

SHAJAHAN

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v.

STATE REP. BY INSPECTOR OF POLICE

(Criminal Appeal Nos. 697-98 of 2012)

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FEBRUARY 16, 2018

[RANJAN GOGOI AND R. BANUMATHI, JJ.]

Penal Code, 1860 – s.396 r/w s.34 – Dacoity with murder – Five accused – Dacoity in shop of PW1 – Deceased was sleeping inside the shop – A2 held the legs of deceased, while A4 sat on his chest and strangled him to death – Trial court convicted all the five accused inter alia u/s.396 r/w. s.34 and sentenced them to imprisonment for ten years – High Court while affirming the conviction, enhanced the sentence of imprisonment from ten years to imprisonment for life – Held: In course of commission of dacoity, if a dacoit commits murder, all his companions who are conjointly committing dacoity, are liable to be convicted u/s.396, although they may have no participation in the murder beyond the fact of participation in the dacoity – Offence u/s.396 is to be viewed with seriousness, especially, when dacoits are armed, however, in the present case, the accused were not armed – Considering the long lapse of time, as the occurrence was of year 2002 and the facts and circumstances of the case, conviction u/s. 396 is maintained but sentence of imprisonment for life imposed upon A1, A2 and A4 is modified as ten years, as directed by trial court.

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Sentencing – Imposition of sentence u/s.302 vis-a-vis u/s.396, IPC– Discretion vested with Court – Scope – Held: Obligation of Court in the matter of imposing sentence- “death or imprisonment for life” is in the same sequence both for ss.302 and 396 – Though offence u/s.396 is to be viewed with seriousness, for conviction under it, larger discretion is vested with the Court as there is possibility of imposing a penalty lesser than death or imprisonment for life– Penal Code, 1860 – s.302, s.396 r/w s.34.

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A Partly allowing the appeals, the Court

B HELD : 1.1 Section 396 IPC prescribes punishment for
 C dacoity with murder. In the course of commission of dacoity, if a
 D dacoit commits murder, all his companions who are conjointly
 E committing dacoity, are liable to be convicted under Section 396,
 F although they may have no participation in the murder beyond
 the fact of participation in the dacoity. The obligation of the court
 in the matter of imposing the sentence - “*death or imprisonment
 for life*” is in the same sequence both for Sections 302 IPC and
 396 IPC. Though the offence under Section 396 is to be viewed
 with seriousness, for the conviction under Section 396, larger
 discretion is vested with the court insofar as there is possibility
 of imposing a penalty lesser than death or imprisonment for life.
 [Para 9][666-C-D]

D 1.2 The offence under Section 396 is to be viewed with
 E seriousness, especially, when the dacoits are armed. But in the
 F case in hand, the accused were not armed. Accused A4 is alleged
 to have sat on deceased and pressed his nose and mouth and is
 alleged to have tightened his neck with the rope. The occurrence
 was of the year 2002. Considering the long lapse of time and the
 facts and circumstances of the case, the sentence of imprisonment
 for life is modified as ten years as directed by the trial court.
 While maintaining the conviction under Section 396, the sentence
 of imprisonment imposed upon the appellants-A1, A2 and A4 is
 modified as ten years of imprisonment. Since the appellants are
 stated to be in custody for more than ten years, they are ordered
 to be released forthwith, if not required in any other case. [Paras
 10, 11][666-E-G]

Dinesh alias Buddha v. State of Rajasthan (2006) 3 SCC
 771 : [2006] 2 SCR 793 – referred to.

G Case Law Reference

[2006] 2 SCR 793 referred to Para 10

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal A
Nos. 697-698 of 2012.

From the Judgment and Order dated 03.09.2010 of the High Court
of Madras in Criminal Appeal No. 69 and 1094 of 2006 respectively

WITH

Criminal Appeal No. 481 of 2015. B

Amit Kumar, R. Balasubramanian, B. Karunakaran,
S. Gowthaman, K. G. Krishnaraj, S. Shanthakumari, Advs. for the
Appellant.

M. Yogesh Kanna, Mrs. Sujatha Bagadhi, Advs. for the C
Respondent.

The Judgment of the Court was delivered by

R. BANUMATHI, J. These appeals arise out of the common
judgment passed by the High Court of Madras in Criminal Appeal Nos.
69, 1096 and 1097 of 2006 allowing the appeal preferred by the State D
thereby enhancing the sentence of imprisonment from ten years to
imprisonment for life for the conviction under Section 396 IPC.

2. Briefly stated case of the prosecution is that on the intervening
night of 13/14.11.2002 at about 01.30 a.m., the appellants accused E
Basheer (A1), Shajahan (A2) and Babu @ Nawab Sahib (A4) along
with two other accused Raja Mohammad (A3) and Balu @
Balasubramanian (A5) with common intention to commit robbery in a
Pawn Broking shop under the name of Peri owned by PW-1 Muthaiyah.
In the course of committing robbery, Shajahan (A2) is alleged to have F
tightly held the legs of deceased Muthukrishnan who was sleeping inside
the shop and Babu @ Nawab Sahib (A4) is alleged to have sat on his
chest and constricted his neck and tied the jute rope around the neck of
Muthukrishnan and strangled him to death. Other accused robbed
jewellery about 4.788 kg. of gold and 5.595 kg. of silver total worth
about Rs.12,00,000/-. On 13.11.2002 at about 05.30 a.m., Chellam-PW- G
4 employed as the sweeper at the Pawn shop came to the house of PW-
1 and informed him that Muthukrishnan was found dead in his shop.
PW-1 lodged the complaint in Mandharakuppam Police Station, based
on which, police had registered a case in Crime No.257 of 2002 under
Sections 457, 380 and 302 IPC. PW-37-SHO had taken up the

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A investigation. On 06.02.2003 at about 11.00 p.m. Raja Mohammad (A3) was arrested near Panrutti bus stand and his confession statement was recorded in the presence of Vasan-PW-15, based on which, a sum of Rs.46,000/- was recovered from Raja Mohammad (A3). Confession statement of accused Raja Mohammad led to recovery of thirty pair of silver anklets, golden necklace and chain from Noorudheen who was identified by accused Raja Mohammad under Ex.P21. Confession statement of accused Raja Mohammad led to further recovery of silver anklets, golden rings, necklace and totally twelve items of jewels from KVM Jewellery at Kallakurichi under Ex.P23. Confession statement of accused Raja Mohammad also led to recovery of seventeen pair of silver anklets, twenty pair of silver pattadai anklets and a golden chain from his house at Pudupet in Vridhachalam.

3. Accused Raja Mohammad took the police and PW-15 to Alichakudi village and on being identified by him, Babu @ Nawab Sahib (A4) was arrested. Based on the confession statement of accused Babu @ Nawab Sahib, seventeen items of jewels were recovered from the house of his mother's sister under Ex.P28. Based on the confession statement of Babu @ Nawab Sahib (A4), the police went to Mumbai where numbers of items of jewels were recovered from the house of his uncle and also from a jewellery shop named Panchaseel Jewellery.

4. On 06.02.2003 at wee hours at about 01.30 a.m. appellants Basheer (A1) and Shajahan (A2) were proceeding on a TVS-50 motor cycle and on being intercepted by the police, the appellants started running and the police caught hold of them. Based on the confession statements of accused Basheer and Shajahan, jewels kept in the cover on the petrol tank of the said TVS-50 vehicle, were recovered by the police. On the basis of the information from the informers, PW-37 arrested Balu @ Balasubramanian (A5) in front of his house at Meyapalayur village on 08.02.2003 at about 04.00 a.m. His confession statement led to recovery of golden jewels from a jewellery shop at Chidambaram. Confession statement of accused Balu @ Balasubramanian further led to recovery of gold jewels from his house (Ex.P33). On completion of investigation, chargesheet was filed against the accused under Sections 457, 395, 396 and 302 read with 34 IPC.

5. In the trial court, prosecution has examined thirty seven witnesses, including PW-1-owner of the Pawn shop, PW-2 and PW-3

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working under PW-1 and other witnesses. Upon consideration of evidence, the trial court convicted all the five accused *inter alia* under Section 396 IPC read with Section 34 IPC and sentenced them to undergo rigorous imprisonment for ten years. The trial court held that in view of the conviction of the accused under Section 396 IPC, conviction of the accused under Section 302 IPC was not necessary.

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6. Being aggrieved by the conviction, accused Shajahan and Raja Mohammad filed appeals before the High Court which came to be dismissed. In the appeal filed by the State, for conviction under Section 396 IPC, the High Court enhanced the sentence of imprisonment from ten years to imprisonment for life. The High Court did not go into the question of conviction of the accused under Section 302 IPC.

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7. We have heard the learned counsel for both the parties and perused the materials on record.

8. There is clear and cogent evidence against accused Raja Mohammad and Babu @ Nawab Sahib as to their involvement in the commission of dacoity by the evidence of PW-15 and PW-17 and by recovery of various items of jewels. The jewels so recovered from the accused were identified by the owner of the Pawn shop (PW-1) and PWs 7 to 14 who pledged the jewels with PW-1. Evidence of PW-1 is further corroborated by the registers maintained in his Pawn shop to show that those items of jewels were pledged in his Pawn shop. The conviction of the appellants Raja Mohammad and Babu @ Nawab Sahib under Section 396 IPC is unassailable.

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9. Accused Basheer and Shajahan were arrested in the presence of PW-21-Anbalagan and PW-22-Vijayarangan who partially turned hostile. In his evidence, PW-21 stated that two persons were coming on the TVS-50 and on being intercepted by the police, they started running and those persons were chased and were caught by the police and the police recovered jewels from the cover kept on the petrol tank of the said vehicle. Though PWs 21 and 22 have spoken about the two persons and recovery of jewels from the said two wheeler, they have not identified accused Basheer and Shajahan. As observed by the trial court, case of the prosecution is not discredited, merely because PWs 21 and 22 have turned hostile so far as identification of accused. As pointed out by the trial court, evidence of PWs 21 and 22 is to be read along with the evidence of Investigating Officer (PW-37) who has clearly spoken about

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- A Basheer and Shajahan were proceeding on the two wheeler TVS-50 and also spoken about the arrest and recovery of jewels. The jewels recovered from Basheer and Shajahan were also identified by PW-1-owner of the Pawn shop. The fact that PWs 21 and 22 turned hostile does not affect the prosecution case as to the involvement of Basheer and Shajahan in the commission of the offence of dacoity. Section 396
- B IPC prescribes punishment for dacoity with murder. In the course of commission of dacoity, if a dacoit commits murder, all his companions who are conjointly committing dacoity, are liable to be convicted under Section 396 IPC, although they may have no participation in the murder beyond the fact of participation in the dacoity. The obligation of the
- C court in the matter of imposing the sentence - “*death or imprisonment for life*” is in the same sequence both for Sections 302 IPC and 396 IPC. Though the offence under Section 396 IPC is to be viewed with seriousness, for the conviction under Section 396 IPC, larger discretion is vested with the court insofar as there is possibility of imposing a penalty lesser than death or imprisonment for life for the conviction under Section
- D 396 IPC.

10. Placing reliance upon *Dinesh alias Buddha v. State of Rajasthan* (2006) 3 SCC 771, the High Court took the view that commission of murder in the course of dacoity is to be viewed with seriousness. We are also of the view that the offence under Section 396
- E IPC is to be viewed with seriousness, especially, when the dacoits are armed. But in the case in hand, the accused were not armed. Accused Babu @ Nawab Sahib is alleged to have sat on deceased Muthukrishnan and pressed his nose and mouth and is alleged to have tightened his neck with the rope. The occurrence was of the year 2002. Considering the
- F long lapse of time and the facts and circumstances of the case, the sentence of imprisonment for life is modified as ten years as directed by the trial court.

11. While maintaining the conviction under Section 396 IPC, the sentence of imprisonment imposed upon the appellants-Basheer, Shajahan
- G and Babu @ Nawab Sahib is modified as ten years of imprisonment and the appeals are partly allowed. Since the appellants are stated to be in custody for more than ten years, the appellants are ordered to be released forthwith, if not required in any other case.