

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.46 of 1995

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1. Mahendra Yadav, son of Sukhdeo Yadav, resident of village Kalikapur P.S. Kaluahi, District Madhubani.
 2. Ram Lochan Das, son of Prabhu Das, resident of village Kalna P.S. Harlakhi, district Madhubani.
 3. Ram Sewak Yadav, son of Rup Chand Yadav, resident of village Kalna, P.S. Harlakhi District Madhubani.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
Criminal Appeal (DB) No. 152 of 1995

Jaibir Yadav @ Mohabia, son of Shri Khattar Yadav, resident of Village Mohanpur P.S. Harlakhi, District Madhubani.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In Criminal Appeal (DB) No. 46 of 1995)

For the Appellant/s : Mr. Hemant Kumar, amicus curiae

For the Respondent/s : Mr. Shivesh Chandra Mishra, APP

(In Criminal Appeal (DB) No. 152 of 1995)

For the Appellant/s : Mr. Vijay Kumar, Advocate.

For the Respondent/s : Mr. Shivesh Chandra Mishra, APP

CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA)

Date : 03-05-2018

1. Both the above stated criminal appeals have been filed against Judgment of conviction and sentence order dated 27.03.1995 passed by learned Sessions Judge, Madhubani in Session Trial No. 241 of 1993, by which



and whereunder, he convicted the appellants for the offence punishable under Section 396 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and, accordingly, a conman judgment is being passed in both the above stated criminal appeals.

2. A Dacoity was committed in the house of informant and others in the night of 02.10.1992 and in that course, the Dacoits committed murder of two persons. P.W.9, Shrichandra Jha, got recorded his Fradbeyan on 03.10.1992, at about 4 a.m. at Basopatti Hospital to this effect that, in the evening of 01.10.1992, he had gone to his village to attained the Barkhi of his aunt and in previous night at about 9.30 p.m., he along with his son Mukesh Kumar Jha, his uncle Bhuneshwar Jha, his cousin brother Jai Chandra Jha and two younger children were sleeping in his *Baithka* and at about 2 a.m., he woke up and saw two to three persons standing near his *Chowki* whereas two to three persons were standing near *Chowki*, on which, Jai Chandra Jha was sleeping. The aforesaid persons were flashing torch, the said persons had covered their faces by *Galmoch*. P.W.9 gave the physical description of the aforesaid persons. P.W.9 further stated that one of the persons, who was standing near *Chowki*, was carrying small weapon in his hand. He further claimed that one person removed his HMT watch from his wrist. In the meantime, he heard some sound, upon which, the person, who was standing near *Chowki*, asked him to sleep and, thereafter, the aforesaid persons proceeded towards his house. He noticed that there were 14 to 15 persons in number. He further stated that, in the meantime, Satish Chandra Jha came out of his house and when he reached at the end of corridor he uttered as to why they had assaulted his family members. In the meantime, P.W.9 heard sound of firing and some of the Dacoits entered in his house and some Dacoits



entered in the house of his cousin brother namely, Sukh Chandra Jha. The above stated Satish Chandra Jha came towards *Baithka* and fell down crying on the *Chowki*. The Dacoits committed loot in both the houses and decamped with looted articles. P.W.9 after decamping of the Dacoits went near the Chowki of Jai Chandra Jha and noticed that Jai Chandra Jha having sustained firearm injury on his eye had died and he also noticed that Satish Chandra Jha had sustained fired arm injury on his neck and the blood was oozing out, Satish Chandra Jha was alive. The informant and others took him to Basopatti Hospital, where Doctor declared him brought dead. The informant claimed that he could identify Dacoits and looted articles.

3. On the basis of aforesaid Fradbeyan, Basopatti P.S. Case No. 139 of 1992 for the offence under Section 396 of the Indian Penal Code was registered and on the same day, former FIR for the above stated offence was drawn up against unknown Dacoits.

4. P.W.13, namely, Mirja Shefula Baig, the then Officer-in-charge of Basopatti Police Station, took the charge of investigation. He inspected the place of occurrence, seized the empty cartridges from the place of occurrence and seized blood stained clothes etc., prepared the seizure list and recorded the statement of witnesses and also got recorded the statements of P.W. 1 and P.W. 2 under Section 164 of the Cr.P.C. and after completion of the investigation, he submitted charge sheet against the appellants and others for the offence punishable under Section 396 of the Indian Penal Code.

5. It is pertinent to note that the appellants were arrested in course of investigation as suspect and they were put on Test Identification Parade. P.W. 5, P.W.6, P.W.8, P.W.9 and P.W.10 participated in the Test Identification Parade and claimed to have identified the appellants. The



appellants stood charged for the offence punishable under Section 396 of the Indian Penal Code, to which, they denied and claimed to be tried.

6. In course of trial, prosecution examined, altogether, 13 prosecution witnesses and also proved certain documents including the postmortem report of the deceased person.

The statements of appellants were recorded under Section 313 Cr.P.C., in which, they denied the prosecution story and appellant, Ram Lochan Das, specifically, stated that he was caught by police from his house and further stated that there was litigation between one Sitaram Yadav and Rambrich Yadav and his elder brother Ramji Das had deposed in favour of Rambrich Yadav and due to aforesaid enmity, he was got implicated in this false case by Ram Bahadur Yadav, son of Sitaram Yadav. The appellant, Ram Lochan Das, further stated that police brought him at police station, where he was badly beaten and P.W.9 as well as his other family members came at the police station and the police got identified him by P.W.9 and his family members. The appellant, Jaibir Yadav, specifically, stated in his statement recorded under Section 313 of the Cr.P.C. that he was admitted in the clinic of Dr. Ramashish Babu and P.W. 9 as well as Ashok Jha brought him to the police station, where he was forced to sleep in the house of one constable and after that he was sent to jail. Similarly, appellant, Mahendra Yadav, specifically stated in his statement recorded under Section 313 of the Cr.P.C. that the cousin sister of P.W.9 was married with Sushil Jha who happens to be his co-villagers and next door neighbour. He further stated that Prem Chandra Jha, Arun Kumar Jha, and Shrichandra Jha, used to visit the house of Sushil Jha. Similarly, Chanda Kumari also used to visit the house of Sushil Jha. He further stated that he quarreled with Shrichandra Jha and Sushil Jha and



thereafter, he was arrested by Kaluahi Police and information regarding his arrest was given to Basopatti Police Station. He further stated that subsequently, he was arrested by police of Basopatti Police Station and thereafter, his photograph was taken by the police and thereafter he was brought to Kowah village. Appellant, Ram Sewak Yadav, stated in his statement recorded under Section 313 of the Cr.P.C. that P.W. 9 Shrichandra Jha, was acquainted with him since long, as there was a criminal case between Sitaram Yadav and Rambrich Yadav and in the aforesaid case, he stood surety for Sitaram Yadav and others. He further stated that P.W.9 Shrichandra Jha was Advocate of Rambrich Yadav and on the instigation of Rambrich Yadav, he has been implicated in this case. He further stated that he was brought to the Police Station and Daroga called P.W.9 Shrichandra Jha and took his photographs as well as photograph of Mahendra Yadav and thereafter, he as well as Mahendra Yadav were taken to Kowah village where villagers including the family members of P.W.9 Shrichandra Jha assembled and they were got identified by the aforesaid persons.

The defence also examined four witnesses and got exhibited some documents in support of the defence.

7. Learned Trial Court after perusing and analysing the evidences available on the record convicted and sentenced the appellants in the manner as stated above.

8. Learned amicus curiae appearing in Criminal Appeal No. 46 of 1995 assailed the impugned judgment of conviction and sentence order, arguing that admittedly, the first information report was lodged against unknown persons, but in course of trial, P.W.2, P.W.3, P.W.11 and P.W.12 claimed that one Ashok Kumar Jha, who happens to be the cousin brother of



P.W.9, was instrumental in commission of Dacoity and the above stated Ashok Kumar Jha was present at the time of committing Dacoity, but it is surprising enough that P.W.2, P.W.3, P.W.11 and P.W.12 were not asked to participate in the Test Identification Parade and, as a matter of fact, the family members and well wishers of Ashok Kumar Jha were called for Test Identification Parade, so that they could save Ashok Kumar Jha by implicating the appellants in the present case. He further submitted that appellant, Mahendra Yadav, and others were well known to P.W.9 and others from before the alleged Dacoity and, therefore, identification of the appellants by the above stated persons was meaningless. He further submitted that, moreover, P.W.13 admitted in his cross-examination that there was no Hajat in Basopatti Police Station and after arrest of the appellants they had been kept in the constable's Barrack. He submitted that it is obvious from the aforesaid fact that the constable's Barrack had easy excess and, therefore, this possibility cannot be ruled out that prior to Test Identification Parade, appellants were shown to the witnesses and, therefore, the claim of the appellants that they were shown to the witnesses prior to the Test Indemnification Parade appears to be plausible and reasonable.

9. He further submitted that the defence has brought documentary evidence to show that appellants have inimical terms with Sushil Jha, who happens to be the cousin brother of P.W.9 and specific case of the appellants that P.W.9 and his others family members used to visit the house of Sushil Jha and, therefore, the possibility of false implication of the appellants in the present case cannot be ruled out.

10. He further submitted that the prosecution witnesses claimed to have identified the appellants in the light of torch flashed by the Dacoits at



the time of Dacoity, but the aforesaid claim of the appellants appears to be doubtful, particularly, in the light of the decision rendered by Apex Court of this country in the case of Tamilselvan versus State represented by Inspector of Police, Tamil Nadu, reported in (2008) 7 Supreme Court Cases 755, in which, it has been held by the Apex Court as follows:-

“ It is difficult to accept version of prosecution witnesses that they could have identified any of the accused merely by moonlight. In the evidence of prosecution witnesses, it is stated that the accused were carrying torches, but there is no indication whether the victims, including the deceased forest guard and the gardener, who sustained fire injures, carried torches. Since it was the accused, who allegedly carried torches, it is difficult to believe how prosecution witnesses could have identified the assailants. The position would have been different if forest guards had been carrying torches and had been pointing them at the assailants, but here the position is just the reverse. In fact due to assailants’ torches, prosecution witnesses would have been partially blinded by the light of the torchlight, and would not have been able to identify anybody”.

11. Learned amicus curiae on the strength of the aforesaid decision argued that in the present case also the prosecution witnesses do not claim that they were carrying any torches or there was any other source of light, in which, they were able to identify the Dacoits rather the prosecution witnesses claimed that they were identify the Dacoits in the light of torches flashed by



the Dacoits themselves and, therefore, the claim of the prosecution witnesses appears to be doubtful.

12. Learned amicus curiae further submitted that, as a matter of fact, the deceased persons were killed on account of property dispute and in the said occurrence, Ashok Kumar Jha was instrumental, but the said Ashok Kumar Jha, in collusion with P.W.9, gave a colour of Dacoits, but subsequently, when the family members of the deceased persons were examined, they fairly disclosed this fact that it was Ashok Kumar Jha, who was instrumental in the crime and was present at the time of alleged occurrence and, therefore, in the aforesaid circumstance, the appellants are entitled to get benefit of doubt.

13. He further submitted that so far as the Test Identification Parade is concerned, the same was held after more than ten days and the delay in holding the Test Identification Parade was also fatal to the prosecution case, but the learned trial court failed to take notice of the aforesaid fact.

14. Learned amicus curiae relied upon the decision of Mulla and another versus State of Uttar Pradesh, reported in (2010) 3 Supreme Court Cases 508, in which, the Apex Court laid down this principle that an Identification Parade ideally must be conducted since possible to avoid any mistake on the part of witnesses and this condition can be revoked if proper explanation justifying the delay is provided and the authorities must make sure that the delay does not result in exposure of the accused, which may lead to mistakes on the part of the prosecution.

15. On the strength of above stated decisions, learned amicus curiae submitted that in the present case, the appellant had been kept in police Barrack and before holding their Test Identification Parade, they were taken



to village Kowah and produced before the witnesses and other villagers and after more than 10 days of their arrest the Test Identification Parade was held and, therefore, in the aforesaid circumstance no reliance can safely be placed upon the Test Identification Parade of the appellants and so far as the identification of the appellants in court by the witnesses is concerned, it is claim of the appellants that they were put before the prosecution witnesses just after their arrest and moreover, except on the basis of their identification in the court, the appellants could not have been convicted, particularly, in absence of any other corroborative evidence.

16. On the other hand, learned Additional Public Prosecutor supported the impugned judgment of conviction and sentence order arguing that P.W. 5, P.W.6, P.W.8, P.W.9 and P.W.10 participated in Test Identification Parade and identified the appellants and furthermore the aforesaid witnesses disclosed the manner, in which, the appellants participated in the Dacoity. He further submitted that P.W. 13 found broken boxes, blood stained cloths etc. which go to show that a Dacoity with murder was committed on the place of occurrence. He further submitted that in course of trial the prosecution witnesses also identified the appellants and, therefore, there is no scope to interfere into the impugned judgment of conviction and sentence order and as a matter of fact, the prosecution has proved its case beyond all shadow of reasonable doubts and the learned trial court rightly convicted and sentenced the appellants.

17. As we have stated that to prove its case prosecution examined, altogether, 13 witnesses, out of them, P.W.2, P.W.3, P.W.5, P.W.6, P.W.7, P.W.8, P.W.9, P.W.10, P.W.11 and P.W.12 claimed themselves to be eye



witnesses of the alleged Dacoity whereas P.W.1 and P.W.4 proved the postmortem reports and P.W.13 is the Investigating Officer.

18. P.W.2 Bina Devi, is wife of deceased, Jai Chandra Jha. This witness stated that at the alleged date of occurrence, at about 2 a.m., she along with her child was sleeping inside her house whereas her younger brother-in-law, namely, Satish Chandra Jha (deceased) was sleeping at the Deosar of her courtyard. She further stated that she heard sound of firing at her door and woke up. She further stated that she along with her child came out of the room and her younger brother-in-law also came out of the house after opening the main door. She further stated that she saw 5 to 7 persons standing at her door and out of the aforesaid persons, she identified Ashok Jha, who ordered the others to shoot Satish Jha and thereafter, out of the aforesaid 5 to 7 persons, one person opened fire at Satish Chandra Jha and having received firearm injury Satish Jha went running near her husband and fell down there. She also went running there and found her husband in injured condition. She noticed that her husband had sustained firearm injury on his eye as well as on his head. She further stated that her cousin father-in-law was issueless and used to say to gift his entire property to her husband and her younger brother-in-law. She further stated that though she had made statement before the police but her statement was not correctly and properly recorded by the police and she had filed protest petition against the investigation of the police. She further stated that she had made statement before the Magistrate and on being cross examined, she stated that her father-in-law had three brothers, namely, Shobhakant Jha, Dhananjay Jha, and Bindeswar Jha. The aforesaid Ashok Kumar Jha, is son Sukhchandra Jha who happens to be son of Dhananjay Jha. Her cousin father-in-law, Bideshwar



Jha, wanted to give his entire property to her husband as well as younger brother-in-law. This witness nowhere stated as to how she identified the Dacoits because she has nowhere stated about any source of light.

19. P.W.3, Ranju Devi, who happens to be wife of late Satish Chandra Jha, claimed that at the time of alleged Dacoity she was sleeping in her house whereas her husband was sleeping out side the house and her elder brother-in-law was also sleeping at outer *Dalan*. She claimed that she woke up after hearing the sound of firing at her door and she came out of her house after opening the door. She further claimed that she saw 5 to 7 persons standing at her door and out of them, she identified Ashok Jha and on the order of Ashok Jha, one of the culprits shot fire at Satish Jha, who having sustained firearm injury went running near Jai chandra Jha. She further stated that Jaichandra Jha had also sustained firearm injury and died on the spot. She claimed that the Dacoity committed in her house and one of the Dacoits snatched ear ring from her. She also claimed that her statement was not properly recorded by the police and she had filed a protest petition before the court against the investigation of the police. She also claimed that her statement was recorded before the Magistrate. On being cross-examined, she stated that she along with P.W.1 had come at her main door. She further stated that Bhuneshwar Jha and Shrichandra Jha were standing near the door and except the aforesaid two persons, there was no any other person. She further stated that police was saving the real culprits and was falsely implicating the innocent persons and that was the reason she had filed an application before the police.

20. P.W.5, Arun Kumar Jha, claimed that at the time of alleged occurrence, he was sleeping on the roof of his house and Satish Chandra Jha



was also sleeping at his house. He further stated that he woke up having heard the sound of firing and noticed that 10 to 15 persons were standing at his door. The aforesaid persons were armed with Farsa, Pistal, etc. This witness stated that he came out of his house after opening the door and similarly, Satish Chandra Jha also came out of his house, but in the meantime, someone opened fire upon the deceased Satish Chandra Jha, who fell down near *Dalan*. This witness claimed that he identified the Dacoits in the light of torch flashed by the Dacoits. He further stated that Jaichandra Jha had also sustained firearm injury and died. At paragraph 4 of his examination-in-chief, this witness has stated that he had gone to Madhubani jail and identified four Dacoits in Madhubani jail. This witness admitted that Ashok Kumar Jha, who has been made accused in this case as well as Santosh Kumar Jha are his full brothers. This witness further stated that Bindeshwar Jha had given his property equally to branches of his family and this witness denied that Bideshwar Jha had adopted Jaichandra Jha as his son. This witness further denied that two days prior to the alleged occurrence, Bideshwar Jha along with Jaichandra Jha had gone to Janakpur to sell his land. This witness admitted at paragraph 12 of his cross examination that he came out of his room when the Dacoits decamped from the place of occurrence. This witness further stated that three Dacoits were resident of Harlakhi village whereas one Dacoit of Kaluahi Police Station. This witness further admitted at paragraph 19 of his cross examination that the Dacoits had not caused injury to any other persons except the two deceased persons. Furthermore, this witness stated at paragraph 23 of his cross examination that the sister of deceased, Satish Chandra Jha, and deceased Jaichandra Jha was married to Sushil Jha of village Kalikapur. This witness denied that he had



ever gone to village Kalikapur. At the same paragraph of his cross examination, this witness stated that he did not know as to whether the house of appellant, Mahendra Yadav was adjacent to the house of Sushil Jha, though, he admitted in the same paragraph that Mahendra Yadav was known to him from before. This witness further admitted at paragraph 24 of his cross examination that he went Madhubani jail alone to participate in Test Identification Parade and in Test Identification Parade, the persons of different complexions as well as different wearings were put in two separate lines and furthermore, at paragraph 25 of his cross-examination he stated that second time he went to attend the Test Identification Parade after one month of the alleged occurrence. This witness denied this fact that the deceased of this case were killed by their family members due to dispute of lands of Bindeshwar Jha.

21. P.W.6, Prem Chandra Jha, also claimed to have seen the alleged Dacoity and repeated almost the similar story. This witness also claimed to have participated in the Test Identification Parade twice and he claimed that he had identified four Dacoits in Test Identification Parade. This witness also identified the appellants before the Court. This witness is full brother of informant. This witness claimed that he had identified Dacoits in the light of torch flashed by the Dacoits. This witness also stated that he had gone to jail for attending Test Identification Parade and at the time of Test Identification Parade 22 to 25 persons were put before him, but all the aforesaid persons had different complexions as well as wearings.

22. P.W.7, Sukhchnadra Jha, has been tendered by the prosecution. This witness is the father of co-accused Ashok Kumar Jha.



23. P.W.8, Birendra Jha @ Nunu Jha, claimed that at the time of alleged occurrence he was sleeping in his house and having heard the sound the firing he woke up and went at the door of Bhuneshwar Jha, where he saw 10 to 15 persons standing there and in the meantime, Satish Chandra Jha came out of his house but someone shot fire at him. This witness further stated that the elder brother of Satish Chandra Jha, namely, Jai Chandra Jha also sustained injury and the Dacoits committed Dacoity in the house of Bhuneshwar Jha, Sukhchandra Jha, and Shivchandra Jha. This witness also claimed that he had identified the Dacoits in the light of torches flashed by the Dacoits. This witness also claimed to have participated in the Test Identification Parade and claimed that he had identified four Dacoits (appellants). This witness stated that in Test Identification Parade the persons who were produced before him had different complexions and wearings.

24. P.W.9, Shrichandra Jha, is the informant of this case. This witness supported his Fradbeyan and prosecution story and stated that he had identified four Dacoits in the light of torch and the aforesaid Dacoits were identified by him in Test Identification Parade. This witness claimed to have identified the appellants as Dacoits before the Court. This witness admitted that he knew Ramashray Yadav and Rajendra Yadav of Kalna village since last three years and the above stated persons were his clients. This witness further stated that the marriage of his cousin sister had solemnized with Sushil Jha of Kalikapur in the year 1972, but he stated that he never visited village Kalikapur. He also admitted that Kusheshwar Yadav is the father of his client Rajendra Yadav. He further stated that Rampreet Yadav was also his client and Rampreet Yadav had lodged a Criminal Case of Section 307 of the Indian Penal Code against Sitaram Yadav and in the aforesaid Criminal Case,



Ram Sewak Yadav (appellant) and Ram Balak Yadav had stood bailor of Sitaram Yadav. This witness further stated that on the alleged date of occurrence, Ashok Jha (co-accused) was sleeping on the roof of his house. This witness further stated that Dacoits had killed only two persons as the remaining male members had fled away from the place of occurrence. This witness further stated that when he woke up, he saw that the Dacoits were flashing torches on him as well as deceased Jaichandra Jha and at that time Dacoits had tied *Gamcha* on their head. He further stated that on 18.10.1992 he had gone to attend the Test Identification Parade. This witness further admitted that the suspects, who were put before him in Test Identification Parade, were of different complexion and had wearing different colour of clothes, the height of the suspects were also not similar. He further stated that on second time he participated in Test Identification Parade on 02.11.1992. This witness denied that Satish Chandra Jha and Jaichandra Jha were got killed by them for grabbing the property of Bindeshvar Jha.

25. P.W.10, Chanda Devi, is the married daughter of deceased, Jai Chandra Jha, and she claimed that on the alleged date of Dacoity she had at her parental home and was sleeping at *Baranda*. She stated that she woke up in night and went near hand pump to take water. She further stated that she found two persons standing in the street and stated the aforesaid fact to her mother and after that she went to sleep. However, after half an hour she heard sound of firing and came in her courtyard where she saw 4 to 5 Dacoits in Angan and two Dacoits at Baranda. The aforesaid two Dacoits were armed with Farsa and Lathi and one of the Dacoits was armed with Pital. She further stated that one Dacoit snatched ear ring from her aunt, namely, Ranju Devi. She further stated that when she came out of Angan, she saw that



Ashok Jha, who was standing there and was ordering the other Dacoits to kill Satish Jha and thereafter, the Dacoit who was carrying Pistol in his hand, shot fire on Satish Chandra Jha. She further stated that Dacoits shot fire to her father also. She also claimed to have identified three Dacoits in the light of torch. She further stated that she participated in Test Identification Parade and identified two Dacoits. She identified appellant, Ram Sewak Yadav, and appellant, Mahendra Yadav, before the court and stated that appellant Ram Sewak Yadav had snatched ear ring from her aunt whereas appellant, Mahendra Yadav, shot fire at Satish Chandra Yadav. She admitted in her cross-examination that Bindeshwar Jha used to treat her father as his son and Bindeshwar Jha wanted to give his entire property to his father as well as his uncle Satish Chandra Jha which had caused annoyance to Ashok Jha and Sukhchandra Jha etc. This witness stated that the Dacoits had not covered their faces by *Gamcha* or *Muretha* at the time of alleged Dacoity. She denied that the appellants were brought to her village after their arrest by the police and the appellants were produced before her for identification. She further stated that 13 suspects, in two different lines, were produced before her and all suspects including the two appellants were wearing different colours of clothes and there was no uniformity in height and complexion of the aforesaid suspects. She further admitted that except her father and uncle none had sustained any injury nor Dacoits did any overt act to assault the remaining persons.

26. P.W.11, Shivkali Devi, is the mother of the deceased. She also claimed that having heard sound of firing, she came out of her house, she saw co-accused, Ashok Kumar Jha, standing near the house and Ashok Kumar Jha gave signal to Dacoits, who shot fire on deceased Satish Chandra Jha. This



witness stated that co-accused, Ashok Jha, had invited culprits to kill her both sons and her both sons were killed due to dispute of property of Bindeshwar Jha.

27. P.W.12, Bhuneshwar Jha, also supported the factum of Dacoity and claimed that he was sleeping at his *Baithka* by the side of deceased Jaichandra Jha. This witness is father of both deceased and stated that he had identified Ashok Jha, on whose direction Dacoits shot fire at deceased Satish Chandra Jha. This witness stated that he had heard the voice of Ashok Jha. This witness further stated that the Dacoits had done nothing with him and other persons who were sleeping with him except deceased Jaichandra Jha. This witness further stated that the main object of Dacoits was to kill his both sons. This witness also stated that due to dispute of the property of Bindeshwar Jha, the Ashok Jha arranged the Dacoits and got killed his two sons.

28. P.W.13, Mirja Shefula Baig, is the Investigating Officer. This witness stated that having recorded the Fradbeyan of P.W.9, he visited the place of occurrence. This witness described the topography of place of occurrence but stated that he did not find any mark of violence on the door of the informant. He seized empty cartridges, blood stained clothes etc. This witness stated that Supervising Authority had observed that the alleged occurrence took place due to property dispute. This witness further admitted that he did not get the statements of P.W.2 and P.W.3 recorded under Section 164 of the Cr.P.C. This witness admitted that, on 18.10.1992, he had gone to the P.O. village and inquired from P.W.2, P.W.3 P.W.7 and P.W.9, but they had not disclosed any specific fact. This witness further admitted that there was no Hajat at Basopatti Police Station and the prisoners used to be kept at the



constable's Barrack. He further stated that three broken boxes were recovered from the orchard. This witness further admitted that the appellants, Mahendra Yadav and Ran Sewak Yadav, were arrested on 07.10.1992, whereas appellant, Ram Lochan Das was arrested on 17.10.1992 and appellant, Mahabir @ Jaibir Yadav, was arrested on 21.10.1992. This witness further admitted that the Test Identification Parade of appellant, Mahendra Yadav, and Ram Sewak Yadav was done on 19.10.1992 and on that very day, Ram Lochan Das was in Madhubani jail as Ram Lochan Das had been arrested on 17.10.1992. He further stated that since Ram Lochan Das arrested on 17.10.1992 and that was the reason for his Test Identification Parade was not done on 19.10.1992. He further stated that he was engaged in another work and that was the reason the Test Identification Parade of appellants, Mahendra Yadav and Ram Sewak Yadav could be arranged after 10 days of their arrest. This witness stated that, on 19.10.1992, the witnesses had come to the police station and along with him went to the court of Chief Judicial Magistrate, Madhubani and after that he along with witnesses and Judicial Magistrate went to jail. This witness further admitted that, on 02.11.1992, the witness, who had identified Ram Lochan Das and Jaibir Yadav had come to police station and thereafter along with him went to the court of Chief Judicial Magistrate, Madhubani, from where, they went to jail. This witness denied that after arrest of Mahendra Yadav and Ram Sewak Yadav, they were taken to Kowah village. This witness further denied that photographs of Mahendra Yadav and Ram Sewak Yadav was taken out after their arrest. This witness admitted that when appellant, Jaibhir Yadav @ Mohabia, was under treatment after his arrest, the aforesaid appellant was got examined by Doctor, who had found one injury on his person said to be caused by hard and



blunt substance. This witness admitted that P.W.10, Chanda Devi, had not claimed before him to have seen the killing of Satish Chandra Jha. This witness further admitted that appellant, Jaibir Yadav @ Mohabia was handed over to him by police of Harlakhi Police Station. This witness denied that the appellant, Jaibir Yadav @ Mohabia was handed over to him by witnesses, Shrichandra Jha and Shivchandra Jha.

29. After scrutinizing the entire evidences available on the record, the certain facts emerged out. It is emerged out that in the night of alleged date of occurrence, Dacoity was committed and in course of that Dacoity, two persons were killed. Furthermore, it is emerged out that informant and other five witnesses are agnates and one set of witnesses denied the participation of co-accused, Ashok Jha in the alleged Dacoity whereas another set of witnesses claimed that at the instigation of Ashok Jha, Dacoits had come to commit the murder of deceased, Jaichandra Jha and Satish Chandra Jha. Furthermore, it is emerged out that one Bindeshwar Jha wanted to transfer his entire property to deceased persons, but the above stated fact had caused annoyance to informant and his other agnates. Furthermore, it is emerged out that the witnesses claimed to have identified Dacoits in the light of torches flashed by the Dacoits and some prosecution witnesses participated in Test Identification Parade and claimed to have identified the appellants in Test Identification Parade, but except P.W.9 the family members of the deceased persons were never asked to participate in the Test Identification Parade. It is pertinent to note here that all the family members of the deceased persons claimed about the participation of Ashok Jha in the alleged occurrence and stated that on the instigation of Ashok Jha, the Dacoits came and committed the murder of the deceased persons. It has also come in the



evidence that P.W.2 and P.W.3, who are respective wives of both the deceased, claimed that they had filed complaint before the court against the investigation of the police and admittedly, P.W.2 and P.W.3 were not asked to participate in the Test Identification Parade though, it is stated that one of the Dacoits snatched the ear ring from P.W.3. It is also emerged out from the evidences available on the record that cousin sister of the informant was married with one Sushil Jha, who is co-villager of appellant, Mahendra Yadav, and the house of aforesaid Sushil Jha is adjacent to the house of Mahendra Jha. Furthermore, it has come in evidence that appellant, Ram Sewak Yadav, stood bailors for one Ramchandra Yadav and in the aforesaid case, the informant was an Advocate. Although, the informant and other material prosecution witnesses claimed that they had not visited village Kalikapur, but the aforesaid statement of informant and other material prosecution witnesses appears to be doubtful because admittedly, the above stated Sushil Jha was close relative of informant and other material prosecution witnesses and, therefore, this possibility cannot be ruled out that Mahendra Yadav was known to the informant and other material prosecution witnesses from before the alleged occurrence. Similarly, in respect of appellant, Ram Sewak Yadav, this possibility cannot be ruled that he was known to informant from before the alleged Dacoity.

30. It has also come in evidence that the appellants were kept at Basopatti Police Station, which had no Hazat and the prisoners of the aforesaid police station used to be kept in constable's barrack and admittedly, after arrest of the appellants, they were kept in the above stated police barrack. Furthermore, it has come in evidence of P.W.13, that the witnesses, who had participated in the Test Identification Parade, had visited the police



station prior to participation of Test Identification Parade and, therefore a suspicion arose in the mind of the court that the appellants might have been seen to the witness, who had participated in the Test Identification Parade. Moreover, the appellants were not put up for Test Identification Parade just after their arrest and remand. They were put up for Test Identification Parade more than after ten days of their arrest and the aforesaid delay in producing the appellants on Test Identification Parade has not been explained by the prosecution and, therefore, the Test Identification Parade of the appellants becomes doubtful. Moreover, the Test Identification Parade is not a substantive piece of evidence and the conviction cannot be based only on the basis of Test Identification Parade. In the present case, apart from Test Identification Parade, the witnesses, who had participated in the Test Identification Parade, claimed to have identified the appellants before the court, but as we have already stated that there was possibility that the appellants were known to the aforesaid witnesses from before to the alleged Dacoity and, therefore, even if the prosecution witnesses had identified the appellants before the court, then also the aforesaid identification test appears to be meaningless.

31. The prosecution witnesses claimed that they had identified the Dacoits in the light of torch flashed by the Dacoits and there was no other source of light at the time of alleged occurrence, but the Hon'ble Apex Court in *Tamilselvan* case (supra) had already held that the identification of the accused in the light of torch flashed by the accused is doubtful. In the present case, the witnesses claimed to have seen the Dacoits in the light of their torches flashed by the Dacoits, but in our view, it is difficult to believe that the witnesses could be able to identify the Dacoits in the light of torches



flashed by the Dacoits, because if the Dacoits flashed torches towards witnesses, the witnesses would have been partially blinded and, therefore, it was not possible for them to identify the Dacoits. Therefore, the above circumstance also creates doubt about the claim of the prosecution witnesses and, in our view, the appellants are entitled to get the benefit of doubt.

32. On the basis of the aforesaid discussions, both the above stated criminal appeals are allowed and the impugned Judgment of conviction and sentence order dated 27.03.1995 passed by learned Sessions Judge, Madhbani, in Session Trial No. 241 of 1993 are, hereby, set aside. The appellants are acquitted of the charges. The appellants are on bail, therefore, they are discharged from the liabilities of their bail bonds.

33. Let a copy of first and last page of this Judgment be handed over to the learned amicus curiae for needful.

(Hemant Kumar Srivastava, J)

(Rajendra Kumar Mishra, J)

bhardwaj/-

AFR/NAFR	AFR
CAV DATE	N.A.
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