[REPORTABLE]

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No…505…/2015

(arising out of SPECIAL LEAVE PETITION (Crl) No. 1873/2011)

Manmeet Singh Alias Goldie .....Appellant

Vs.

State of Punjab .....Respondent

J U D G M E N T

Amitava Roy,J.

Leave granted.

2. The instant appeal launches a challenge to the conviction of the appellant herein under section 396 of the Indian Penal Code (for short hereinafter referred to as the "Code") for committing dacoity as well as murder of one Mohinder Singh and the consequential sentence of imprisonment for life and fine of Rs.3,000/-, in default of further rigorous imprisonment for two months held out by the judgment and order dated 17.1.2007 passed in Sessions Case No.RT-4/15.3.05/17.5.05 by the learned

Additional Sessions Judge, Rupnagar and affirmed by the judgment and order dated 1.11.2010 rendered by the High Court of Punjab and Haryana at Chandigarh in CRLA No.133/2007.

3. We have heard the learned counsel for the parties.

4. Stated briefly, the prosecution case is traceable to the First Information Report (for short the "FIR") lodged with Morinda Police Station on 28.05.2004. The FIR disclosed that the informant, Gursatinder Singh had lodged it on the date of the incident i.e. 28.0.5.2004 contending that he along with Mohinder Singh, Cashier, Surinder Pal, Accountant City Sub-Division, PSEB and Balbir Singh, Cashier at about 11.00 a.m. had travelled in a Matador vehicle No.PB-11-6119 driven by Gurcharan Singh to collect the salary of the employees from the State Bank of Patiala, Kharar Branch and that in due course an amount of Rs. 7,78,156/- was collected from the bank and put in a green colour bag. According to the informant, an amount of Rs. 7,18,715/- towards salary of the City Sub-Division was put in another bag and both the bags were taken in the Matador vehicle. At 2.30 p.m. when the party reached the Suburban Sub Division Office, Morinda,

Mohinder Singh, Cashier alighted from the vehicle with the bag containing Rs.7,78,156/-. It was then, according to the informant, that a gentleman aged about 25/30 years with Mulla looks and wearing a cap confronted him (Mohinder Singh) with a pistol like article in his hand and tried to snatch the bag of money from him. It was stated further that as Mohinder Singh resisted, the intruder fired from his pistol for which he (Mohinder Singh) fell down. The shot had injured him on the left side of his chest. The assailant then carried the bag of money on a Bajaj Chetak Scooter No.5648 along with another young man of the same age who was standing nearby. The informant mentioned that both the persons then in the scooter drove towards Kurali. That he raised an alarm on which people gathered and thereafter Mohinder Singh was taken to the Government Hospital, Morinda where he was declared dead was also stated. In the FIR the informant did not name any of the offenders but claimed that he would be able to identify the two persons.

5. On the basis of the recorded statement of Gursatinder Singh son of Jit Singh, Accountant, Sub Division, Morinda, the information was registered as FIR No.69 dated 28.05.2004 under

section 302/397/34 IPC and 24/25/29 of Arms Act and on the completion of the investigation, a charge sheet was laid under Section 173 of the Cr.P.C.. On the completion of the committal proceedings, five accused persons including the appellant were sent up for trial. At the trial before the learned Addl. Sessions Judge, Rupnagar in the aforementioned sessions case, charges were framed as hereunder:

> "That you Satnam Singh, Sukhwinder Singh, Malkiat Singh, Manmeet Singh, Balwinder Singh along with Gurcharan Singh (Proclaimed offender vide Order dt.30.11.2004) on 28.5.2004 in the area of Morinda agreed to do an illegal act i.e. to commit dacoity or to commit murder and in pursuance of that agreement you all the above said accused committed the dacoity of Rs. 7,78,156/- and committed the murder of Mohinder Singh and thereby you all committed an offence punishable under Section 120-B of the IPC and within my cognizance.
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> Secondly, on the same date and time you all the accused namely Satnam Singh, Sukhwinder Singh, Malkiat Singh, Manmeet Singh, Balwinder Singh and Gurbachan Singh were present near Suburban Office PSEB Morinda and you accused Malkiat Singh in furtherance of common object of you co-accused committed the murder by intentionally causing the death of Mohinder Singh and thereby you accused Malkiat Singh committed an offence punishable under section 302 of the IPC whereas your co-accused Satnam Singh, Sukhwinder Singh, Manmeet Singh,

Balwinder Singh and Gurbachan Singh (P.O) have committed an offence punishable under section 302 of IPC read with section 149 of the IPC, and within my cognizance.

Thirdly, on the same date, time and place you all the accused namely Satnam Singh, Sukhwinder Singh, Malkiat Singh, Manmeet Singh, Balwinder Singh and Gurbachan Singh (P.O) committed dacoity by using deadly weapon i.e. revolver 32 bore and snatched a sum of Rs.7,78,156/- from the possession of Mohinder Singh and thereby you all the above said accused have committed an offence punishable under section 397 of the IPC and within my cognizance."

6. All the persons who had been sent up for trial, namely the appellant Manmeet Singh alias Goldie, Satnam Singh, Sukhwinder Singh, Malkiat Singh and Balwinder Singh denied the charges. The prosecution examined 27 witnesses including the Doctor who had conducted the post-mortem examination on the dead body of Mohinder Singh and the investigating officer. It projected PW1 Gursatinder Singh the informant, PW3 Gurcharan Singh the driver of the vehicle and PW4 Balbir Singh, Cashier, to be the eye witnesses of the incident. The incriminating evidence brought on record by the prosecution was then explained to the accused persons who in their statements under Section 313, Cr.P.C. stood

by their denial of the charges and the accusations made against them. They thereafter examined 13 witnesses in defence principally trying to explain the varying sums of money seized from them by the police in course of the investigation. The learned trial court on the evidence on record and after hearing the learned counsel for the parties convicted and sentenced the appellant as above but acquitted the four co-accused persons. The appeal filed by the appellant from the decision however stood dismissed, as herein before mentioned. The appellant in his relentless pursuit for redress is thus before this Court.

7. Mr. Huzefa Ahmadi, the learned senior counsel for the appellant has emphatically argued that having regard to the charges framed and the evidence adduced by the prosecution, conviction of the appellant in no way is permissible under Section 396 of the IPC and thus he is entitled to be acquitted. According to the learned senior counsel, in the face of the essential ingredients of an offence under section 396, IPC, in absence of any evidence or finding that the alleged offence had been committed on the basis of a conspiracy and perpetrated by five

or more persons as charged, the appellant could not have been convicted of the said offence in the teeth of the acquittal of the four co-accused persons. Mr. Ahmadi has urged that not only the prosecution has failed to identify the perpetrators of the alleged offence through an identification test parade or otherwise, it having failed to adduce any direct and convincing evidence to establish that the appellant was the assailant, his conviction, if allowed to stand, would result in travesty of justice. The learned senior counsel maintained that it being apparent from the findings recorded by the learned trial court that the prosecution had failed to connect the other four co-accused persons with the crime involved, it was impermissible in law to convict the appellant under section 396, IPC as no independent charge under section 302 had been framed against him. Having regard to the state of evidence on record, the learned trial court has grossly erred in law and on facts in convicting the appellant under the said provision of the Code, he urged. Without prejudice to these, the learned counsel insisted as well that the prosecution had failed to adduce any cogent or reliable evidence to prove any of the charges against the persons on trial and thus the impugned conviction of

the appellant and the sentence awarded ought to be interfered with in the interest of justice. Reliance has been placed on the decisions of this Court in endorsement of the above on **Ram Bilas Singh & Ors. Vs. The State of Bihar** 1964 (1) SCR 775 and **Raj Kumar vs. State of Uttaranchal** 2008(11) SCC 709.

8. Per contra, the learned counsel for the State has argued that the complicity of the appellant having been unmistakably proved by the witnesses PW1, PW3 and PW4, his conviction is unassailable in law. While contending that the evidence on record does prove the charges against all the five persons including the appellant, he has urged that in any view of the matter, the participation of all of them in the offence can, by no means, be ruled out. According to him therefore, in view of the concurrent findings recorded by the learned trial court and the High Court of Punjab and Haryana, no interference is warranted.

9. We have carefully weighed the rival submissions. In the normal course, in the face of concurrent findings, this Court would have been disinclined to advert to the evidence bearing on the essential factual aspects, but having regard to the grounds urged

on behalf of the appellant, it construed it to be expedient to undertake the exercise to the extent necessary. This is more so as the appellant has been sentenced to undergo imprisonment for life.

10. The testimony of PW1 Gursatinder Singh is in substantial reiteration of his account of the incident, as narrated in the FIR. He, however, did add in his deposition at the trial that he did not know the name of the two accused persons, but would be able to identify them. In Court, he indeed identified the appellant. In cross-examination this witness, inter-alia, stated that he had been shown the bag and the pistol but denied to have been shown any cartridge/bullet. He stated that at the time of the preparation of the memo pertaining to the pistol, Sukhwinder Singh was also present. He too affirmed that in the Matador vehicle, he had travelled along with Mohinder Singh, Darshan Singh and Gurcharan Singh, the driver. He stated as well that there was no scuffle between the assailant and the deceased and admitted that the occurrence took place near the front window of the matador vehicle.

10 A. The statement of PW2 Sukhwinder Singh is to the effect that on the same day, when he was coming back from different villages, where he had gone for distribution of electricity bills, he at about 2.45 p.m. had seen one white Maruti car with three persons standing nearby of whom one was wearing a cap and the others were sikh gentlemen. According to him, the scooter on which he was travelling developed a snag for which he stopped and that in course of his halt there he overheard the conversation of the persons over some delay. The witness stated that then one Bajaj scooter did come from the Morinda side and two persons alighted whereafter all left in the car towards village Rangian. This witness at the trial did identify four accused persons but was doubtful about the fifth, Malkiat Singh.

10 B. PW3 Gurcharan Singh stated that he had driven the vehicle to the State Bank of Patiala, Kharar Branch to collect the salary amount therefrom about 11.00 a.m. on the date of incident. According to him, they started from the bank with the cash put in a bag. He stated that Mohinder Singh was sitting on the back seat of the vehicle and that one bag was with

Gursatinder and the other with Balbir Singh. According to the witness, he stopped the van at the office of the Suburban Sub division of main Morinda Kharar road. Mohinder Singh alighted from the vehicle and Gursatinder gave him one bag containing cash and at that point of time two persons made an attempt to snatch the bag from Mohinder Singh and as the latter resisted there was a scuffle and he fell down. The witness stated that the two persons then fired from a revolver which struck Mohinder Singh on the left side of the chest. Though this witness identified the appellant in Court, he could not identify the others. He stated further that he did not know as to what had happened with the bag which Mohinder Singh had been carrying.

11. PW4 Balbir Singh who at the relevant time was the Cashier, City Sub Division PSEB, stated on oath that he was a member of the party that had travelled in the Matador vehicle bearing No.PB-11-6119 of which Gurcharan Singh was the driver. He similarly stated that when the vehicle returned after carrying the cash for the salary of the employees and had stopped at the Suburban Sub Division at about 2.30 p.m., Mohinder Singh alighted from the vehicle with a bag containing money. According to this witness,

Gursatinder Singh did also disembark and that at that point of time one person tried to snatch the bag from Mohinder Singh and when he resisted he was fired at by the assailant. This witness stated that the assailant was alone. He however stated that after the assault he along with another person drove away on the scooter Kurali side. In the course of the trial, the witness identified the appellant but failed to recognize the others. In cross-examination, this witness admitted that he did not know accused Manmeet Singh by name and that he had not seen him before the incident. He admitted as well that he had seen him for the first time in Court.

12. Though as many as 27 witnesses in all had been examined by the prosecution, except the evidence of PW14, the Doctor who had conducted the autopsy, PW18 SI Gurbachan Singh, PW19 ASI Tara Singh and PW21 SI Balwant Singh, the investigating officer, that of others is not of any decisive significance.

13. PW14 in his testimony, referring to the post-mortem, did opine that there was “a punctured wound on the left side of the sternum, 2 cm away with margin inveterate charred black in 4

and 5th intercosted space". According to him, the cause of death was bullet injury causing haemorrhage shock and death with heart failure and that the injury was ante mortem in nature.

14. PW18 S.I. Gurbachan Singh, is the witness to the disclosure statements made by the appellant and Malkiat Singh on the basis whereof certain amounts were recovered from the possession of the accused persons.

15. PW21 S.I. Balwant Singh, the investigating officer, mentioned about the report made to him by Sanjiv Joshi on 30.07.2004 that he had overheard one person talking on telephone at the Bus Stand Morinda that whenever he would give a missed call, the other side should understand that the car carrying cash of the Electricity Board had started from Kharar.

16. According to this witness acting on this information, Gurbachan Singh and thereafter Satnam Singh and Sukhwinder Singh were arrested. Further on 5.8.2004 from Balwinder Singh an amount of Rs.20,000/- was recovered. This witness further stated that on 8.8.2004, Sanjiv Joshi identified all the accused persons. He further stated that on 11.8.2004 a scooter and a

revolver was seized. He also stated that the accused Balwinder Singh, Satnam Singh, Manmeet Singh and Malkiat Singh had admitted their involvement in various similar such incidents.

16 A. Sanjiv Joshi, PW25, in his testimony however stated that on 28.5.2004 while he was standing near the State Bank of Patiala, Kharar Branch, one Maruti car bearing No.PB-10X 1665 was parked nearby and one sikh gentleman having beard was present there and was talking on a mobile phone. This witness stated that the sikh gentleman conveyed through his phone that he would give three missed calls once the vehicle carrying the money of PSEB would start. This witness deposed that when he came to know about the incident after 2/3 months, he passed on this information to the Police Station. Noticeably, this witness did omit to give the identification of the accused persons.

17. The learned trial court to reiterate, after a due appraisal of the evidence on record concluded that the recovery of the different amounts of money from the accused persons was not only not in consonance with the disclosure statements but also

did not establish any nexus with the offence in absence of the identification of the currency notes with those delivered by the bank. The evidence of the defence witness explaining the circumstances under which these amounts had remained deposited with them was also taken note of in reaching this conclusion. The learned trial court rightly discarded the statements of the accused persons to the effect that the amount recovered had been the booty of the dacoity being inadmissible under section 27 of the Indian Evidence Act, 1872. It rejected as well the test identification parade conducted in course of the investigation being flawed for various legal infirmities. It recorded too that the witnesses had not been able to disclose the registration numbers of the scooter or the car referred to in their evidence and also noticed the contradictions in the registration number of the scooter used in the commission of the offence. The seizure of the revolver was also rejected to be of no probative value vis-à-vis the offence alleged.

18. The testimony of PW2 was also disregarded as not believable to connect the accused persons with the crime. It, however, acted on the testimony of PW1, PW3 and PW4 at the trial to conclude

that the appellant had entered into a scuffle with the deceased and had eventually shot at him. The trial court thus returned a finding that the prosecution could connect only the appellant with the offence and none other. It thus, as a corollary, recorded that conspiracy had not been made out. The appellant was convicted and sentenced in this background. The High Court affirmed in toto the analysis of the evidence as undertaken by the learned trial court and its ultimate conclusions in all respects.

19. A plain perusal of the charges framed would demonstrate that whereas all the accused persons had been indicted for the offence of conspiracy under section 120-B, IPC and of murder under Section 302,IPC read with section 149 of the Code, accused Malkiat Singh was exclusively charged for murder under section 302 IPC. All of them, additionally were arraigned for having committed the offence punishable under section 396 as well.

20. It is thus patent that the accused persons including the appellant, in terms of the charge so framed could be convicted, if proved, for the offences under section 120B, 302, 396 IPC.

21. Both the courts below have concluded that the prosecution had failed to prove the charge of conspiracy and had in fact unreservedly recorded that the other four co-accused persons could not be connected with the offences charged. On being queried by us the learned counsel for the State has fairly conceded that the State of Punjab has not preferred any appeal against the acquittal of the four co-accused persons. It has thus accepted the verdict of the learned courts below in this regard. The acquittal of these four co-accused persons for lack of evidence about their identification and participation in the commission of the alleged offence has thus become final.

21 A. On an assessment of the entire gamut of the evidence on record, the inescapable conclusion is that the prosecution has failed to prove either the identification of the four co-accused persons or their involvement in the offences as members of the assembly for the offence of dacoity with murder. The evidence of PW1, PW3 and PW4 if read together also does not unimpeachably prove that the appellant was the assailant and that he had fired from the pistol in his possession at Mohinder Singh. Their evidence in fact is contradictory in material terms.

Not only the informant, at the time of the incident, did not know the appellant by his name, admittedly it was for the first time that he claimed to identify him in Court at the trial. The same is the state of PW3 and PW4 as well.

21 B. To reiterate, the test identification parade held by the investigating agency had been discarded and rightly for being vitiated by contraventions of procedural safeguards mandated by law. There is thus no direct evidence as well to establish the culpability of the appellant qua any of the offences. As a matter of fact, the evidence of the above eye witnesses does not indicate the involvement of five or more persons in the perpetration of the crime. With the failure of the State to prefer an appeal against the acquittal of the four co-accused persons, the finding to this effect has also become final and binding. There is no overwhelming evidence to the contrary to overturn the concurrent findings of the courts below on the failure of the prosecution to prove for participation of five or more persons in the commission of the alleged offences.

22. Section 391,IPC defines dacoity to be an offence, if 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 of attempt, amount to five or more. In terms of section 391,IPC in such an eventuality every person so committing, attempting or aiding is said to commit dacoity. Section 396 which comprehends dacoity with murder is a contingency where one of the five or more persons who are conjointly committing dacoity, commits murder in so committing dacoity. In such a case, every one of those persons shall be punished with death or imprisonment for life or rigorous imprisonment for a term which may extend to 10 years and would also be liable to pay fine.

23. A combined reading of section 391 and 396, IPC would bring to the fore, the essential pre-requisite of joint participation of five or more persons in the commission of the offence of dacoity and if in the course thereof any one of them commits murder, all members of the assembly, would be guilty of dacoity with murder and would be liable to be punished as enjoined thereby.

24. Axiomatically, thus, the indispensable pre condition to perceive an offence of dacoity with murder is a participating assembly of five or more persons for the commission of the offence. In absence of such an assembly, no such offence is made out rendering the conviction therefor of any person in isolation for murder, even if proved, impermissible in law. To convict such a person of the offence only of murder, if proved otherwise, there ought to be specific charge to that effect.

25. This Court in **Ram Bilas Singh & Ors. Vs. The State of Bihar** 1964 (1) SCR 775 while dilating on the scope and purport of Section 149 of the IPC had held:

> "What has been held in this case would apply also to a case where a person is convicted with the aid of s.149, Indian Penal Code instead of s.34. Thus all the decisions of this court to which we have referred make it clear that it is competent for a court to come to the conclusion that there was an unlawful assembly of five or more persons, even if less than that number have been convicted by it if (a) the charge states that apart from the persons named, several other unidentified persons were also members of the unlawful assembly whose common object was to commit an unlawful act and evidence led to prove this is accepted by the court; (b) or that the first information report and the

> evidence shows such to be the case even though the charge does not state so, (c) or that though the charge and the prosecution witnesses named only the acquitted and the convicted accused persons there is other evidence which discloses the existence of named or other persons provided, in cases (b) and (c), no prejudice has resulted to the convicted person by reason of the omission to mention in the charge that the other unnamed persons had also participated in the offence."

26. Their Lordships thus enunciated, on an exhaustive survey of the judicial renderings on the issue that it is competent for a Court to come to the conclusion that there had been an unlawful assembly of five or more persons and yet convict a lesser number of persons if the charge stated that, apart from the persons named, several other unidentified persons were also members of the unlawful assembly whose common object was to commit an unlawful act and that the evidence led to prove the same is accepted by the Court or if the FIR and the evidence shows such to be the case even though the charges does not state or if though the charge and the prosecution witnesses named only the acquitted and convicted persons, there is other evidence which disclosed the existence of named or other persons provided, that in the last two contingencies, no

prejudice would result to the convicted persons by the reason of omission to mention in the charge that the other unnamed persons had also participated in the offence.

27. With reference to the offence of dacoity under section 391, IPC in particular and the import of section 149, IPC, this Court in **Raj Kumar vs. State of Uttaranchal** 2008 (11) SCC 709 had propounded that in absence of a finding about the involvement of five or more persons, an accused cannot be convicted for such an offence. Their Lordships, however, clarified that in a given case it could happen that there might be five or more persons and the factum of their presence either is not disputed or is clearly established, but the Court may not be able to record a finding as to their identity resulting in their acquittal as a result thereof. It was held that in such a case, conviction of less than five persons or even one can stand, but in the absence of a finding about the presence or participation of five or more persons, less than five persons cannot be convicted for an offence of dacoity.

27 A. The above pronouncements do acknowledge the extension of the concept of collective culpability enshrined in

section 149, IPC in section 396, IPC contemplating murder with dacoity. An assembly of five or more persons participating in the offence is thus the sine qua non for an offence under section 396, IPC permitting conviction of any one or more members thereof even if others are acquitted for lack of their identity. In absence of such an assembly of five or more persons imbued with the common object of committing dacoity with murder, any member thereof cannot be convicted for the said offence irrespective of his/her individual act of murder unless independently and categorically charged for that offence.

28. As adverted to hereinbefore above, the prosecution has completely failed in the instant case to either prove the participation of five or more persons in the commission of the offence or establish their identity. In that view of the matter having regard to the above principle of law as authoritatively laid down by this Court and in absence of a singular charge under section 302, IPC against the appellant sans the assembly, we are of the unhesitant opinion that his conviction for dacoity with murder punishable under section 396, IPC, in the facts and circumstances of the case, cannot be sustained in law. The

attention of the courts below we understand had not been drawn to this vital and determinative facet of the case.

29. Be that as it may, in our considered view, the conviction and sentence of the appellant being repugnant to letter and spirit of section 391 and 396 of the IPC, the same is liable to be interfered with. We order accordingly.

30. The appeal is thus allowed and the impugned judgments and orders are hereby set aside. The appellant is acquitted of the charges and is hereby ordered to be set at liberty forthwith. The lower courts records be transmitted immediately for necessary follow up steps.

.....J.
(M.Y.Eqbal)

.....J.
(Amitava Roy)

New Delhi,
Dt. March 24, 2015