

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.161 of 2015

Arising Out of PS.Case No. -65 Year- 1988 Thana -WAJIRGANJ District- GAYA

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**SHEO RATAN PASWAN, S/O GANGU PASWAN R/O VILLAGE -
KHARKHURA, CHAMAR TOLI, P.S. DELHA, DISTRICT GAYA.**

.... **APPELLANT/S**

VERSUS

THE STATE OF BIHAR

.... **RESPONDENT/S**

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Appearance:

For the Appellant/s : Mrs. Soni Shrivastava, Adv.

Mr. Ravi Bhardwaj, Adv.

For the Respondent/s : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 23-01-2018

Appellant, Sheo Ratan Paswan has been found guilty for an offence punishable under Section 395 IPC and sentence to undergo R.I. for ten years as well as fined rupees twenty thousand and in default thereof, to undergo S.I. for two years, additionally by the Additional Sessions Judge, IXth, Gaya in Sessions Trial No.217/2014 vide judgment of conviction dated 24.02.2015 and order of sentence dated 27.02.2015.

2. On 22.06.1988 at about 05:30 AM Mauzi Sao (not examined) gave his fardbeyan to the effect that while he along with his family member were sleeping over roof in the preceding night, they awoke on an alarm of female members of his family dacoit-dacoit whereupon they have seen presence of 5-6 dacoits in the courtyard. 3-4 dacoits were outside courtyard from roof of the house. He also began to raise alarm dacoit-dacoit as well as began to pelt brick particles from the roof of the house whereupon dacoits hurled bomb which caused explosion. During midst thereof, police arrived even then, the dacoits continued with hurling of bombs. In order to protect themselves, police party fired



as a result of which, dacoits began to flee who were chased but, after crossing railway line they managed to succeed taking the benefit of darkness. Police party gone in search to apprehend the dacoits but could not succeed. His family members have seen the dacoits in the electric light whom they identified. Then had disclosed the physical feature of the dacoits. It has further been disclosed that the dacoits could not be able to take away their belongings rather one bag belonging to the dacoits left away which was produced before the police official during course of fardbeyan. On the basis of the aforesaid fardbeyan, Wazirganj P.S. Case No.65/1988 was registered followed with an investigation as well as submission of charge sheet, facilitating the trial which concluded in a manner, subject matter of instant appeal.

3. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 Cr.P.C. is that of innocence as well as false implication at the instance of the police. To substantiate the same also examined one DW as well as had also exhibited the jail register.

4. In order to substantiate its case, prosecution had examined altogether six PWs who are PW.1-Suresh Prasad, PW.2-Surendra Prasad, PW.3-Basanti Devi, PW.4-Parwati Devi, PW.5-Janki Mahto and PW.6-Chunni Singh. Side by side also exhibited Ext.1-Signature of father of informant over fardbeyan, Ext.2-Signature of Janki Mahto over seizure list, Ext.3-Formal FIR, Ext.4-Fardbeyan, Ext.5-Production cum Seizure List, Ext.5/A-Seizure List relating to seized articles, Ext.6-TIP of accused, Ext.6/A-TIP of seized articles. As stated above, defence had also



examined DW.1-Narendra Kumar Verma had exhibited Ext.A-Jail Admission Register dated 25.07.1988.

5. Manifold points have been raised during course of argument at the end of learned counsel for the appellant in order to challenge the veracity of the finding recorded by the learned lower court. The first and foremost happens to be that appellant was not at all put on TI Parade as, the day on which TI Parade was conducted, appellant was enjoying privilege of bail. Neither was noticed by the court nor by the Investigating Officer to participate in the TI Parade and that being so, there was no occasion for the appellant to participate during T.I. Parade. In pursuance thereof, the identification of appellant in court for the first time after long delay of years together neither is legally recognizable nor could be relied upon, as such long duration was sufficient to undo the event as might have faded with memory of the witnesses. It has also been submitted that from the fardbeyan itself it is apparent that there happens to be no presence of PW.1 as well as PW.2 who happen to be sons of informant and as they are the persons who claimed identification of the appellant therefore, same appears to be unreliable contrary to it, as per fardbeyan, the inmates of the house were the person who have got full access in the electric light to see the dacoits but they failed to identify In the aforesaid background, identification of the appellant in the court for the first time is not at all tenable in the eye of law. Furthermore, it has also been submitted that though during course of cross-examination PW.2 was not at all tested on that very score but the fact remains that the day on which PW.1 was examined i.e. 19-09-2000 PW.2 was also present and so, he had got full opportunity to see the



appellant and that being so, his identification in court could not be accepted. So, in worst case it happens to be a case of single identification, that too in court, after expiry of so many years whereupon, appellant is found entitled of benefit of doubt.

6. It has also been submitted that appellant has been victimized at the end of the investigating officer who, in case would have been examined, then in that that circumstance the appellant would have an opportunity to expose the conduct of the Investigating Officer and so, on account of non-examination of the Investigating Officer, his interest has been prejudiced. That being so, the appellant is entitled for acquittal.

7. It has also been submitted that in criminal case, suggestion has got no relevancy. The suggestion are being given to the witness only for chastising as, under the evidence act there happens to be no obligation on the part of the accused to suggest a witness who has come to depose out of so many reasons may be properly exposed and in some cases may not be. Even without suggestion having to the particular witness, his evidence is to be considered whether he happens to be reliable or not and the court has to give its finding on that very score. Therefore, the evidence of the witness is to be adjudged independently away from the suggestion whatever been given /not given. Excluding the suggestion whatever been given to the PW.1 as well as PW.2, their evidences became worthless. In likewise manner, it has also been submitted that learned lower court should not have forced the appellant to waive identification on account of his representation under Section 317 of the Cr.P.C. on the day, on which, PW.2 was



examined as, the same had caused prejudice to the interest of the appellant. Apart from the fact that Section 317 of the Cr.P.C. does not prescribe any kind of embargo or condition while allowing the same. So, in sum and substance, it has been submitted that the judgment impugned, as suffers from vagueness as well as non-appreciation of legal intricacies, been passed in mechanical manner and so, is fit to be set aside.

8. On the other hand, while supporting the finding recorded by the learned lower court, it has been submitted on behalf of learned Additional Public Prosecutor that the judgment impugned has been passed after due consideration and deliberation of the materials available on the record in its right perspective and so, is fit to be affirmed.

9. First of all legal issue is taken. On that very score, the submission of the learned counsel that though appellant was represented under Section 317 Cr.P.C. during course of evidence of PW.2, his identification could not have been waived as it happens to be contrary to mandate of law. So, the prime question relates with incidence of waiving identification during course of allowing representation petition, is the legal requirement. It is needless to say that evidences is to be taken in presence of accused which Section 273 of the Cr.P.C. does commands. Appearance means physical appearance with certain exceptions in the background of prevailing exigencies coupled with nature of the offence which Section 205 Cr.P.C. as well as Section 317 Cr.P.C. properly deals with Section 205 Cr.P.C. is applicable only where there happens to be no serious offence and further, commands the



stage of first appearance of the accused, till pendency of the trial subject to condition, so clutched by the court concerned. So far Section 317 is concerned, it happens to be invariably exercised irrespective of nature of the case and further, for the particular day or days or time which, in the opinion of the court is found expedient in the interest of justice. For better appreciation, Section 317 Cr.P.C. is quoted below:-

“317. Provision for inquiries and trial being held in the absence of accused in certain cases.

(1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.”

10. The same has been subject to consideration before the Hon’ble Apex Court in ***Bhaskar Industries Ltd. v. Bhiwani Denim & Apparels Ltd.*** reported in ***(2001) 7 SCC 401.***

“17. Thus, in appropriate cases the Magistrate can allow an accused to make even the first appearance through a counsel. The Magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with. Section 317 of the Code has to be viewed in the above perspective as it empowers the court to dispense with the personal attendance of the accused (provided he is represented by a counsel in that case) even



for proceeding with the further steps in the case. However, one precaution which the court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in court and that he has no objection in taking evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of the witnesses.”

So the waiving of identification is in accordance with law and that being so, appellant is not at all legally permissible to challenge the same.

11. TI Parade has not been properly held to be requirement of law and that happens to be reason behind its absence under the Criminal Procedure Code. However, it happens to be an event, if taken during course of investigation at the end of the prosecution would enable the prosecution to arrive at in its conclusiveness regarding proper identification of the accused and is found admissible in terms of Section 9 of the Evidence Act and for that there should be proper evidence by the witness regarding his participation during course of TIP, as well as that of magistrate under whose guidance TIP was held. It is taken further, appears to be in pursuance of police manual. When the event is taken up in depth then in that circumstance two events are found guarding the issue (a) where there happens to be TI Parade in course of investigation corroborated at the stage of trial and (b) where no TI Parade was conducted during course of investigation but, there happens to be identification in dock. It is needless to say that the evidence having adduced during course of trial is the substantial evidence acceptable, recognizable under the eyes of law.



12. In ***Mukesh Vs. State of NCT of Delhi*** reported in **2017 Cr.L.J. 4365** it has been held:

“140. Criticizing the TIP, it is urged by the learned counsel for the appellants and Mr. Hegde, learned amicus curiae, that refusal to participate may be considered as circumstance but it cannot by itself lead to an inference of guilt. It is also argued that there is material on record to show that the informant had the opportunity to see the accused persons after they were arrested. It is necessary to state here that TIP does not constitute substantive evidence. It has been held in ***Matru alias Girish Chandra v. State of Uttar Pradesh (1971) 2 SCC 75*** that identification test is primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation of an offence is proceeding on the right lines.

141. In ***Santokh Singh v. Izhar Hussain and another (1973) 2 SCC 406***, it has been observed that the identification can only be used as corroborative of the statement in court.

142. In ***Malkhansingh v. State of M.P. (2003) 5 SCC 746***, it has been held thus:

“7. ... The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. ...”

And again:

“16. It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. ...”

143. In this context, reference to a



passage from ***Visveswaran v. State represented by S.D.M. (2003) 6 SCC 73*** would be apt. It is as follows:

“11. ... The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence. ...”

144. In ***Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1***, the Court, after referring to ***Munshi Singh Gautam v. State of M.P. (2005) 9 SCC 631***, ***Harbhajan Singh v. State of J & K (1975) 4 SCC 480*** and ***Malkhansingh*** (supra), came to hold that the proposition of law is quite clear that even if there is no previous TIP, the court may appreciate the dock identification as being above board and more than conclusive.”

13. What is the relevancy of suggestion. Neither under Cr.P.C. nor under Evidence Act, suggestion during course of cross-examination of a witness has been identified. But precedence speaks that during course of cross-examination of a particular witness, the adversary has to suggest the reason why he has come to depose against him, that means to say interestedness, hostility, animosity, professional and further, is under obligation to flash his own case in order to challenge the veracity of the prosecution case or explaining the circumstance. How the suggestion is to be considered, has been taken into consideration by the Hon’ble Apex Court in ***Tarun Bora @ Alok Hazarika Vs. State of Assam*** reported in ***2002 Cr.L.J. 4076*** wherein the Hon’ble Apex Court had occasion to perceive the mode of cross-examination and further, infer its conclusion on that very basis. For better appreciation, same is quoted below:

“**16.** In cross-examination the witness stated as under:



“Accused Tarun Bora did not blind my eyes nor he assaulted me.”

17. This part of cross-examination is suggestive of the presence of accused Tarun Bora in the whole episode. This will clearly suggest the presence of the accused Tarun Bora as admitted. The only denial is that the accused did not participate in blindfolding the eyes of the witness nor assaulted him.

18. xx xx xx

19. xx xx xx

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22. xx xx xx

23. xx xx xx

24. xx xx xx

25. We have already noticed that in the cross-examination of PW 1, a suggestion was put to him that the appellant Tarun Bora had neither participated in blindfolding him nor assaulted him. This is clearly indicative of the presence of the appellant and participation in the kidnapping episode.”

14. Now the evidences are to be scrutinized in the background of principle enumerated by the Apex Court as referred hereinabove. So far occurrence is concerned, all the witnesses have substantiated the same and in likewise manner, there happens to be no emphatic stress at the end of the appellant on that very score. So, commission of dacoity in the house of prosecution party is not under controversy. Furthermore, it is evident that right from PW.3 and onward have not claimed identification of the appellant. Thus, the evidence of PW.1 as well as PW.2 are to be seen whether they substantiated the theme of proper identification of appellant being a member of dacoits during course of commission of dacoity in their house.

15. PW.1 had deposed that in between of night of 21/22-06-1981 at about 02:00 AM while they were sleeping over roof along with his father and brother Surendra Prasad, there was



commission of dacoity in his house. He had further deposed that after hearing alarm of thief-thief they woke up and saw five persons snatching ornaments from inmates as a result of which, they raised alarm. They pelted brick particles. In electric light they have seen the dacoits and disclosed physical feature thereof. Dacoits were also hurling bomb. During midst thereof, police arrived. Dacoits also hurled bomb over police party during course of chase. Dacoits managed to escape. After return to their house, they came to know that dacoits have also taken away boxes containing sari etc. He had also stated that he along with his father had gone to jail to participate in TI Parade during course of which, he had identified two persons who is present in the dock. On query they disclosed their name as Ramun Paswan and Shiv Ratan Paswan. He had further deposed that he had gone to participate TI Parade relating to articles and during course thereof, had also identified the articles (detailed). He had also exhibited signature of his father (since deceased) over fardbeyan. He had also disclosed that his mother had also died. During cross-examination he had deposed that his house lies in the midst of Wazirganj market. They raised alarm while were on roof. There was commotion for about an hour. 10-15 persons of the locality arrived along with police. Police came within half an hour. It was patrolling party. They also raised alarm attracting so many persons and then, dacoits were chased. Dacoits hurled bomb at the house itself and then, upon chasers. Dacoits were hurling bomb during course of fleeing. Police had also fired three rounds. They have chased about a kilometer and then returned back. All the family members including he himself made statement before



the police and during course thereof, they had narrated with regard to the articles having looted away by the dacoits. In para-6, there happens to be cross-examination relating to identification parade of the seized article and said that during course thereof, he had identified three boxes. He had further stated that he had made statement before the police regarding snatching of ornaments from his mother as well as Bhabhi. In para-7, he had stated that Officer-in-charge had directed him to participate in T.I. Parade. Officer-in-charge remained outside jail. These accused persons have no cut, burn injury over his hand. There were 15-20 persons standing in a row during course of TI Parade. He had divulged that these accused persons were inside the house during course of commission of dacoity. Then, there happens to be suggestion that it is not a fact that at the instance of police due to fear he had identified the accused.

16. PW.2 is brother of PW.1, namely, Surendra Prasad who had stated that in between night of 21/22-06-1988 at about 02:00 AM there was commission of dacoity in his house. At that very time, he along with his brother, father, was sleeping over the roof. After hearing hobnobbing at the ground floor of his house, they awoke and found 5-6 persons taking away their belongings. Ornaments of his Bhabhi and mother were snatched away by the dacoits. They have seen the dacoits in electric light (detailed physical feature). Dacoits took away 2-3 boxes containing cloth, ornaments. He had further stated that he had participated in TI Parade and during course thereof, had identified the culprit. He had further stated that had there been presence of accused persons in dock, he would have certainly identified them.



Identification was waived as accused were represented under Section 317 Cr.P.C. During cross-examination at para-3, he had stated that on the date of occurrence itself his statement was recorded by the police. He is not remembering whether police had taken his signature or not. In para-4 he had stated that after 5-7 days of the occurrence, he came to know that same accused were apprehended on suspicion. When they were apprehended, he was not present. He had not gone to the Police Station. Other members of the family had gone to Police Station. They have disclosed that dacoits were apprehended. Even then, he had not gone there. He had further stated that the apprehended accused were resembling the physical feature of the dacoits which they have stated during course of statement. In para-5, he had stated that he had not received notice for TI Parade. He had gone to participate in TI Parade after a month along with Officer-in-charge of Wazirganj but, he was not along with him during course of conduction of TI Parade. About twenty-five persons were standing in a row during course of TI Parade. Then had denied the suggestion that it is not a fact that he had seen accused persons at Police Station where they were instructed by the police to identify.

17. PW.3 is Basanti Devi, inmates of the house who during course of examination-in-chief had reiterated the factum of dacoity having committed at her house and during course thereof, the dacoits looted away their belongings, ornaments as well as boxes. They have seen the dacoits in electric bulb. She had not claimed identification of the accused in dock. During cross-examination she had stated that police had not taken her to TI



Parade.

18. PW.4 is Parwati Devi, another inmates of the house who had stated that on the alleged date and time of occurrence there was commission of dacoity in her house. At that very time she had seen the dacoits in electric light but she is unable to identify whereupon, she was declared hostile. During course of cross-examination she had stated that she was not at all taken by the police for conduction of TI Parade.

19. PW.5 is Janki Mahto, resident of village-Naudiha Khurd who had stated that on 23.08.1988 he was at his house. Police had came to his village and gone near well of Ram Swaroop Paswan whereupon, he had also gone there and found the police along with one person who was handicap. He had further stated that he is unable to say who had taken out articles from the well but, as directed by the police he had put signature over seizure list. However, he also added that no article was before him at that very moment, whereupon, was declared hostile. Then thereafter he was confronted that his further statement but, the prosecution could not be able to explicit anything positive from him. On court question, he had stated that he had not identified the accused. During cross-examination he had stated that he had put his signature over blank paper.

20. PW.6 is the Advocate Clerk who had been examined only to exhibit certain documents as, Investigating Officer was not examined.

21. DW.1 has also been examined in order to exhibit the jail register wherefrom, it is evident that appellant was remaned in



this case on 25.07.1988 and was released on 11.08.1988.

22. In order to properly appreciate the submission having made on behalf of appellant, the exhibit have been minutely gone through. It is evident that Exhibit-5 is the seizure list relating to recovery of two empty box from a well of Ram Swaroop Paswan, Ext.5/A is the seizure list relating to recovery of Sari, Blouse from the house of Ramun Paswan of village-Karauna. Ext.6 is the TI chart relating to suspect Chando Tanti, Karu Paswan, Sheo Ratan Paswan, Ram Paswan, wherefrom it is evident that Surendra Prasad had identified Chando Tanti as well as another person, an accused of different case who had participated during course of TI Parade while Suresh Prasad had identified only Chando Tanti. Ext.6/A is relating to the articles having been seized from the accused and during course of TI Parade, the same was identified by the witness Mauzi Sao as well as Suresh Prasad.

23. On account of non-examination of the Magistrate, the sanctity of TI Parade became deficient one. However, from Ext.6, it is evident that appellant was put on TI Parade but was not identified. However, during course of evidence there happens to be no cross-examination at the end of the appellant that he was put on TI Parade and was not identified. At least with regard to PW.1 and so far PW.2 is concerned, on account of his absence and being represented under Section 317 of the Cr.P.C., the aforesaid bonanza having in favour of appellant gone evaporated.

24. In *Gian Chand & others v. State of Haryana* reported in **2013(4) PLJR 7 (SC)** it has been held:-



“11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in **Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors., AIR 2013 SC 1204** observing as under:

“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”

(Emphasis supplied)

Moreover, during course of cross-examination instead of challenging the same, it is apparent that the appellant had admitted identification and that too, by the two PWs who are non-else than the victim but, at the instance of police. That being so, there happens to be identification by two PWs.

25. By Ext.A defence had tried to place before the court



that his presence was not at all relating to the present case and so, there was no occasion for him to participate during TIP. As stated above, appellant was remanded to the judicial custody in connection with two different cases bearing Delha P.S. Case No.45 of 1988, Delha P.S. Case No.49 of 1988 and then, a prayer was made on behalf of Investigating Officer whereupon vide order dated 26.07.1988 he was directed to be remanded in this case. Furthermore, from the order sheet dated 11.08.1988, which relates with prayer of Investigating Officer to depute a magistrate for holding TIP, relating to accused including the appellant which was allowed by the learned lower court giving a liberty that in case there happens to be presence of Sheoratan under custody, who had already been granted bail relating to the instant case, then in that event, he might be put on TI Parade and that happens to be reason behind his presence in the TI chart, Ext.6. Had there been, genuineness in the assertion of the defence that he was already released on bail and was not at all present under judicial custody then, in that event, it was incumbent upon him to have placed relevant order sheet of concerned P.S. Case number to justify his contention and that being so, his plea on that very score is found not at all entertainable. In likewise manner, the submission having made on behalf of appellant that on account of non-examination of the Magistrate, his interest has been prejudiced is of also no consequence because of the fact that from Ext.6, it is apparent that neither PW.1 nor PW.2 had identified the appellant during course of TI Parade. Apart from this, there happens to be no challenge at the end of the appellant that he has not been identified but with a clause that same materialized at the



instance of police. Be that as it may, it has become crystal clear that the witnesses could not be able to identify the appellant at an earliest stage, that means to say, during course of TIP, then in that circumstance, identifying the said person in court, cast doubt over authenticity of identification.

26. As stated above, Investigating Officer has not been examined. There happens to be specific suggestion to the witnesses that at the instance of police, they have identified appellant. From the evidence of PW.2, it is evident that he had categorically stated that after 5-6 days after the occurrence suspects were arrested and were kept at Police Station. He had not gone there but his family members had gone who had an opportunity to see the suspect and found them resembling with the physical feature of dacoits. However, in the background of suggestion as referred hereinabove, in consonance with the non-examination of the Investigating Officer coupled with divulgence of evidence of PW.2, para-4, the right of the accused is found duly eclipsed. In ***Lahu Kamlakar Patil v. State of Maharashtra*** reported in **(2013) 6 SCC 417**, it has been held:

“18.It is an accepted principle that non-examination of the investigating officer is not fatal to the prosecution case. In *Behari Prasad v. State of Bihar* (1996) 2 SCC 317, this Court has stated that non-examination of the investigating officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. In *Bahadur Naik v. State of Bihar* (2000) 9 SCC 153, it has been opined that when no material contradictions have been brought out, then non-examination of the investigating officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial Judge nor the High Court has delved into the issue of non-examination of the investigating



officer. On a perusal of the entire material brought on record, we find that no explanation has been offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the court did not find place in the statement recorded under Section 161 of the Code. Thus, this Court in *Arvind Singh v. State of Bihar*(2001) 6 SCC 407, *Rattanlal v. State of J&K*(2007) 13 SCC 18 and *Ravishwar Manjhi v. State of Jharkhand*(2008) 16 SCC 561, has explained certain circumstances where the examination of investigating officer becomes vital. We are disposed to think that the present case is one where the investigating officer should have been examined and his non-examination creates a lacuna in the case of the prosecution.”

27. Irrespective of the fact that there happens to be admission by way of suggestion, as well as waiving of identification while availing of privilege of Section 317 Cr.P.C., in the background of deficiency as stated herein above it looks unsafe to concur with the finding recorded by the learned lower court. Consequent thereupon, same is set aside. Appeal is allowed. Appellant is on bail, hence is discharged from its liability.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	A.F.R.
CAV DATE	04.01.2018
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Transmission Date	23-01-2018

