APPELLATE CRIMINAL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice Harrison.

LASHKAR AND OTHERS—*Appellants,*

versus

THE CROWN—*Respondent.*

1921

June 18.

Criminal Appeal No. 285 of 1921.

Indian Penal Code, Sections 390, 396—*Dacoity—one of the dacoits killing two persons while the dacoits made good their escape with their booty—whether his comrades liable for the consequences of his act.*

The house of one K. was raided by a gang of five dacoits, one of whom was armed with a gun and the rest with *chhavis*. The dacoits ransacked the house and made good their escape with their booty. A number of villagers had assembled outside the house and in fighting their way through the crowd one of the dacoits shot one man dead and inflicted fatal wounds upon another who died shortly afterwards. The question before the Court was whether under these circumstances every dacoit was equally liable for the consequences of this act of one of them.

Held, that murder committed by dacoits while carrying away the stolen property is "murder committed in the commission of dacoity," *vide* section 390 of the Indian Penal Code, and every offender was therefore liable for the murder committed by one of them.

Queen-Empress v. *Sakharam Khandu* (1), and *Vitti Thevan* v. *Vitti Thevan* (2), followed.

Emperor v. *Chandar* (3), distinguished.

Appeal from the order of Lt.-Colonel B. O. Roe, Sessions Judge, Lahore, dated the 17th March 1921, convicting the appellants.

M. OBEDULLA and ASGHAR BEG, for Appellants.

KHILANDA RAM, Public Prosecutor, for Respondent.

The judgment of the Court was delivered by—

SIR SHADI LAL, C. J.—On the night of the 19th August 1921, the house of one Kiman in the village of Shaikh Saad in the district of Lahore was raided by a

(1) (1900) 2 Bom. L. R. 325. (2) (1906) 17 Mad. L. J. 118.

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gang of five dacoits, one of whom was armed with a gun and the rest with *chhavis*. Kiman himself was not in the house at that time, but his two wives, *Mussammat* Phanan and *Mussammat* Nuran, who were in the house with two children, were deprived of their ornaments and *Mussammat* Phanan was also molested. The dacoits ransacked the house, broke open a box containing jewellery and made good their escape with their booty. It appears that on hearing the outcry of the women a large number of villagers assembled outside the house and the offenders in fighting their way through the crowd shot one Jaimal dead and inflicted serious wounds upon one Jamala, who died shortly afterwards.

The Sessions Judge of Lahore has convicted three persons, namely, Lashkar, Musa and Bagga of having participated in the dacoity, and has sentenced them under section 396, Indian Penal Code, to the penalty of death each. That the house of Kiman was the scene of a daring dacoity does not admit of any dispute and the only question is whether the participation of the convicts has been duly established.

Upon an examination of the evidence for the prosecution we have reached the conclusion that so far as Lashkar and Musa are concerned, there cannot be the slightest doubt that they took part in the dacoity. As against them we have not only the testimony of the approver Mahanda, but also the evidence of the witnesses, *Mussummat* Phanan, *Mussummat* Nuran and Nizam Din, who are unanimous in saying that both these persons were members of the gang who visited the house of Kiman on the night in question. Further we have the fact that on the 25th August 1920 Lashkar produced from his house an earthen vessel containing stolen ornaments and Musa produced from the house of his cousin Imam Din an earthen pot containing jewels, and from the house of a man, Saddu, *Kureshi*, a piece of cloth containing some other ornaments which have been identified to be a part of the stolen property. There is a mass of evidence on the record to show that the ornaments produced by Lashkar and Musa are the property of Kiman, and no serious attempt has been made to impeach the veracity of the witnesses who profess to identify the articles. The discovery of the stolen property coupled with the identification evidence referred to

above affords in our opinion a strong corroboration of the approver's story as against these two men; and we have, therefore, no doubt that their guilt has been fully established.

Coming now to the case against Bagga we find that there is no evidence to support the story of the approver. It is admitted that Bagga was not found in possession of any stolen property, and the learned Sessions Judge is wholly wrong in saying that *Mussammat* Phanan identified this convict "before the police and again in Court." The learned Vakil for the Crown admits that the identification parade at which *Mussammat* Phanan was asked to pick out the offenders, was held on the 27th August 1920, and it is beyond doubt that Bagga was not arrested until the 8th September 1920 It is clear that this lady never identified Bagga and her statement that she picked out the "three accused and the approver four days afterwards at an identification parade" is manifestly incorrect. We have searched in vain for any evidence to show that Bagga was identified by any person before the Court; indeed, the learned Vakil for the Crown admits that he is unable to support the conclusion arrived at by the Sessions Judge. It is clear that beyond the approver's testimony there is not an *iota* of evidence to connect Bagga with the commission of the crime and we must, therefore, hold that his participation in the dacoity has not been established.

The learned Vakil for the appellants contends that as the murders were committed when the offenders were effecting a retreat, it cannot be said that they were committed in the course of the commission of the dacoity. To this contention we cannot accede. It is beyond doubt that the culprits were engaged in carrying off their booty, and in view of the definition of robbery contained in section 390, Indian Penal Code, it must be held that they were still engaged in committing dacoity. The murders of Jaimal and Jamala were, therefore, committed in the commission of the dacoity: and every offender is equally liable for the consequences of the acts of one or more of his comrades. The judgment in *Emperor* v. *Chandar* (1) relied upon on behalf of the appellant is clearly distinguishable. In that case the

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dacoits did not get any plunder, and it was while they were retreating without any booty that one of them turned round upon his pursuers and committed a murder. It was consequently held that only the person who had actually committed the murder could be convicted under section 396, and that the responsibility for murder cannot be extended to the whole gang.

We have no hesitation in holding that murder committed by dacoits while carrying away the stolen property is "murder committed in the commission" of dacoity; and this view has been held by the Bombay High Court in *Queen-Empress* v. *Sakharam Khandu* (1) and by the Madras High Court in *Vitti Thevan* v. *Vitti Thevan* (2).

For the aforesaid reasons we uphold the convictions of Lashkar and Musa and confirming the sentences of death imposed upon them dismiss their appeal. We accept the appeal of Bagga and direct that he be released forthwith.

Appeal accepted in part.

(1) (1900) 2 Bom. L. R. 325. (2) (1906) 17 Mad. L.J. 118.