

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 13th July, 2016
Judgment delivered on: 22nd August, 2016

+ **CRL.A. 1763/2014**

GAURAV Appellant

Represented by: Mr. L.S. Saini, Adv.

versus

STATE (NCT OF DELHI) Respondent

Represented by: Ms. Neelam Sharma, APP with
SI Amit Rana, PS Maurya
Enclave.

+ **CRL.A. 288/2015**

SURAJ @ BHAGAT Appellant

Represented by: Mr. Himanshu Dutt, Adv.

versus

STATE OF NCT OF DELHI Respondent

Represented by: Ms. Neelam Sharma, APP with
SI Amit Rana, PS Maurya
Enclave.

+ **CRL.A. 358/2015**

SANJAY @ AMIT Appellant

Represented by: Mr. Jatin Rajput, Mr. Vikram
Mathur, Mr. Anupam Dubey,
Advs.

versus

STATE Respondent

Represented by: Ms. Neelam Sharma, APP with
SI Amit Rana, PS Maurya
Enclave.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeals the appellants Gaurav, Suraj @ Bhagat and Sanjay @ Amit challenge the impugned judgment dated 22nd November, 2014 convicting Gaurav and Sanjay @ Amit for the offences punishable under Sections 395/186/332/353/34 IPC and Suraj @ Bhagat for the offences punishable under Sections 395/186/332/353/397/34 IPC in FIR No.142/2012 registered at PS Maurya Enclave and the order on sentence dated 29th November, 2014 directing them to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹10,000/-; in default to undergo simple imprisonment for a period of one month.
2. Learned counsel for Gaurav contends that Pradeep, PW- 18 who was the complainant has turned hostile. Further, Pradeep in his cross examination stated that Gaurav was not seen at the spot, hence benefit of doubt should be given to Gaurav. There are contradictions in the testimony of Pradeep and Dinesh. Pradeep stated that Suraj @ Bhagat gave the stab blow on his stomach whereas Dinesh stated that Sanjay @ Amit gave stab blows to Pradeep. Furthermore, Pradeep stated that one person caught hold of him who was apprehended and his name was revealed as Sanjay @ Amit, one person inflicted knife injury and another boy was wearing blue t-shirt and had cut marks on the mouth. The knife injury was inflicted by Suraj @ Bhagat and the person having cut marks on the mouth was acquitted by the learned Trial Court. Therefore, Gaurav was not one of those three boys, thus, was not present at the spot and liable to be acquitted. Conviction cannot be

based solely on the testimony of Dinesh because he is not a reliable and trustworthy witness. Dinesh failed to identify the boys who caught hold of him but identified those persons who caught hold of Pradeep and gave him stab injuries. It is totally unbelievable that a person can identify a person who was standing at a distance, on the opposite side of the vehicle whom he had no occasion to see on the other side.

3. Learned counsel for Gaurav further contends that the TIP was not conducted through Dinesh but through PW-19 ASI Sheshdhar who failed to identify Gaurav in the TIP proceedings. Further TIP was conducted after two months by PW-20 HC Babu Lal after showing him photographs of the appellant Gaurav, hence under these circumstances, Gaurav refused to participate in the TIP. The identification in Court was rightly not believed by the Trial Court as there is no purpose to conduct TIP after two months. Dinesh claimed that Sanjay @ Amit inflicted knife injury to Pradeep but on the other hand Pradeep identified Suraj @ Bhagat as the person who stabbed him and Sanjay @ Amit caught him hold with another person. The Trial Court believed this statement of Pradeep but did not believe when Pradeep specifically stated that Gaurav was not the other person. Learned Trial Court failed to note that Dinesh stated that he remained in police station for 15-16 days till his vehicle was not released and he wrongly identified Gaurav under the pressure of police. Thus, Gaurav is liable to be acquitted. Dinesh stated that Sanjay @ Amit was arrested on the spot and a sum of Rs. 1500-1600 and the mobile phone of Pradeep was recovered from Sanjay @ Amit and were handed over to him on the same day in the police station. However, the prosecution case was that it was seized by the police and later on same was taken on Superdari. Thus, the testimony of Dinesh cannot be relied

upon. Moreover no recovery was effected from the possession or at the instance of Gaurav.

4. Learned counsel for Suraj @ Bhagat contends that the appellant Suraj @ Bhagat was neither identified by any of the witness nor by PW-13 Pancham. Furthermore, no Test Identification Parade was conducted. Suraj @ Bhagat was identified only by Pradeep (who has turned hostile) and that too on the basis of the photographs shown to him at the police station. There was no recovery of knife from Suraj @ Bhagat. No witness has deposed about it and the versions of Pancham and Raju are different.

5. Learned counsel for Sanjay @ Amit contends that both Pancham and Raju have not recognized Sanjay. Further Pradeep also did not recognize Sanjay though it is alleged that Sanjay caught hold of Pradeep when injury was inflicted on him. The only evidence is of Dinesh, who could not have seen injuries being inflicted to Pradeep as he was on the other side of the truck. In the alternative, it is also submitted that as regards offences punishable under Section 186/332/353 IPC are concerned, the appellant has already undergone four years imprisonment. The only offence left is Section 395 IPC. Since the prosecution has not been able to prove that 5 or more persons were involved, thus no offence of dacoity punishable under Section 395 IPC is made out. Hence in the alternate the conviction may be converted to one under Section 392 IPC and the appellant be released on the period already undergone as no minimum sentence is prescribed for offence punishable under Section 392 IPC.

6. Learned APP for the State on the other hand contends that Sanjay @ Amit who was apprehended at the spot was the one who caught hold of Pradeep and not the one who caused stab injury. Pradeep also identified

Sanjay. Gaurav refused to participate in TIP hence adverse inference is required to be drawn. Pradeep identified Suraj @ Bhagat through dossier who gave knife blow. The version of the prosecution witnesses is supported by the MLC of injured Pradeep Ex.PW-9/A proved by Dr. Farooq Khan PW-9 who noticed a lacerated wound on the left iliac region of the abdomen of Pradeep. Recovery of wrist watch of the complainant has been made at the instance of the appellants, which also proves the prosecution case.

7. Brief facts of prosecution case are that the complainant Pradeep PW-18 driver of Swaraj Mazda truck bearing no. PB – 65P – 7734 on 2nd June, 2012, along with the cleaner Dinesh Kumar PW-10 was coming from Ambala to Kirti Nagar, Delhi and at 2:00 AM when they reached Ashiana Chowk, a TATA 407 Tempo bearing no. DL – 1LE 7561 stopped in front of their truck and 8-10 boys came out of the truck. Two three boys pulled the complainant down from his truck and two three boys pulled out the cleaner. While two boys were holding the complainant, one of the boys took out the complainant's purse from his pocket. Thereafter, those boys tried to drive away the complainant's truck and when the complainant tried to stop the same, one of them stabbed him with a knife in his stomach. Those boys drove away the truck towards Wazirpur. Thereafter, two police man met them on a motorcycle to whom the complainant and the cleaner narrated the entire incident. The police men along with the cleaner went towards Wazirpur to apprehend the assailants and trace the truck. While the complainant was walking, he saw the assailants and TATA 407 on the opposite side of the road at Kohat Red Light where the police had apprehended one of the assailants who had robbed him. The name of the person apprehended was revealed as Sanjay @ Amit and he was identified

by the complainant. The complainant also stated that Sanjay @ Amit was holding him when other boy stabbed him. On the basis of the statement Ex. PW 18/A of the complainant, FIR was registered under Sections 395/397/412/186/332/353/34 IPC and investigation carried out. Charges were framed against the appellants under Sections 395/397/412/186/332/353/34/120B/307 IPC.

8. Dinesh who was examined as PW-10 was working as a cleaner on the truck Swaraj Mazda bearing no. PB 65P 7734, stated that in the intervening night of 2nd and 3rd June, 2012 at about 2:00 A.M., when their truck which was driven by Pradeep reached Ashiana Chowk, Pitampura, suddenly one TATA 407 came in front of their vehicle and 10-15 persons came down from that TATA 407. Two persons entered from his side and one of them was having a knife. Another person entered from the side of the driver Pradeep PW-18 and demanded money. He stated that the mobile phone and purse of Pradeep containing Rs. 1000-1500/- was taken by the assailants and when Pradeep was trying to save himself, he was assaulted on his stomach by a knife by the assailant. He further stated that Pradeep and he ran away from there and the assailants took the truck towards Wazirpur. Thereafter, he met the police officials at Madhuban Chowk and narrated the whole incident. He further stated that they saw the assailants taking their truck by pushing the same (*dhakka mar kar la rahe thay*). The police officials tried to stop them. All of them ran except one who was apprehended by the police. His name was disclosed as Sanjay @ Amit. He stated that he identified him as he was the one who caught hold of Pradeep while injury was caused on his stomach.

9. Pancham who was examined as PW-13 was the tempo driver of TATA 407 bearing no. DL -1LE- 7561 stated that on 2nd June, 2012, he

along with his elder brother Raju and helper Saroj were coming to Delhi from Gurgaon when around 11:15 P.M. near furniture market Mangolpuri, suddenly in the darkness 5-6 persons came in front of their truck. When he stopped the vehicle, two persons came in the vehicle from his side after opening the door and put a revolver on his back and threatened him. Another person who was holding a knife entered from the side of the helper. Thereafter, the assailants forced him to take a U-turn from the furniture market and the truck was stopped at Phathar market. He also stated that his brother Raju and Saroj were detained at the back side of TATA 407. The assailants were also at the back side of TATA 407 and then the assailants forced him to take his TATA 407 towards bypass Karnal road. When they reached Samaypur Badli area, he was also pushed towards the back side of TATA 407. He found that 8-9 assailants were present there. They were forced to lay down towards the floor of the tempo. He further disclosed that his mobile phone of red colour made in China bearing SIM of Vodafone with mobile no. 8860972216 and Rs. 1600/- were taken by the assailants from him at Mangolpuri Furniture market. Meanwhile, they heard the voice of someone and thereafter they heard noise of shots being fired and all the persons were running away from there. Thereafter, he was forced to drive towards Madhuban Chowk, follow a Canter and then to bring his vehicle in front of the Canter. He stated that two persons remained in the cabin of the Tata 407 and the revolver was put on his back. The other assailants went towards the canter and were grappling with the driver of the canter. In the meantime, two police officials fired in the air and all the assailants ran away and the police officials followed them. One of the assailants was apprehended by the police. He stated that he could not identify the faces of

the assailants since it was night time and he had not seen the faces completely. He denied the suggestion that the assailants present in the cabin were talking about the commission of dacoity with the truck Swaraj Mazda. However, he stated that they directed him to follow the truck and then overtake it.

10. ASI Sheshdhar who was examined as PW-19 stated that in the intervening night of 2nd and 3rd June, 2012, he was posted at police station Maurya Enclave and was on night patrolling duty. At 2 A.M., he found one injured person standing on the road along with one other person near Ashiana Chowk and on their indication he stopped. He came to know that they were driver and cleaner of truck bearing no. 7734. They informed that 7-8 boys came in TATA 407 and stopped it in front of their vehicle and thereafter pulled them down from the truck and inflicted knife blow, assaulted them and escaped with their truck towards Wazirpur. ASI Sheshdhar further stated that he came to know that the name of the driver who had received stab injury was Pradeep PW-18 and other boy standing with him was the cleaner Dinesh PW-10. He further stated that he took the cleaner along with Ct. Babu Lal and went towards Wazirpur to apprehend the persons and recover their truck. When they reached Kohat Enclave red light, the cleaner pointed out towards the truck. He directed the persons to stop the truck. They stopped the truck and 7-8 boys came down from the truck and started scuffling. When he saw Ct. Babu Lal being surrounded by these boys, he fired in air and on hearing the sound of fire, all the boys ran in different directions. One boy was apprehended by him and on interrogation, his name was revealed as Sanjay @ Amit. He was arrested. On casual search of Sanjay @ Amit, Rs. 1600/- were recovered and he disclosed that he

had robbed it from the driver of TATA 407 bearing no. DL – 1LE- 7561 and the mobile phone was also recovered.

11. PW-20 HC Babu Lal corroborated the testimony of PW-19 ASI Sheshdhar PW-19.

12. Before the Court, the complainant Pradeep PW-18 deposed in sync with the statement made before the police. He however stated that the name of the person who gave him stab injury on his stomach was Suraj @ Bhagat. Pradeep identified him by his photograph shown to him in the police station. During his cross-examination, he stated that he cannot identify the exact person who gave him knife blow but he heard other assailants calling out the said person by the name of Suraj. He also stated that it was Sanjay who caught hold of him along with two other boys when he was given knife blows. Later on he identified Suraj on the basis of dossier.

13. As per the evidence of the witnesses, three consecutive incidents of dacoity took place on the night of 2nd June, 2012. The first incident related to TATA 407 bearing No. DL-1LE-7561 driven by Pancham PW-13 whose version is supported by Raju, PW-14 the cleaner/ helper of the said vehicle. As per the deposition of Pancham and Raju TATA 407 was stopped near furniture market Mangol Puri while they were returning from Gurgaon by 5-6 boys on the point of revolver and knife. Thereafter the vehicle was hijacked and they took away the cash and mobile of Pancham and compelled him to take ‘U’ turn towards phathar market where the vehicle was stopped and both Raju and Saroj were compelled to go on the back side of the vehicle and the driver was compelled to drive the vehicle to Karnal Bypass. When the vehicle reached Samaypur Badli area, the driver was also forced to move towards the back side and held captive. For this incident a separate

FIR No.212/2012 under Section 395/397/367/401/120-B/34 IPC was registered at PS Mangol Puri. Thereafter the accused entered a factory at Samaypur Badli, when the guard resisted he was stabbed to death where after the accused fled as the other guard fired upon them and foiled the attempt of dacoity. For this second incident FIR No.187/2012 under Section 397/398/302/34 IPC was registered. However when the robbed TATA bearing No. DL-1LE-7561 was driven back to the outer road side of Madhuban Chowk, driver Pancham was compelled to drive the vehicle in front of Canter/ Swaraj Mazda in order to stop the said vehicle bearing No. PB-65P-7734 which was loaded with cables and copper wires. About 7-8 persons came out of TATA 407 and pulled out Pradeep and his cleaner Dinesh from the vehicle, removed his purse containing cash and forcibly took away his vehicle. When Pradeep resisted he was given stab injury by one and two boys caught hold of him, while 2-3 boys caught hold of the cleaner Dinesh. Thereafter they took away the vehicle i.e. the Canter (Swaraj Mazda) of Pradeep along with TATA 407. In the meantime seeing two Police personnel on motorcycle Pradeep and cleaner stopped them and narrated the incident who followed the two vehicles. As Swaraj Mazda was creating trouble, they found the vehicle moving slowly on the road towards Wazirpur side and both the vehicles were stopped near Kohat Enclave Red light. All the assailants came out of the vehicles and ran in different directions, however Sanjay @ Amit was apprehended at the spot. From the personal search of Sanjay @ Amit, cash looted from Pancham and robbed mobile phone which was case property in FIR No.212/2012 PS Mangol Puri were recovered.

14. Dinesh Saini PW-10 has identified both Gaurav and Suraj stating that

when they entered the vehicle their faces were not muffled. He identified Sanjay @ Amit as the person who entered the truck, was having knife and caught hold Pradeep to the ground. He also identified Gaurav as the second person who held Pradeep to the ground. Dinesh further identified Suraj @ Bhagat as one of the assailants before the Court in cross-examination by the learned APP. He denied the suggestion that he identified Suraj @ Bhagat on 22nd August, 2012 in the police station with Pradeep by the photograph. The version of Dinesh is corroborated by the testimony of Pradeep who stated that he could not exactly identify the person who gave the knife injury but he was being called by the name Suraj, the others were calling out “*Suraj Maar Suraj Maar*” and thus he stated he was Suraj. He stated that Suraj appeared to be the same person as his profile matched with the person who had inflicted knife blow to him. Thus there is no contradiction in the testimony of Dinesh and Pradeep. Merely because Pradeep has not been able to identify Gaurav as the second person who caught hold of him, testimony of Dinesh whose presence at the spot has been proved beyond reasonable doubt, cannot be disbelieved.

15. Sanjay @ Amit does not dispute the identity for the reason he was apprehended at the spot. As regards test identification of Gaurav is concerned, Gaurav was arrested on 4th June, 2012 at 6.00 PM on a secret information whereafter an application for conducting test identification parade was filed by the investigating officer SI Surajpal. Initially the test identification parade was to be conducted on 21st July, 2012 however again fresh application was filed seeking permission for test identification parade which was allowed. When the test identification parade was conducted on 1st August, 2012 PW-19 ASI Sheshdhar failed to identify Gaurav. However

in the said test identification parade, no such plea was taken that the photographs of the accused Gaurav were taken after his arrest and shown to the witnesses. Despite continuing in judicial custody when the second application for test identification parade was filed on 8th August, 2012 Gaurav refused to participate in the same on the ground that his photographs were taken by the police and shown to the witnesses. This plea is unsustainable for the reason the same was not taken on 1st August, 2012 when Gaurav participated in the test identification parade for the first time. As regards identification of Suraj @ Bhagat is concerned, the application for test identification parade was filed on 3rd August, 2012 and on 9th August, 2012 he refused to take part in the test identification parade on the ground that his photographs have already been shown by the police officials. Dinesh Saini PW-10 was not shown any photographs prior to refusal of test identification parade by Suraj @ Bhagat but only on 22nd August, 2012 after Suraj @ Bhagat refused test identification parade. Thus, the plea that Gaurav and Suraj rightly refused TIP because their photographs had been shown to the witnesses is unsustainable. The other plea taken by Gaurav and Suraj are that Dinesh Saini could not have identified them is incorrect for the reason both Dinesh Saini and Pradeep driver of Swaraj Mazda were taken out from the vehicle and when pradeep was assaulted the same was witnessed by Dinesh Saini. Even in cross-examination of Dinesh, nothing contrary could be elicited.

16. The statements of the witnesses clearly prove the sequence of events and the witnesses have identified the accused. In a melee when number of accused attack, it may not be possible for each of the witness to identify all of them. Moreover it is not the quantity of the evidence but the quality of

the evidence. From the testimony of Dinesh PW-10, Pradeep PW-18, Pancham PW-13 and Raju PW-14 the prosecution has proved its case beyond reasonable doubt against the appellant.

17. The contention of learned counsel for the appellant Suraj that since only three appellants have been convicted, appellants cannot be convicted for offence punishable under Section 395 IPC as there are less than 5 persons is mis-conceived and required to be rejected. In the decision reported as (2008) 11 SCC 709 Raj Kumar @ Raju Vs. State of Uttaranchal the Supreme Court dealing with the similar contention held:

”20. It was contended before this Court that as the High 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, negated the contention observing as under: (Saktu case[(1973) 1 SCC 202 : 1973 SCC (Cri) 307] , SCC p. 204, para 6)

“6. ... 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 13 or 14 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)

21. 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.

22. *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 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 of common object of that assembly, every member of such assembly is guilty of that offence.*

23. *In Dalip Singh v. State of Punjab [AIR 1953 SC 364 : 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 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 than five persons with the aid of Section 149 IPC would be legal and lawful. Speaking for the Court, Bose, J. stated: (AIR p. 366, paras 19-20)*

“19. Before Section 149 can be called in aid, the court must 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 on this uncertain foundation.

20. *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 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 behoves a court, particularly in a murder case where sentences of transportation in no less than four cases have been enhanced to death, to say so with unerring certainty. Men cannot be hanged on vacillating and vaguely uncertain conclusions.*”

(emphasis supplied)

24. Again, in *Mohan Singh v. State of Punjab* [AIR 1963 SC 174 : 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* [AIR 1953 SC 364 : 1954 SCR 145] stated: (*Mohan Singh case* [AIR 1963 SC 174 : 1962 Supp (3) SCR 848] , AIR p. 179, para 9)

“9. ... 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.”

25. Similarly, in *Krishna Govind Patil v. State of Maharashtra* [AIR 1963 SC 1413 : (1964) 1 SCR 678] , after referring to *Mohan Singh* [AIR 1963 SC 174 : 1962 Supp (3) SCR 848] , the Court observed: (Patil case [AIR 1963 SC 1413 : (1964) 1 SCR 678] , AIR p. 1416, para 7)

“7. ... It may be that the charge discloses only named persons; it may also be that the prosecution witnesses named only 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, 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.”

26. In yet another decision in *Ram Bilas Singh v. State of Bihar* [(1964) 1 SCR 775] this Court said: (SCR pp. 787-88)

“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 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 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 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 IPC provided it comes to the conclusion that five or more persons participated in the incident.”

27. *In Maina Singh v. State of Rajasthan [(1976) 2 SCC 827 : 1976 SCC (Cri) 332] 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.*

28. *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.*

29. *In Ram Dular Rai v. State of Bihar [(2003) 12 SCC 352 : 2004 SCC (Cri) Supp 408 : JT (2003) 9 SC 301] this Court said: (SCC p. 356, para 6)*

“6. 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.”

30. *The learned counsel appearing for the State, however, referred to Ram Shankar Singh v. State of U.P. [AIR 1956 SC 441] In that case, six accused were placed on trial for an offence of dacoity. Three of them belonged to the complainant's village whereas remaining three belonged to the adjoining village. The trial court convicted all the six accused. 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 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 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 IPC, nothing more was necessary. When the High Court set aside conviction of the three accused and acquitted them out of six persons jointly tried, it was left only with the 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 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.*

31. *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 acquittal has attained finality.*

32. *Shyam Behari v. State of U.P.* [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 their attempt as the villagers raised hue and cry. Residents of the village reached at the place and the miscreants ran away without collecting booty. They were chased by some persons who 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.

33. *Ramdeo Rai Yadav v. State of Bihar* [(1990) 2 SCC 675 : 1990 SCC (Cri) 413 : 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.

34. Similar is the ratio in *Anshad v. State of Karnataka* [(1994) 4 SCC 381 : 1994 SCC (Cri) 1204 : JT (1994) 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 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.

35. 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 conspiracy punishable under Section 120-B 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.”

18. Appeals are dismissed.
19. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.
20. TCR be returned.

(MUKTA GUPTA)
JUDGE

AUGUST 22, 2016
‘vn’