

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 266 of 2012
with
CRAN 6 of 2018 (Old CRAN 486 of 2018)

Joydeep Roy @ Raju
-Vs-
State of West Bengal

With

CRA 177 of 2012
In
CRAN 4 of 2021
Ranajit Mondal @ Ranjit Mondal
@ Ron @ Rana
-Vs-
State of West Bengal

With

CRA 181 of 2012
Sk. Motaleb @ Sk. Matleb
-Vs-
State of West Bengal

With

CRA 637 of 2012
Bidhan Gharui
-Vs-
State of West Bengal

With

CRA 758 of 2012
Azim Mistry
-Vs-
State of West Bengal

**For the Appellant
In CRA 266 of 2012** : Mr. P. P. Das, Advocate.

**For the Appellant
In CRA 177 of 2012** : Mr. Sourav Chatterjee, Advocate
Ms. Subhasree Patel, Advocate,
Mr. Soham Banerjee, Advocate,
Ms. Saini Das, Advocate.

**For the Appellant
In CRA 181 of 2012** : Mr. Kalyan Kr. Mukherjee, Advocate.

**For the Appellant
In CRA 637 of 2012
& CRA 758 of 2012** : Mr. Navanil De, Advocate.

For the State : Mr. Neguive Ahmed, Id. A.P.P.,
Ms. Zareen N. Khan, Advocate,
Ms. Trina Mitra, Advocate,
Ms. Amita Gaur, Advocate,
Mr. Ashok Das, Advocate.

Heard on : 14th March, 2022

Judgment on : 14th March, 2022

Joymalya Bagchi, J. :-

Appellants have challenged the judgment and order dated 06.02.2012 and 07.02.2012 passed by learned Additional Sessions Judge, Diamond Harbour, South 24-Paraganas, in Sessions Trial No. 11(08)2006 arising out of Sessions Case No. 14(07)2006 convicting them and one Sunil Mondal @ Chittu for commission of offence under Section 396 of the Indian Penal Code and one Momrej Ali Khan @ Bhikari under Section 395 of the Indian Penal Code and sentencing the appellants Azim Mistry, Bidhan Ghorui, Joydeep Roy @ Raju and Ranjit Mondal @ Rana to suffer imprisonment for life and to pay a fine of Rs. 2,000/- each in default to suffer simple imprisonment for six months each and the appellant Sk. Motleb and Sunil Mondal @ Chittu to suffer rigorous

imprisonment for ten years and to pay a fine of Rs.2,000/- each in default to suffer simple imprisonment for six months each for the self-same offence. Appellant Azim Mistry was also convicted under section 25 (1-B) (a) of the Arms Act and sentenced to suffer rigorous imprisonment for three years and pay a fine of Rs. 1000/-, in default, to suffer simple imprisonment for three months more.

Prosecution case, as alleged against the appellants and one Sunil Mondal @ Chittu and Momrej Ali Khan @ Bhikari is to the effect that on 24.03.2006 one Asraf Gazi, P.W. 1 had boarded a train commonly known as “cash train” from Magrahat Station around 2:30 p.m. P.W. 1 was carrying a sum of Rs. 96,900/- on behalf of his employer Golam Md. Gazi who ran a meat shop for purchasing buffaloes for his business. He had kept the money concealed in an underwear pocket which was covered with chocolate wrapper and kept in a red and white coloured bag. When the train reached Hotor Railway Station, two boys boarded the train and sat opposite to P.W. 1. Thereafter the train reached Durgapur station and proceeded towards Kalyanpur. At that juncture, one of the boys placed a pistol on the head of P.W. 1 while the other placed a pistol on his stomach. The person who placed up a pistol on his stomach hit him on the hand with the butt of the firearm. The other miscreant who had placed pistol on his head snatched away the red and white coloured bag containing money. He cried out “*dakaat dakaat*”. The boys fled towards the door of the compartment. When P.W. 1 proceeded

towards to door, he found two more persons standing with pistols in their hands. One of them shouted '*Awaj Kara*'. Thereupon, the other fired from his pistol. A boy sitting in the compartment was hit with a bullet and fell down on the seat. His clothes were drenched in blood. As the train slowed down at Kalyanpur station, the dacoits got down from the train and fled away. He also got down at the station and informed his employer who asked him to go to Baruipur GRPS. Son of his employer came to Baruipur GRPS. He narrated the incident to him and the latter scribed the written complaint which was lodged at the police station. P.W. 2, Officer-in-charge of Diamond Harbour GRPS, received written complaint from Asraf Gazi, P.W. 1 and commenced investigation. He went to the place of occurrence and thereafter to Baruipur Hospital where he saw the dead body of the victim boy viz., Somnath Majumdar. He examined witnesses and arrested Bidhan Ghorui, Joydeeb Roy and Ranjit Mondal. Inquest was held over the dead body of Somnath. He collected post mortem report. From the statements of the arrested accuseds, he came to know the involvement of Azim Mistry. CID took over investigation in the instant case on 12.04.2006 and the investigation was entrusted to P.W. 21 S.I. Shyamal Kr. Mukherjee who was posted at Bhabani Bhawan, CID at the relevant time. P.W. 21 received information that one driver Momrej Ali @ Bhikari had gone to Kalyanpur Station with Tata Sumo vehicle bearing No. WB 02M 9455. He arrested Momrej and on his interrogation came to know the names of

4/5 miscreants. He also sent requisition to S.I., S. N. Chakraborty to arrest Sk. Motaleb. On the showing of Momrej, Tata Sumo vehicle owned by P.W. 9, Ashok Das was seized on 12.04.2006. Thereafter, Azim Mistry was arrested and he was identified by P.W. 1 Asraf Gazi and P.W. 2, Snigdha Majumdar, mother of the deceased boy and P.W. 4, Sanjib Tiwari, a co-passenger in the course of T.I. Parade. On his leading statement, Exhibit-28 an improvised revolver was recovered which was sent for forensic examination and found to be in working order by P.W. 16. Post mortem report of the deceased was obtained and charge-sheet was filed. Subsequently, upon receiving sanction, supplementary charge-sheet was filed.

Thereafter, the case was committed and the charges were framed against the appellants and one Momrej Ali Khan @ Bhikari under Section 396 of the Indian Penal Code and under Section 302 read with Section 34 of the Indian Penal Code. Charge was also framed under section 25 (1-B)(a) of the Arms Act against Azim Mistry. Subsequently, Sunil Mondal @ Chittu was arrested and similar charges were framed against him. The appellants pleaded not guilty and claimed to be tried. In the course of trial, prosecution examined 21 witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and false implication.

In conclusion of trial, the trial Judge by judgment and order dated 06.02.2012 and 07.02.2012 convicted and sentenced the appellants, as aforesaid.

Co-accused Sunil Mondal @ Chittu was also convicted under Section 396 of the Indian Penal Code and sentenced to rigorous imprisonment for ten years while Momrej was convicted under Section 395 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for seven years.

Being aggrieved by the aforesaid judgment and order of conviction, the appellants are before this Court. However, no appeal was filed by co-accused Momrej Ali Khan @ Bhikari and Sunil Mondal @ Chitta. The Court is informed that they have served out their respective sentences.

Ms. Patel, learned Advocate appearing for the appellant Ranjit Mondal @ Rana (CRA 177 of 2012) argues P.W. 1 is an unreliable witness. Neither his employer nor his son has been examined. No recovery of money was made from the appellants to prove the charge of dacoity. There is delay in lodging the first information report. P.W. 2, mother of the deceased did not implicate the appellant in the murder. Her deposition with regard to the number of passengers in the compartment is at variance to P.W. 1 and other witnesses. P.W. 4 also does not implicate the appellant in the murder. Appellant was not put up for T.I. Parade and these witnesses identified the appellant for the first

time in Court. No explanation is offered by P.W. 5 how he knew the name of the appellant. Explanation of P.W. 6 that appellant was involved in committing theft in train is not supported by any contemporaneous document with regard to previous criminal conduct. Even if the deposition of P.Ws. 1, 2 and 4 are believed, they did not state five or more persons were involved in snatching money from P.W. 1 and the offence of dacoity is not established. Under such circumstances, conviction under Section 396 of the Indian Penal Code cannot be maintained.

Mr. Das, learned Advocate appearing for the appellant Joydeep Roy @ Raju in CRA 266 of 2012 adopted the submission of Ms. Patel. In addition thereto, he submitted even the trial Court in its judgment expressed doubt how P.Ws. 5 and 6 knew the names of the appellants.

Mr. De, learned Advocate appearing for the appellants Azim Mistry and Bidhan Ghorui submits the offence of dacoity has not been proved. P.Ws. 5 and 6 were examined after 20 days of the incident. It is unclear how police came to know of their presence in the compartment on the fateful day. There is nothing to show that P.Ws. 5 and 6 were aware of the identities of the accused persons. Similarly, P.W. 11 who stated co-accused Momrej had driven Azim and others in the Tata Sumo vehicle was belatedly examined and appears to be an unreliable witness. Even if evidence of P.Ws. 1, 2 and 4 are believed, dacoity committed by five or more persons is not proved beyond doubt. No conviction has been

recorded against the appellants under Section 302/34 of the Indian Penal Code. Analysis of evidence of P.Ws. 1, 2 and 4 would show none of the appellants had intended to murder the boy. Bidhan Ghorui has not been put up for T. I. Parade and was identified for the first time in Court. Thus, they may be acquitted.

Mr. Mukherjee, learned Advocate appearing for the appellant Sk. Motaleb @ Sk. Matleb submits that his client was not identified by the star witnesses viz., P.Ws. 1, 2 and 4. He adopts the submissions of other learned Counsels with regard to the improbability of P.Ws. 5 and 6 being aware of the identity of his client. He submits P.Ws. 5 and 6 are pocket witnesses of the police and were belatedly examined to implicate the appellants. He further submits his client has already served out the sentence imposed upon him.

Mr. Ahmed, with Ms. Khan appearing for the State in all the appeals submit P.Ws. 1, 2 and 4 have clearly established the prosecution case against the appellants. Their evidence is corroborated by P.Ws. 5 and 6 who named all the appellants including one Sunil Mondal @ Chittu as the dacoits. It is possible P.Ws.1, 2 and 4 had not seen Sk. Motaleb and Sunil Mondal who were standing at the gate and preventing people from getting into or alighting from the compartment. Moreover, co-accused Momrej also assisted the appellants in committing the dacoity and his role is proved through the evidence of the owner of the vehicle, P.W. 9, his son, P.W. 10 and P.W. 11 who saw Azim Mistry and

5/6 others getting into the 'Tata sumo' vehicle at Baruipur petrol pump which was driven by Momrej. In the course of dacoity, Bidhan Ghorui had exhorted to fire by stating Azim Mistry 'Awaj Kara'. Thereafter Azim fired at the child resulting in his death. All the appellants shared common intention to murder the boy. Hence, the appeals are liable to be dismissed.

Summary of the prosecution evidence:

P.W. 1, Asraf Gazi is the informant. He had boarded a local train bearing No.SD 127J (Diamond Harbour to Sealdah local) in bagey No.11218 around 2.30 p.m. from Mograhat Station. When the train arrived at Hotar railway station, two boys had got into the bagey and sat opposite to him. When the train left Durgapur station and proceeded towards Kalyanpur, one of the boys put a pistol on his stomach and hit on the hand. The other boy put a pistol on his head and snatched a red and white colour bag wherein he was carrying a cash of Rs. 96,950/- which was given to him by his employer for purchasing buffaloes in connection with his meat shop. He shouted '*dakat dakat*' and proceeded towards the door of the compartment. He found two more boys standing in front of the gate. One of them said '*Awaj Kara*' and the other fired from his pistol and injured a young boy who fell down on the seat. As the train slowed down at Kalyanpur railway station, the dacoits got off the train and fled away. He also alighted at the railway station and telephoned his employer who advised him to go to Baruipur GRPS. He

proceeded to Baruipur GRPS and waited for his employer. Khairul Gazi son of the employer came at the police station and scribed the first information report. He proved the first information report. In course of investigation, he made statement before the Magistrate. He identified Azim Mistry in the T.I. Parade held during investigation. In court he identified Ranajit, Joydeep, Bidhan and Azim. He stated Azim had shot at the boy while Bidhan had exhorted him to the fire by stating 'Awaj Kara'. Joydeep had put a pipe gun on his head and snatched the bag. Ranjit had put a pipe gun on his stomach and hit him with the butt of the revolver.

P.W. 2, Snigdha Majumder is the mother of the deceased boy Somnath Majumder. She deposed Somnath was a student of Class VI at Sarisha Ram krishna Mission and used to stay in the boarding school. He became sick before his exams and with the permission of the school was taking the exams from his residence. His exams commenced from 13.03.2006. Till 23.03.2006, her husband used to take her son to school and bring him back. On 24.03.2006 due to work her husband was unable to take their son to school. She took her son to the school for examination. The exam ended at 1.00 p.m. and they took the Diamond Harbour local to return home. They had boarded the last compartment of the train. When the train proceeded to Kalyanpur station, she heard a sound 'dacoit dacoit'. She saw two dacoits with guns in their hands pass from her side with a bag. Thereafter, another dacoit shouted 'Awaj Kara'

and his companion fired at the head of her son who collapsed beside her. His clothes were stained with blood. Passengers brought them down at Kalyanpur railway station. No doctor was available at Kalyanpur. Hence, they came to Baruipur S. D. General Hospital where her son was declared dead. She identified the appellant Ranajit, Joydeep, Bidhan and Azim in Court and stated the specific roles played by them. She also deposed that she had identified Azim who had fired at her son in the course of T.I. Parade.

P.W. 3, Sanjoy Majumdar father of the deceased child has corroborated the version of P.W. 2.

P.W. 4, Sanjib Tewari used to run a catering business. On the fateful day, he was returning from his father-in-law's house at Kakdwip. He boarded 2.00 p.m. cash train from Diamond Harbour. He was sitting in the last compartment of the train. At Hotar station, he got down for a smoke. Thereafter, he again went back to his seat. When the train left Durgapur station, he found two boys who went to a person sitting opposite to him and one of them placed a revolver on the head of that person and another placed a revolver on his stomach. Thereafter, the miscreants snatched a bag from the said person who shouted 'dacoit dacoit'. At that time two persons brought out Pistols and stood guard at the door of the compartment. One of them shouted 'Awaj Kara' and the other fired at a boy sitting in the compartment resulting in his death. He identified the appellants Ranajit Mondal, Joydeep Roy, Bidhan Ghorui

and Azim Mistry and stated their specific roles in Court. He had identified Azim during T.I. Parade.

The other co-passengers who were examined are P.Ws. 5 and 6.

P.W. 5, Ajit Singha claimed that he was a wholesale dealer in fried rice and used to supply fried rice in the routes of Diamond Harbour, Canning and Laxmikantapur. While carrying goods, he took the vendor compartment otherwise he boarded ordinary compartment. On 24.03.2006, he had boarded the cash train from Diamond Harbour at 2.00 p.m. When the train reached at Hotor station, six persons entered the compartment. In addition to Ranajit Mondal, Joydeep Roy, Bidhan Ghorui and Azim Mistry, he also identified Sk. Motaleb and one Sunil Mondal @ Chittu as the miscreants. He stated Bidhan Ghorui and Azim Mistry stood at the kata gates while Ranajit and Joydeep went inside. Thereafter the dacoity took place. Motaleb and Sunil brought out firearms and stopped people from getting down.

In cross-examination, the witness stated he is a resident of New Alipore Station. He did not report the matter to any government authority but discussed the incident with his friends. He admitted he was cross-examined 18/19 days after the incident. He, however, remained silent how he was aware of the identity of the appellants who admittedly resided far away from his residence.

P.W. 6, Biplav Banerjee named Motaleb along with others who have been identified by P.Ws. 1, 2 and 4 as the miscreants who

conjointly committed dacoity. He, however, did not name Sunil @ Chittu but claimed six miscreants had got down from the train after the dacoity. He stated he knew the miscreants as persons who indulged in snatching and thefts.

In cross-examination, he admitted he did not remember any crime committed by the appellants earlier. He also had not reported the matter to the police and was interrogated for the first time 18/19 days after the incident.

P.Ws 7 and 8, Swami Rajibananda and Brahmachari Srinath Chaitanya are the Secretary and Assistant Headmaster respectively of the school in which the victim used to study. They corroborated the version of her mother that the boy had come to take his exam on the fateful day.

P.W. 9, Ashoke Das, is the owner of the Tata Sumo vehicle which was driven by co-accused Momrej @ Bhikhari. He deposed Momrej had taken out the vehicle on the fateful day and returned at mid-night. Thereafter did not come. On 12.04.2006 he came along with police and identified the vehicle. The vehicle was seized and the witness signed on the seizure list. His son, P.W. 10, Bappa Das, has corroborated his evidence in court. He also signed on the seizure list.

P.W. 11, Dipu Singh, is a van rikshaw puller. He saw Momrej with a maroon coloured Tata Sumo vehicle at Baruipur petrol pump. After sometime, Azim and 5 to 6 persons came there and asked him whether everything was alright. Momrej replied everything was fine and he had

filled the car with petrol. All the persons left in the said vehicle. He identified Azim and Momrej in court. In cross-examination, he deposed he plied rikshaw van without licence in the Baruipur area. He kept his van with one Gopal Da of Purna Bazar which was at a distance of 2 k.m. from petrol pump. He admitted that he was examined 20 days after the incident.

P.W. 12, Dr. Bimalendu Halder, was a medical officer at Baruipur S.D. Hospital. He deposed one Somnath Majumder was brought to the hospital and he issued his death certificate.

P.W. 13, Dr. Debasish Sarkar, was the doctor who held post mortem over the body of Somnath. He had opined death was due to gunshot injury ante-mortem and homicidal in nature. He proved the post mortem report marked as Exhibit-16.

P.W. 14, Deb Kumar Goswami, is the Judicial Officer who held the test identification parade with regard to Azim Mistry. He deposed P.Ws. 1, 2 and 4 had identified the said accused as the one who fired at the boy.

P.W. 20, S.I. Mausam Chakraborty, was posted at Diamond Harbour GRPS. He received written complaint from P.W. 1 and proceeded to the place of occurrence. He went to Baruipur S.D. Hospital. He arrested Ranajit, Bidhan Ghorui and Joydeep Roy @ Raju and arranged for inquest over the dead body and collected post mortem report. He seized the wearing apparels of the deceased. He prepared sketch map with index. He handed over investigation to C.I.D. on 12.04.2006.

P.W. 21, Shyamal Kumar Mukherjee, attached to C.I.D. was the second investigating officer. He arrested Momrej and on his statement seized the Tata Sumo vehicle bearing no. WB-02M-9455. He also arrested Sk. Motaleb. In the course of investigation, he came to know Azim Mistry was arrested in connection with a case in Thakurpukur Police Station by P.W. 18. He made prayer for showing Azim Mistry arrested in connection with this case. On the statement of the Azim Mistry (Exhibit-28) he recovered a six chambered revolver in the presence of P.W. 15. Revolver was sent for examination and the criminal case started with regard to the seizure of the revolver at Baruipur Police Station was tagged to the present case. He submitted charge-sheet. Thereafter obtaining the report of the ballastic expert (P.W. 16) he submitted the supplementary charge-sheet.

Whether P.Ws. 1, 2 and 4 are reliable?

On an analysis of the evidence of P.Ws. 1, 2 and 4 it appears P.W. 1 who had boarded the last compartment of a Diamond Harbour-Sealdah local train (commonly referred to as cash train) at Mograhat Railway Station on 24.03.2006 around 2:30 p.m. with a sum of Rs. 96,950/- had been robbed by some miscreants. One of the miscreants, namely, Ranajit Mondal, had put a gun on his stomach and hit his hand with the butt of the pistol. Joydeep Roy had put the gun on his head and snatched away his bag containing money. As the miscreants proceeded towards the door, P.W. 1 stood up and shouted “dacoit” “dacoit”. He also proceeded towards

the door. At that time he found Bidhan Gharui and Azim Mistry who were standing at the door of the compartment with arms. Bidhan Gharui shouted “Awaj Kara” and Azim fired resulting in a fatal injury on a 12 year old boy who was returning after taking exams in his school. Evidence of the aforesaid witness is corroborated by the mother of the deceased boy, P.W. 2 as well as a co-passenger P.W. 4. Their depositions are consistent with one another and clearly establish the roles of the Ranajit, Joydeep, Bidhan and Azim in snatching away money from P.W. 1 and Azim Mistry shooting at the boy upon the exhortation of Bidhan Gharui. It has been argued none of the aforesaid appellants except Azim was put up for test identification parade and had been identified for the first time in Court. It is also argued Azim was known to P.W. 1 who stated that he had visited the shop of his mother. Identification of a witness in court is substantive evidence. Test identification parade of an accused is undertaken during investigation as corroboration to identification of the said accused witness in Court. In the event identification of an accused in court is beyond reproach and inspires confidence such identification cannot be thrown out on mere plea that no test identification parade had been undertaken during investigation (see ***Simon and Others Vs. State of Karnataka***¹; ***Deepak Alias Wireless Vs. State of Maharashtra***²). Various parameters have been laid down to test the reliability of identification of an accused in Court. Firstly, is the

¹ (2004) 2 SCC 694

² (2012) 8 SCC 785

time period as well as the circumstances in which the witnesses had the opportunity to see the accused. Secondly, is the source of light. Thirdly, whether the witness had disclosed the features of the accused at the earlier opportunity. In the present case, the incident occurred around 4 p.m. in a railway compartment. There was sufficient light and all the witnesses had seen the accused persons at close quarters for a considerable period of time. Evidence has come on record that the miscreants had boarded the train at Hotor Railway Station and after committing dacoity had alighted at Kalyanpur Railway Station. Moreover, P.Ws. 1 and 2 are the victims in the crime. A sum of over Rs. 96,000/- was snatched from P.W. 1 while P.W. 2 saw her 12 year old son murdered before her own eyes. The gravity of the incident would leave an indelible mark on the mind of the affected witnesses and there is little possibility of their forgetting the faces of the individuals who were responsible for their misfortune. It is also to be borne in mind that P.W. 1 had given description of Ranajit Mondal and Joydeep Roy at the earliest opportunity in the F.I.R. These circumstances provide sufficient assurance to the court that the identification by the aforesaid witnesses of Ranajit Mondal, Joydeep Roy, Bidhan Gharui and Azim Mistry in the aforesaid incident is wholly reliable.

It is argued the specific roles attributed to the appellants were stated for the first time in Court by these witnesses and the stolen booty had not been recovered. I find little substance in the aforesaid

submissions made on behalf of the appellants. The witnesses have, in graphic details, stated in Court the manner in which the incident unfolded. The crux of their versions were recorded in their statements to the police. It is trite law neither the F.I.R. nor the earlier statements to police can be an encyclopedia of facts. In this background, a clear and more detailed description of the specific roles of Ranajit, Joydeep, Bidhan and Azim in Court does not amount to material contradiction adversely affecting the credibility of the witnesses. On behalf of Azim Mistry it is argued P.W. 1 was known to him. Such contention also deserves to be rejected. On a query from the court, P.W. 1 clarified though he had heard that the shop visited by him was run by the mother of one Azim Mistry, he was never acquainted with the latter at any point of time. He saw Azim Mistry for the first time when the incident occurred and also identified him in the course of the test identification parade conducted by P.W. 14. Thus, identification of the appellants namely Ranajit Mondal, Joydeep Roy, Bidhan Gharui and Azim Mistry in the course of robbery and murder of Somnath Majumder is clearly established. In this backdrop, non-recovery of the stolen booty does not affect the truthfulness of the prosecution case. Non-examination of the employer of P.W. 1, namely, Golam Md. Gazi or his son Khairul is not fatal. P.W. 1, who was an employee of Golam Md. and was aware of the handwriting of his son, Khairul, has proved the F.I.R. scribed by Khairul. P.W. 1 has succinctly narrated the circumstances in which he was carrying the cash on behalf

of his employer and how it was snatched away. Hence, non-examination of the aforesaid witnesses does not hinder the seamless unfolding of the prosecution case through the mouth of P.W. 1 and other witnesses.

Credibility of P.Ws. 5 and 6:

However, I am sceptical with regard to P.Ws. 5 and 6 who through their evidence have sought to increase the number of persons who committed the robbery in the train compartment. These witnesses claimed in addition to aforesaid four appellants, one Chittu @ Sunil Mondal and Sk. Motaleb were also present conjointly committed the dacoity. P.W. 5 who is a wholesaler of fried rice named all the appellants and claimed they had boarded the train together. Similarly, P.W. 6, a supplier of stationery goods named five of the miscreants and stated six of them had got down together after the dacoity. P.W. 5 is a resident of New Alipore and none of the appellants stayed in his neighbourhood. They reside at different places far away from the residence of P.W. 5. P.W. 5 is silent how he came to know of the identities of the accused persons who had committed dacoity on the fateful day. His conduct after the incident is also most curious. After the dacoity he did not make any effort to assist P.W. 1 who had been robbed or P.W. 2 whose son had died in the course of the incident. On the other hand, he proceeded to Ballygunge station and thereafter to New Alipore. He did not report the matter to the police authorities and it is unclear how police came to know of his presence in the compartment and interrogated him 20 days after

the incident. P.W. 6 claimed that he came to know the identities of the accused persons as they used to indulge in theft in trains. However, he admitted in the course of cross examination that he was unaware of any prior criminal case lodged against any of the accused persons. He also could not give out the name of any vendor from whom he claimed to have gathered such knowledge.

Both of these witnesses had been examined 20 days after the incident. I am conscious mere delay in examining a witness would not erode the truthfulness of his deposition if the same has a ring of truth. As discussed earlier, versions of P.Ws. 5 and 6 with regard to their knowledge about the names and identities of the accused persons appears to be most artificial and unconvincing. From the evidence of investigating officers P.Ws. 20 and 21 it appears that the names and identities of the accused persons had all come to light even before the interrogation of P.W.s 5 and 6. There is no explanation from the investigating officer how he came to know of the presence of these witnesses in the compartment on the day of the incident. In this backdrop, unexplained delay of 20 days in examining these witnesses assumes significance and gives an impression that they are planted witnesses. Even the trial Judge expressed doubt with regard to claim of P.W. 5 and 6 with regard to their knowledge regarding names and identities of the accused persons. It is pertinent to note the depositions of P.Ws. 5 and 6 with regard to presence of Sk. Motaleb and Sunil Mondal

as participants in the crime is not corroborated by the star witnesses P.Ws. 1 and 2. Even P.W. 4, a co-passenger has not corroborated their version with regard to six persons committing dacoity. Thus I am unable to place reliance on the evidence of P.W. 5 and 6 to come to a conclusion that Sk. Motaleb and Chittu @ Sunil Mondal had committed dacoity along with other appellants in the railway compartment on the fateful day.

Whether the offence of dacoity is proved?

In the light of the aforesaid analysis of the evidence on record, one must examine whether offence of dacoity has been proved or not.

Section 391 of the Code reads as follows:

“391. Dacoity - When five or more persons conjointly commit or attempt to commit a robbery or where the whole number of persons conjointly committing or attempting to commit a robbery and persons present and aiding such commission or attempt amount to five or more every person so committing, attempting or aiding is said to commit “dacoity”.”

Essential pre-requisite to prove the offence of dacoity is presence of five or more persons who conjointly commit or attempt to commit dacoity or are present and aiding such dacoity or its attempt. P.Ws. 1, 2 and 4 unequivocally stated that four persons armed with pistols had robbed P.W. 1. P.Ws. 5 and 6 seek to increase the number of miscreants from four to six. For the reasons discussed earlier, it is difficult to rely on their evidence which appears to be palpably artificial and not inspiring confidence. Even if the deposition of P.Ws. 9, 10 and 11 is believed,

Momrej Ali Khan @ Bhikari appears to have helped the miscreants by driving them in the 'Tata Sumo' vehicle and was admittedly not present at the place of occurrence. Thus, his role in the crime would not change the number of persons who committed the dacoity or were present and aiding the crime. In this regard reference may be made to **In re:- Ibrahim and others**³ wherein this Court had held that an accused who aided commission of a robbery but was not present at the spot, cannot be counted to as a person who committed dacoity as per section 391 of the I.P.C.

In the light of the aforesaid discussion, I am of the opinion the prosecution has not been able to prove that the robbery committed by Ranajit Mondal @ Rana, Joydeep Roy @ Raju, Bidhan Ghorui and Azim Mistry would transcend to one of dacoity as defined in section 391 I.P.C. Thus, the appellants cannot be convicted for the offence of dacoity with murder under section 396 I.P.C. since commission of dacoity is an essential ingredient of the said offence.

Whether the offence under section 302 read with section 34 of the I.P.C. is proved?

There is ample evidence on record particularly P.Ws. 1, 2 and 4 that on the exhortation of Bidhan Ghorui, Azim Mistry had fired at the minor child resulting in his death. Ocular version of P.Ws. 1, 2 and 4 finds corroboration from the medical evidence on record.

³ AIR 1926 Cal 374

It has been argued none of the miscreants including Bidhan Ghorui and Azim Mistry had intended to murder the deceased. I find such submission wholly misplaced.

Section 300 I.P.C. reads as follows:-

“300. Murder – Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

Secondly.- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

Thirdly.- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or.....”

It may also be relevant to note illustration (d) to the aforesaid section.

“(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.”

In the present case Bidhan Ghorui had exhorted Azim Mistry to fire by stating ‘Awaj Kara’. Pursuant to such exhortation, Azim Mistry fired at the sitting passengers, one of whom was a 12-year old minor child who died due to gun-shot injury. Act of Azim Mistry in mercilessly firing at passengers in a train compartment pursuant to exhortation of co-accused Bidhan Ghorui was so imminently dangerous that it must in all certainty have caused death or bodily injury likely to cause death attracting the 4th clause of section 300 IPC. However I do not find any active participation of the other appellants in the said act.

Mr. Ahmed strenuously argues all the appellants were armed and shared common intention to commit the murder. There is clear distinction between the vicarious liability envisaged under section 396 I.P.C. vis-à-vis section 34 of the I.P.C. Ingredients of section 396 I.P.C. are as follows:

- (a) Five or more persons committed dacoity and,
- (b) One of them committed murder in the course of such dacoity.

If the aforesaid conditions are proved, prosecution is not called upon to show each one of the gang of dacoits shared common intention to murder. On the other hand, to attract the offence under section 302 read with section 34 of the I.P.C., prosecution must prove each of the accuseds shared common intention to murder and pursuant to such common intention, murder had been committed.

As discussed earlier, I am of the view prosecution has not been able to prove that robbery had been committed by five or more persons in the present case. Thus, charge under section 396 IPC ought to fail and mere membership in a group to commit robbery would not ipso facto attract the vicarious liability as envisaged under section 34 of the Indian Penal Code for the offence of murder. Under such circumstances, could the appellants be convicted in the alternative under section 302 read with section 34 of the I.P.C.? In ***Shyan Behari Vs. State of Uttar Pradesh***⁴, a Constitution Bench held if the charge under section 396 of the I.P.C.

⁴ AIR 1957 SC 320

fails and accused may be convicted for the offence of murder if the evidence shows that he had committed the murder. This view is reiterated by the Apex Court in ***Rafiq Ahmed alias Rafi Vs. State of Uttar Pradesh***⁵ wherein it is held conviction under section 302 of the I.P.C. would not prejudice the accused. In the present case, alternative charge under section 302 read with section 34 of the I.P.C. was framed against the appellants. No order of acquittal on the said charges was recorded by the trial Court as it had proceeded to convict the appellants under section 396 of the I.P.C. In similar circumstances, the Apex Court in ***Ramdeo Rai Yadav Vs. State of Bihar***⁶ held conviction of the accused under section 302 of the I.P.C. is maintainable. However, to do so, it must be shown that the accused had committed the murder or shared common intention altogether to do so. Analysing the roles of the appellants in that perspective I find Bidhan Ghorui had exhorted Azim Mistry to fire by stating “Awaj Kara” and thereupon Azim Mistry indulged in an imminently dangerous act of firing at innocent passengers which inevitably would have caused loss of life. In fact, a 12 years old boy died due to such firing. In this factual matrix, conduct of the aforesaid appellants clearly establish their common intention to murder pursuant to which the child was killed. With regard to other appellants that is, Ranajit Mondal and Joydeep Roy @ Raju though they had participated in the robbery and were armed, they did not play any role in the murder of

⁵ (2011) 8 SCC 300

⁶ (1990) 2 SCC 675

the child. They had not used the firearms. This circumstance persuaded me to come to the conclusion the said appellants did not share common intention with Bidhan Gharui and Azim Mistry to murder the victim. Under such circumstances, I am inclined to hold that the evidence on record has proved specific roles played by Azim Mistry in firing upon exhorting of Bidhan Gharui resulting in the death of the minor Somnath Majumdar. Thus, ingredients of the offence punishable under section 302 read with section 34 of the I.P.C. are proved against them. However, the other appellants, namely, Ranajit Mondal and Joydeep Roy who were present at the place of occurrence and participated in the robbery did not use their firearms or by any other conduct displayed sharing of common intention with the other aforementioned appellants to murder the deceased. Hence, they cannot be convicted under section 302 read with section 34 of the I.P.C. Their conviction under section 396 of the I.P.C. altered to 392 of the I.P.C.

As I have not believed P.Ws. 5 and 6, presence of Motaleb at the place of occurrence and his participation in the robbery is not proved. Hence, prosecution case against him altogether fails and he is entitled to an order of acquittal.

In this backdrop and keeping in mind the clear evidence on record with regard to specific roles played by Azim Mistry in firing upon exhortation of Bidhan resulting in the death of a child Somnath Majumder I am of the opinion no prejudice would be caused in the event

the said appellants are convicted under section 302 I.P.C. read with section 34 I.P.C. However, since the number of persons committing robbery has not been proved to be five or more, conviction of Ranajit Mondal and Joydeep Roy are altered to section 392 of the I.P.C.

Conclusion:

In the light of the aforesaid discussion, I hold as follows:

Conviction and sentence of Sk. Motaleb is set aside.

Appellant Sk. Motaleb shall be forthwith released from custody, if not wanted in any other case, upon executing a bond to the satisfaction of the trial court for a period of six months in terms of section 437A of the Code of Criminal Procedure.

Conviction and sentence imposed on Ranajit Mondal @ Rana and Joydeep Roy @ Raju are altered from section 396 of the I.P.C. to section 392 of the I.P.C. and directed them to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 2000/- each, in default, to suffer simple imprisonment for a further period of six months each for the offence punishable under section 392 of the I.P.C.

Conviction of Bidhan Ghorui and Azim Mistry is recorded under section 302 read with section 34 of the I.P.C. instead of 396 of the I.P.C. Sentence imposed upon the aforesaid appellants, namely, Bidhan Ghorui and Azim Mistry shall remain unaltered.

This Court is informed Ranajit Mondal @ Rana and Joydeep Roy @ Raju have already suffered imprisonment for 16 years. Under such

circumstances, they may be released from custody, if not wanted in any other case, upon executing a bond to the satisfaction of the trial court which shall remain in force for a period of six months in terms of section 437A of the Code of Criminal Procedure.

Period of detention suffered by the appellants during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon them in terms of section 428 of the Code of Criminal Procedure.

The appeals are, accordingly, disposed of. Connected applications, if any, also stands disposed of.

Lower court records along with copies of this judgment be sent down at once to the learned trial court as well as the Superintendent of Correctional Home for necessary compliance.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)