the light of framing of alternative charge, this Court held that conviction of the appellant-accused for an offence punishable under Section 302, IPC can be sustained.

33. Similar is the ratio in *Anshad & Ors. v. State of Karnataka,* (1994) 4 SCC 381 : JT 1993 (3) SC 324. There five accused were tried for offences punishable under Sections 396, 449, 395 and 307, IPC and were convicted. In the light of the factual position, the Court held that conviction of accused Nos. 1, 2 and 3 could be altered to one under Section 302 read with Section 34, IPC, Section 394 read with Section 34, IPC and Section 379 read with Section 34, IPC.

34. 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

A 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.

B 35. For the foregoing reasons, the appeal is allowed. The conviction of the appellant for an offence punishable under Section 396, IPC is set aside and he is ordered to be acquitted. Since the appellant is in jail, he is ordered to be released forthwith if his presence is not required in any other case.

C 36. The appeal is accordingly allowed.

S.K.S. Appeal allowed.