

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1033 of 2018

Arising Out of PS. Case No.-28 Year-2016 Thana- BUNIYAD GANJ District- Gaya

=====

Guddu Singh, S/o Satyendra Singh, R/o Vill.- Kamalpur, P.S.- Muffasil Town,
District- Gaya.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

=====

with

CRIMINAL APPEAL (DB) No. 857 of 2018

Arising Out of PS. Case No.-28 Year-2016 Thana- BUNIYAD GANJ District- Gaya

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Deepak Kumar Giri @ Deepak Pandey @ Deepak Giri, Son of Bharat Giri,
Resident of Lakarka, P.S.- Katrasgarh, District- Dhanbad (Jharkhand).

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

with

CRIMINAL APPEAL (DB) No. 913 of 2018

Arising Out of PS. Case No.-28 Year-2016 Thana- BUNIYAD GANJ District- Gaya

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Karu Singh, S/o Satendra Singh @ Satyendra Singh, R/o Mohalla- Chhotki
Delha, P.S.- Delha, District- Gaya.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

with

CRIMINAL APPEAL (DB) No. 993 of 2018

Arising Out of PS. Case No.-28 Year-2016 Thana- BUNIYAD GANJ District- Gaya

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Mohit Kumar, son of Raju Prasad, Resident of Mohalla - Telbigha Mor (Near
Kali Aasthan), P.S.- Kotwali, District - Gaya.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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with
CRIMINAL APPEAL (DB) No. 212 of 2019

Arising Out of PS. Case No.-28 Year-2016 Thana- BUNIYAD GANJ District- Gaya

Pappu Rao @ Birendra Rao, Son of Anil Rao, Resident of Village- Lao, P.S.- Tekari, District- Gaya.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 1033 of 2018)

For the Appellant/s : Mr. Baidyanath Thakur, Advocate
Ms. Guriya Nisha, Advocate

For the Respondent/s : Mr. Dilip Kumar Sinha, APP

(In CRIMINAL APPEAL (DB) No. 857 of 2018)

For the Appellant/s : Mr. Manish Kumar No.2, Amicus Curiae

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

(In CRIMINAL APPEAL (DB) No. 913 of 2018)

For the Appellant/s : Mr. Manish Kumar No.2, Amicus Curiae

For the Respondent/s : Mr. Abhimanyu Sharma, APP

(In CRIMINAL APPEAL (DB) No. 993 of 2018)

For the Appellant/s : Mr. Manish Kumar No.2, Amicus Curiae

For the Respondent/s : Mr. Abhimanyu Sharma, APP

(In CRIMINAL APPEAL (DB) No. 212 of 2019)

For the Appellant/s : Mr. Manish Kumar No.2, Advocate
Mr. Ram Kumar, Advocate
Mr. Rohit Kumar, Advocate
Mr. Sanjeev Kumar, Advocate

For the Respondent/s : Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE SHAILENDRA SINGH)

Date : 30-08-2024

This batch of five criminal appeals have arisen out of the same judgment, so they are being decided together by a common judgment.

2. In this batch of five criminal appeals, in Cr. Appeal (DB) No. 857 of 2018, Cr. Appeal (DB) No. 913 of 2018

and Cr. Appeal (DB) No. 993 of 2018, learned counsels are not appearing, however, this Court has requested Mr. Manish Kumar No. 2, learned counsel who appears for the appellant in Cr. Appeal (DB) No. 212 of 2019 to assist this Court as *Amicus Curiae* also on behalf of those appellants whose lawyers are not representing.

3. Heard Mr. Baidyanath Thakur, learned counsel for the appellant in Cr. App(DB) No. 1033 of 2018, Mr. Manish Kumar No. 2, learned *amicus curiae* for the appellants in Cr. App(DB) Nos. 857 of 2018, 913 of 2018 and 993 of 2018 and also in Cr. App(DB) No. 212 of 2019 in which he is representing the appellant as his counsel and Mr. Dilip Kumar Sinha, Mr. Sujit Kumar Singh, Mr. Abhimanyu Sharma and Ms. Shashi Bala Verma, learned Additional Public Prosecutors for the State.

4. The appeals have been filed against the judgment of conviction dated 12.06.2018 and order of sentence dated 13.06.2018 passed by the court of learned Additional District & Sessions Judge-II, Gaya, in connection with Sessions Trial No. 54 of 2017/412 of 2016 arising out of Buniyadganj P.S. Case No. 28 of 2016, whereby and whereunder the appellants have been convicted for the offences punishable under Sections 396 and 412 of the Indian Penal Code (in short

‘IPC’) and they have been sentenced to undergo life imprisonment for both the offences and the sentences awarded upon them have been directed to run concurrently by the learned trial court.

Prosecution Story : -

5. The substance of the prosecution case is that as per the informant, Sudhir Kumar (P.W.-5) who worked in CMS company and engaged in loading and unloading the cash amount in Automated Teller Machines (in short ‘ATM’) at the time of alleged occurrence and on 10.02.2016 at 11:30 A.M. a sum of Rs. 1,22,00,000/- (rupees one crore and twenty two lakhs) was initially withdrawn from Punjab National Bank’s (in short ‘PNB’) branch situated on Tekari road in Gaya and thereafter, he along with security guards Vinod Sharma(P.W.-4) and Naresh Pandey (deceased), custodian Naresh Kumar Singh (P.W.-8) and driver Rajesh Prasad (P.W.-6) went to Gaya station by their van to Bank of Baroda and thereafter, a sum of Rs. 15,00,00/- (rupees fifteen lakhs) was taken from one Kashi Nath and then went to Axis Bank, from there also, the cash was withdrawn/taken and thereafter, they went to State Bank of India’s main branch and from there also, the cash was taken, after that they went to Tower Chowk where they loaded the cash

in the ATMs of PNB and Bank of India (in short 'BOI') and thereafter, they proceeded to Manpur and after reaching there, the cash van driver Rajesh Prasad and security guard Vinod Sharma remained in the vehicle. The informant, custodian Naresh Kumar Singh and guard Naresh Pandey got down from the vehicle with a black colour bag containing Rs. 16,00,000/- (rupees sixteen lakhs) and there they loaded a sum of Rs. 5,00,000/- (rupees five lakhs) in PNB ATM situated at *Manpur Durga Asthan* and from there, they started walking on foot with Rs. 11,00,000/- (rupees eleven lakhs) for the purpose of loading the cash in the ATMs of PNB and BOI situated at *Manpur Patuatoli* and then at around 2:05 P.M., in Patuatoli lane, at the distance of 100 meters from PNB ATM, three miscreants came and fired a shot at the head of the guard Naresh Pandey and snatched the bag containing the cash amount. The guard died on the spot after sustaining firearm injury. As per the informant, the age of the miscreants was between 20 and 25 and they were of light dark complexion (सांवला), out of them, one was wearing a jacket and the said miscreant abused the custodian Naresh Kumar Singh and snatched the bag containing cash amount from him and after committing the crime, the accused fled away with brandishing their weapons. After that, the informant

informed the second security guard about the occurrence who came rushing and he fired two rounds at the miscreants but they managed to escape away upon their black colour motorcycle of *Honda* company in southern direction and thereafter, the location In-charge, Sanjay Kumar, was informed about the occurrence by him. As per the informant, after the incident, he went with the body of the deceased (Naresh Pandey) to Buniyadganj police station by his vehicle.

6. The informant filed a written application Exhibit-1 giving the above-mentioned details about the commission of the occurrence of *dacoity* with murder and on that basis, the formal FIR bearing No. 28/2016 was registered on 10.02.2016 at Buniyadganj police station under Sections 302 and 394 read with Section 34 of IPC and Section 27 of the Arms Act and later on, Sections 396 and 412 of IPC were added which set the criminal law in motion.

Proceedings before the trial court: -

7. After completion of the investigation, in respect of the appellants, they were chargesheeted along with the co-accused Raja Kumar, Rahul Kumar, Nitish Kumar and Vicky Kumar for the offences under Sections 396 and 412 of IPC and the investigation was kept pending against one namely Falak @

Rajat. The appellants stood charged for the offences under Sections 396 and 412 of IPC and the charges were read over and explained to them in Hindi to which they denied and claimed to be tried for the charged offences.

8. During trial, the prosecution examined altogether 27 witnesses in oral evidence who are as under: -

Sr. No.	Name	
P.W. -1	Gend Lal Prasad	Independent witness
P.W. -2	Hariom Prasad	Independent witness
P.W. -3	Ram Naresh Singh	Seizure list witness
P.W. -4	Binod Sharma	Guard 1
P.W. -5	Sudhir Kumar	Informant
P.W. -6	Rajesh Prasad	Driver
P.W. -7	Dr. Purendu Shekhar	Medical Officer who conducted postmortem examination on the body of the deceased Naresh Pandey
P.W. -8	Naresh Kumar Singh	Custodian
P.W. -9	Surendra Prasad	Official witness (constable)
P.W. -10	Basuki Nath	Official witness (constable)
P.W. -11	Lalan Mali	Seizure list witness
P.W. -12	Anup Kumar Malviya	Seizure list witness
P.W. -13	Jitendra Kumar	Seizure list witness
P.W. -14	Vishwadeep Kumar	Seizure list witness
P.W. -15	Shrawan Kumar	Seizure list witness
P.W. -16	Munish Kumar	Seizure list witness
P.W. -17	Sanjay Singh @ Bablu Singh	Seizure list witness
P.W. -18	Abhay Singh	Seizure list witness
P.W. -19	Sunita Devi	Seizure list witness
P.W. -20	Soni Devi	Seizure list witness
P.W. -21	Shakuntala Devi	Seizure list witness
P.W. -22	Sanjeet Chaudhary	Seizure list witness
P.W. -23	Santosh Kumar Singh	Constable
P.W. -24	Jatu Ram	Head Constable

P.W. -25	Chandra Shekhar Singh	Investigating Officer
P.W. -26	Deepak Kumar	FSL Expert
P.W. -27	Jitendra Kumar	FSL Expert

9. In documentary evidence, the prosecution produced and proved the following documents and got them marked as Exhibits which are as under: -

Exhibit 1	Signature of witness Ram Naresh Singh on seizure list on page No. 88 of C.D.
Exhibit 1/1	Signature of witness Akshay Kumar on seizure list on page 88 of C.D.
Exhibit 2	Signature of c/s witnesses Sudhir Kumar, Vinod Sharma and Naresh Kr. Singh on written F.I.R.
Exhibit 3	Entire written statement in writing of informant Sudhir Kumar.
Exhibit 4	P.M. Report
Exhibit 1/2	Signature of witness Surendra Pd. on seizure list on page no. 97 of C.D.
Exhibit 1/3	Signature of witness Basuki Nath on seizure list on page no. 97 of C.D.
Exhibit 1/4	Signature of witness Anup Kr. Malviya on page no. 94 of C.D.
Exhibit 1/5	Signature of witness Jitendra Kr. on seizure list on page no. 89 of C.D.
Exhibit 1/6	Signature of witness Vishwadeep Kr. on seizure list on page no. 94 of C.D.
Exhibit 1/7	Signature of witness Shrawan Kumar on seizure list on page No. 87 of C.D.
Exhibit 1/8	Signature of witness Manish Kumar on seizure list on page no. 87 of C.D.
Exhibit 1/9	Signature of witness Sanjay Singh on seizure list on page no. 85 of C.D.
Exhibit 1/10	Signature of witness Sanjay Singh on seizure list on page

	no. 86 of C.D.
Exhibit 1/11	Signature of witness Abhay Singh on seizure list on page no. 86 of C.D.
Exhibit 1/12	Signature of witness Sunita Devi on seizure list on page no. 91 of C.D.
Exhibit 1/13	Signature of witness Soni Devi on seizure list on page no. 91 of C.D.
Exhibit 1/14	Signature of witness Sanjeet Choudhary on seizure list on page no. 90 of C.D.
Exhibit 1/15	Signature of witness Santosh Kr. Singh on seizure list, made at Manpur Railway Station given on page no. 95 of C.D.
Exhibit 1/16	Signature of witness Santosh Kr. Singh on seizure list made on a road near <i>Malgodam</i> given on page no. 93 of C.D.
Exhibit 1/17	Signature of witness Santosh Kr. Singh on seizure list made at Ishwar Chaudhary Halt given in page no. 96 of C.D.
Exhibit 1/18	Signature of accused Deepak Kr. Giri on the seizure list made at Ishwar Chaudhary Halt given in page no. 96 of C.D.
Exhibit 1/19	Signature of witness Jattu Ram on seizure list made near <i>Malgodam</i> yard given in page no. 93 of C.D.
Exhibit 1/20	Signature of witness Jattu Ram on seizure list made at Manpur Railway Station given in page no. 95 of C.D.
Exhibit 1/21	Signature of witness Jattu Ram on seizure list made at Ishwar Chaudhary Halt given in page no. 96 of C.D.
Exhibit 5	Formal F.I.R.by I.O.
Exhibit 6	The seizure list signed by Police Officer Guffar Ahmad and witnesses Lalan Mali , Vinod Kr and Deepak Kr.
Exhibit 7	The Seizure list signed by the witness Anup Kr. Malviya & Vishwadeep Kr. on Page No. 94 of C.D.
Exhibit 8	The Seizure list made at the house of accused Guddu Singh given at Page No. 85 of C.D.
Exhibit 9	Confessional statement of Guddu Singh
Exhibit 10	A Seizure list made at the house of accused Guddu Singh

	given at Page No. 86 of C.D.
Exhibit 11	A Seizure list made at the house of accused Nitish Kumar given at page No. 87 of C.D.
Exhibit 12	Confessional Statement of accused Nitish Kumar.
Exhibit 13	The Seizure list made at the house of non F.I.R. accused Raja Kumar given at page No. 88 of C.D.
Exhibit 14	A Seizure list made at the motor cycle stand of Gaya Railway Station given at page No. 89 of C.D.
Exhibit 15	Confessional Statement of accused Mohit Kumar
Exhibit 16	A Seizure list made at the house of accused Mohit Kumar's in-laws given at page No. 90 of C.D.
Exhibit 17	A Seizure list made at the rented accommodation of accused Mohit Kr. given at page No. 91 of C.D.
Exhibit 18	A Seizure list made at the Village Jamune given at page No. 97 of C.D.
Exhibit 19	Confessional Statement of accused Pappu Rao
Exhibit 20	A Seizure list made at the house of accused Pappu Rao Situated at the Village 'Lao' given at the page No. 92 of C.D.
Exhibit 21	Seizure list prepared by F.S.L. experts
Exhibit 22	Confessional statement of accused Deepak Kr. Giri
Exhibit 23	Confessional statement of accused Rahul Kr.
Exhibit 24	Confessional statement of accused Raja Kumar
Exhibit 25	Confessional statement of accused Vicky Kumar
Exhibit 26	Signature of F.S.L. expert Deepak Kumar on the report of Crime scene.
Exhibit 26(A)	Signature of F.S.L. expert Jitendra Kumar on the report of F.S.L. of Crime Scene.
Exhibit 27	Signature of Senior Scientific Officer, Das Ashok Kumar, on F.S.L. report.
Exhibit 28	Signature of Senior Scientific Officer, Raj Kumar, on F.S.L. report.

10. The prosecution also produced the following articles and got them marked as material objects which are as

under: -

Exhibit I	A bundle of Rs. 2,00,000/-
Exhibit II	Two live cartridges
Exhibit III	One barrel gun
Exhibit IV	A bundle of Rs. 1,95,000/-
Exhibit V	A gold chain
Exhibit VI	A bundle of Rs. 20,000/-
Exhibit VII	A bundle of Rs. 1,00,000/-
Exhibit VIII	A bundle of Rs. 1,70,000/-
Exhibit IX	A mobile phone
Exhibit X	A bundle of Rs. 1,50,000/-

11. After completion of the prosecution’s evidence, the statements of the appellants were recorded under Section 313 of the Code of Criminal Procedure (in short ‘Cr.P.C.’) by the learned trial court giving them an opportunity to explain the main incriminating evidences appearing against them from the prosecution’s evidences which were denied by them and they claimed themselves to be innocent.

12. The appellants examined two persons in their defence who are as under: -

Sr. No.	Name	
D.W.-1	Vindeshwari Singh	
D.W.-2	Akhileshwar Kumar Singh	

Submissions on behalf of the appellants

13. Learned counsels for the appellants have argued that in the present matter, the accused persons who were

directly involved in the commission of the alleged *dacoity* with murder were not identified by the main prosecution witnesses P.W.-4, P.W.-5, P.W.-6 and P.W.-8 who claimed to have seen the commission of the occurrence and after the arrest of the accused persons, they were not put on *Test Identification Parade* despite the alleged occurrence being taken place in broad daylight and the accused having their faces not covered and in this regard, the evidence of Chandra Shekhar Singh (Investigating Officer), who was examined as P.W.-25, is relevant. During the trial, the prosecution failed to establish the identity of the appellants as being the miscreants who allegedly committed the occurrence and the prosecution also did not succeed to establish a connection or link between the appellants and other co-accused persons. Though the recoveries of some part of the looted amount of Indian currency of different denominations are said to have been made from the possession of some of the appellants but admittedly, the seized currency notes were not put before the concerned bank officials through Test Identification procedure to establish the seized currency notes as being a part of the looted money and further any sign such as a slip of the concerned bank upon the seized bundles of notes was not found to prove the same as being withdrawn from the concerned bank

during the relevant time as mentioned in the FIR. It is further submitted that so far as the recovery of the firearms is concerned, the same also cannot be deemed to prove the involvement of the appellants in the commission of the alleged occurrence as there is no forensic expert's opinion to establish that the recovered firearms were used in causing injuries to the deceased guard and moreover, in respect of the seized firearms, the concerned accused and the appellants were made accused by lodging another P.S. cases against them. It is further submitted that as per the FIR, the gun of the deceased guard was snatched by one of the accused and it is alleged that the looted gun was recovered from the house of the appellant Guddu Singh on the basis of his disclosure statement but the prosecution failed to prove the seized gun as being the looted gun, as in the FIR, there is no description of the gun such as its type, number, etc. and further in this regard, any kind of documentary evidence was also not given. So far as the recovery of a motorcycle from the possession of the accused-appellant Guddu Singh is concerned, the same also could not have been established as being the motorcycle which was used by the accused in the commission of the alleged occurrence because as per the evidence of the Investigating Officer, the seized motorcycle was

of *Yamaha* company but in the FIR, the motorcycle used by the accused was shown as of *Honda* company. As such, there is no any kind of incriminating evidence against the appellants to show their involvement in the alleged occurrence. It is further argued that the alleged offence of 396 of IPC is not made out, as for constituting the said offence, it must be proved that at least five persons have committed the offence but in the present matter as per the FIR, only three unknown persons committed the alleged occurrence. Though during the investigation, some other persons were also made accused but it could not be established that the alleged occurrence was committed in furtherance of any conspiracy or assistance by all of them including the appellants. So far as the offence under Section 412 of IPC is concerned for which the appellants have also been convicted, the same is also not made out as the prosecution completely failed to establish the relevant materials such as the alleged money, motorcycle and firearms which are said to have been recovered from the possession of the appellants and others as being stolen property or being the articles of which possession had been obtained by committing a loot by five or more persons. It is further submitted that most of the witnesses of the seizure lists went hostile and the Investigating Officer

accepted in the cross-examination that he did not record their statements during investigation, so, no reliance can be placed on all the witnesses of seizures and the prosecution also did not succeed to prove the blood stains which were found on the seized trouser and socks from the possession of the accused-appellant (Karu Singh) as being in the blood group of the deceased guard.

Submissions on Behalf of the State

14. On the contrary, learned Additional Public Prosecutors have submitted that though the FIR was registered against unknown but during investigation, from the possession of the accused and some of the appellants, the looted money and gun were recovered and the motorcycle which was used by them was also recovered and in this regard, thereof, seizure memos were also proved by the Investigating Officer and the same is sufficient to prove the involvement/complicity of the appellants in the commission of the offence of *dacoity* with murder. It is further submitted that though the appellants were not put on *Test Identification Parade* during investigation but before the trial court, P.W.-4/Binod Sharma identified the appellant Pappu Rao and co-accused Rohit Kumar on seeing them in the dock and the prosecution witness P.W.-8/Naresh Kumar Singh identified the

appellant Mohit Kumar and co-accused Falak @ Rajat in the court room when both the witnesses appeared to record their evidence and the identification by both the witnesses is sufficient to prove the involvement of the said appellants and co-accused in the crime of *dacoity* with murder. It is further submitted that though the seized money (currency notes) was not put for identification before competent person of the bank concerned, however, their seizures were proved by the Investigating Officer and other witnesses and the seized currency notes as well as other articles were also produced before the learned trial court, hence, there is sufficient material to justify the conclusion of the learned trial court in holding the appellants guilty for the charged offences.

Consideration and Analysis: -

15. The appellants have been convicted and sentenced for the offences under Sections 396 and 412 of IPC. In view of the punishment prescribed for both the offences, the offence under Section 396 can be deemed to be a major offence. To attract the offence under Section 396 of IPC, it must be proved that the offence of *dacoity* as defined in Section 391 of IPC has been committed and during the commission of *dacoity*, murder of one or more persons has also been committed by the

accused. When the offence of *dacoity* is committed by unknown accused then the prosecution is bound to prove the identity of the accused involved in the commission of said offence. Where the identity of the accused is not in question then the recovery of the looted article/s from the possession of the accused and identification of the same become very important in such type of offence, particularly, when the prosecution's evidences do not inspire confidence of the court with regard to the alleged identity of the accused. In the present matter, admittedly, the offence of *dacoity* was committed by three unknown persons and during the commission of the said offence, the accused opened fire at the informant, his companions Naresh Kumar Singh and guard Naresh Pandey when they were proceeding to load ATM of Punjab National Bank (in short 'PNB') and Bank of India (in short 'BOI') with a cash of Rs. 11,00,000/- (rupees eleven lakhs) but in the meantime, the gun, which was being carried by the guard, was snatched after causing a firearm injury to his head by the accused and the bag having a cash amount of Rs. 11,00,000/- was also snatched from Naresh Kumar Singh by the accused. The guard Naresh Pandey died on the spot on account of having sustained firearm injury in his head and the age of the accused persons involved in the occurrence was

between 20 and 25 years and the accused persons were of light dark complexion (साँवला) and further as per the prosecution story, after snatching the cash bag from Naresh Kumar Singh and firearm (Gun) from the possession of the guard Naresh Pandey, the accused fled away with brandishing firearms and in that course the second guard, namely, Binod Sharma, who was present in the cash van, rushed after the accused and fired 2 rounds at the accused but they managed to escape in southern side on a black motorcycle of *Honda* company. In view of this prosecution story, the identification of the accused, who were involved in the commission of the alleged *dacoity* with murder, is very important and also, the recovery of the looted money as alleged being made from the possession of the said accused is an important aspect. As per the prosecution, the appellants were involved in the alleged offences as the identity of the appellant Mohit Kumar and Pappu Rao was established by the prosecution as they being involved in the alleged offence under Section 396 of IPC and further the recovery of the incriminating materials such as looted money, looted gun and a motorcycle used in the alleged crime from the possession of the appellants which were also proved by the prosecution witnesses. Before arriving at a conclusion, we would like to discuss the evidence

of the material prosecution witnesses. Altogether 27 prosecution witnesses were examined by the prosecution before the trial court and among them, P.W.-4 (Binod Sharma), P.W.-5 (Sudhir Kumar), P.W.-6 (Rajesh Prasad) and P.W.-8 (Naresh Kumar Singh) are said to be the witnesses of the commission of the alleged offence of *dacoity* with murder. Among the rest witnesses, most of them are said to be the witnesses of search and seizure and others are said to be the official witnesses. P.W.-4 (Binod Sharma) deposed in the examination-in-chief that he was sitting in the cash van when he received a phone call to this effect that the cash and firearm had been looted and the guard Naresh Pandey sustained firearm injury, as a result of which he died. He further stated in the examination-in-chief in paragraph No. '1' that he did not hear the sound of firing and after receiving the information on his phone, he came out of the vehicle and saw that three accused persons were carrying the bag in which the cash amount was kept and the gun looted from the guard Naresh Pandey and the accused's vehicle was available 10 steps away from the cash van and in defence he also fired in air. Further, he deposed in the cross-examination that the distance of the parked cash van was 20-30 feet from the ATMs and from that place, the ATMs were not visible. He

further stated that the place at where the incident of firing took place was a crowded place and a ruckus and panic situation erupted among the people owing to the occurrence of *dacoity* with murder and the commission of murder, the act of calling him by his companion happened within 5-7 minutes. He further stated that he did not see the commission of murder of Naresh Pandey (guard) and he stated before the court regarding his death as per the information given to him by Sudhir Kumar (P.W. -5) on his phone at the time of the occurrence. He further stated in the cross-examination that he could not have identified any of the accused at the time of the occurrence and did not reveal the name of any of the accused before the Investigating Officer during investigation. From the evidence of this witness, it is clearly evident that the witness could not have identified the accused and he was inside the cash van when the occurrence of firing and loot took place and he came out of the vehicle after receiving the information of the occurrence on his phone and according to him, the whole occurrence happened within 5-7 minutes and the ATMs towards which the victim and his other companions had proceeded to fill/load the money were 20-25 feet away from the cash van and the ATMs were also not visible from the cash van. Further, the place of occurrence was

crowded with people when the occurrence took place and just after the commission of the occurrence of loot and murder, a ruckus and panic situation created at the place of occurrence and people started running here and there and the witness also rushed to the place of occurrence so, in such a situation, it can be deemed that it was very difficult for this witness to have noticed the physical appearance of the accused. Admittedly, during investigation, the appellants were not put on *Test Identification Parade* before this witness. Though the witness claimed to have identified the appellants Mohit Kumar and Pappu Rao before the trial court upon seeing their face when he appeared before the trial court for recording his evidence. The alleged occurrence took place on 10.02.2016 and the witness was examined on 20.06.2017 as a witness before the trial court. So, his claim as to he being able to identify the said appellants even after a gap of about 16 months between his first seeing the appellants at the crowded place and thereafter seeing them again after 16 months in the dock, does not appear to be believable. Further in view of the circumstances appearing from the prosecution's evidences concerned to identification of the accused, the claim of this witness as to he being able to identify both the appellants in the court room does not appear to be

reliable. In this regard, the principle laid down by the Hon'ble Apex Court in the case of **OMA @ Omprakash and Anr. vs. State of Tamil Nadu** reported in **AIR 2013 SC 825** is very relevant and the same is being reproduced as under : -

"31. Evidently, the witnesses did not know the accused earlier, hence the accused could be identified only through a test identification parade which was not done in this case, so far as A-2 is concerned. In this connection, we may refer to the judgment of this court in Mohd. Iqbal M. Shaikh v. State of Maharashtra (1998) 4 SCC 494 : AIR 1998 SC 2864: 1998 AIR SCW 1741) wherein this Court held that:

"If the witness did not know the accused persons by name but could only identify from their appearance then a test identification parade was necessary, so that, the substantive evidence in court about the identification, which is held after fairly a long period could get corroboration from the identification parade. But unfortunately the prosecution did not take any steps in that regard and no test identification parade had been held."

In the above cited case the Hon'ble Apex Court followed its own principle laid down in the case of **Ravi alias Ravichandran vs. State represented by Inspector of Police**

reported in **(2007) 15 SCC 372**, in which it was held that:

“33. A judgment of conviction can be arrived at even if no test identification parade has been held. But when a first information report has been lodged against unknown persons, a test identification parade in terms of Section 9 of the Evidence Act, is held for the purpose of testing the veracity of the witness in regard to his capability of identifying persons who were unknown to him.”

34. Further, it is also held that:

"It was incumbent upon the prosecution to arrange a test identification parade. Such test identification parade was required to be held as early as possible so as to exclude the possibility of the accused being identified either at the police station or at some other place by the witnesses concerned or with reference to the photographs published in the newspaper. A conviction should not be based on a vague identification."

Hon'ble Apex court in the case of OMA (*supra*) further observed in para '35' that:

“35. A-2, it may be noted, was not named in the FIR, nor any identification parade was conducted to identify him by the witnesses. It is rather impossible to identify the accused person when he is produced for the first time in the court i.e. after ten years since he was unknown to the

witnesses. We are of the view that it is a glaring defect which goes to the root of the case since none of the witnesses had properly identified the accused.”

The Hon’ble Apex court in the Case of **Hridyanand Shukla and Another vs. Yadupati Chauhan and Others** reported in (2012) 13 SCC 427 observed in paragraph ‘4’ that: -

“4. With the assistance of the learned counsel appearing for the parties to the lis, we have carefully perused the judgment and order passed by the High Court and also analysed the evidence that was recorded by the trial court. The High Court has reappreciated the evidence on record and observed that the two accused persons, A-1 and A-2, have neither been named in the FIR nor was their involvement disclosed at the earliest opportunity by any of the witnesses. Additionally, no charge has been laid by the prosecution under Sections 396 and 397 IPC against them. The only identification of the said accused was during the course of the trial by the witnesses whose testimony stands contradicted by the evidence of the investigating officer. In the light of the aforesaid and there being no test identification parade at the investigation stage, the High Court has concluded that the evidence against the said accused persons

is not sufficient for conviction under Sections 396 and 397 IPC.”

16. PW-5 (Sudhir Kumar), PW-6 (Rajesh Prasad) and PW-8 (Naresh Kumar Singh) are also important witnesses of the prosecution as they are said to be the eye-witnesses of the commission of the alleged *dacoity* with murder. PW-5 is the informant and he stated in the examination-in-chief that when he and his companions started proceeding towards the ATMs to fill/load them with money, three accused came and first tried to snatch the bag containing the bank money from Naresh Kumar Singh (PW-8) then Naresh Pandey (guard) resisted and stopped the miscreants/accused and then one of the accused opened fire that caused firearm injury at the head of gunman Naresh Pandey resulting in his instant death at the spot and at that time, he was present at that place at some distance. The witness further stated that the accused, after firing, succeeded in snatching the bag containing the money from Naresh Kumar and also snatched the gun of guard Naresh Pandey and thereafter, they fled away. According to this witness, the age of the accused was between 20-25 years and one of them was wearing a jacket and they were of light dark complexion (साँवला) and the incident of firing was informed by him to the second guard who was present inside the

vehicle near the place of occurrence. He further deposed in the cross-examination that he was not taken to jail for identifying the accused through *Test Identification Parade* and the place of occurrence was a densely populated area and a ruckus and panic creating disturbance erupted due to the incident. Accordingly, the evidence of this witness is not sufficient to establish the identity of the appellants.

17. PW-6, Rajesh Prasad, who was the driver of the CMS cash van, deposed that he did not see any of the accused committing the alleged occurrence nor he identified any of them and in the cross-examination he stated that he could not have identified the accused and did not know about the persons who were involved in the occurrence. So, the evidence of this witness also does not help the prosecution in establishing the identity of the appellants as being involved in the commission of the offences.

18. PW-8, Naresh Kumar Singh, is also an important witness of the prosecution and in respect of the identification of the appellant, Mohit Kumar and co-accused Falak @ Rajat, the prosecution highly placed reliance upon his evidence as the witness claimed to have identified both the accused in the courtroom when he appeared for recording his

evidence. Though the witness identified both the said accused before the trial court but from his evidence, it appears that he had only two occasions to see the accused involved in the alleged occurrence. Firstly, as per the prosecution, he saw the accused when they were committing the occurrence and thereafter, on second occasion, he saw them in the courtroom after a gap of about sixteen months and during that period, he had no occasion to see any of the accused and it is also an admitted position that the alleged occurrence took place at a crowded place and a ruckus erupted after the commission of the occurrence and people started running here and there, so, in such a situation, it can be deemed that it was very difficult for this witness to remember the physical appearance of the accused and moreover, the witness did not explain the circumstances under which he had been able to keep the physical appearance of the accused in his mind fresh even after a gap of sixteen months from seeing them only on one occasion. Furthermore, the police did not adopt the proper course to put the appellants for identification by this witness through *Test Identification Parade* and in respect of identification of an accused in the courtroom by a witness, the possibility of making such witness aware of the identity of the accused before his/her entering into

the courtroom cannot be ruled out. Accordingly, we do not find this witness to be sufficient to establish the identity of the appellants as being involved in the alleged occurrence of *dacoity* with murder. The instant matter relates to the loot of bank currency notes of different denominations and as per the prosecution's case, from the possession of the appellants and co-accused, the looted money, gun of the guard which was snatched and the motorcycle which was used in the commission of the crime by the accused persons were recovered during investigation and the prosecution highly placed reliance upon these recoveries. In respect of these recoveries, the evidence of P.W.-9 to P.W.-24 is relevant as they are said to be the witnesses of the recovery of the looted money, looted firearm of the deceased guard and the motorcycle which was used in the commission of the alleged occurrence. Among these witnesses, P.W.-11, P.W.-12, P.W.-13, P.W.-14, P.W.-17, P.W.-19 and P.W.-22 went hostile and none of them supported the recoveries which are said to have been made before them. So far as the evidence of other witnesses of the recoveries is concerned, their evidence also does not help the prosecution as the prosecution failed to establish the connection between the recovered money, firearm and the motorcycle with the alleged looted money,

firearms and alleged motorcycle concerned to the present matter. Now, we are going to discuss the evidence of these witnesses.

19. P.W.-10, Basuki Nath, simply stated that a mobile phone of Micromax company was recovered from the possession of Pappu Rao (appellant) and a sum of Rs. 1,50,000/- was recovered from his house but there is no material to prove the seized money as being a part of the looted money of the alleged occurrence and the prosecution did not show the relevance of the seized mobile phone which is said to have been recovered from the appellant Pappu Rao.

20. P.W.-15, Shrawan Kumar, deposed that Rs. 1,95,000/- which was in the denominations of Rs. 500 and Rs. 100 and keeping in several packets was recovered along with a gold chain from the courtyard of the house of co-accused Nitish Kumar and Shrawan Kumar (father of Nitish). But the prosecution did not give any evidence to show any connection between the said co-accused and the appellants and further there is no evidence to prove that the recovered money is a part of the looted money concerned to the present matter.

21. P.W.-16, Manish Kumar, stated that though his signature was available on the seizure list but he did not know

about the contents of the seizure memo and the police got his signature on a blank paper.

22. P.W.-17, Sanjay Singh @ Bablu Singh, stated that a black Pulsor motorcycle was recovered from the appellant Guddu Singh. But the witness was declared hostile as he denied the factum of the recovery of the looted money, two bullets and a gun etc. before him. In the cross-examination, he deposed that nothing incriminating material was recovered before him and he did not record his statement before the police and his signature was taken on a blank paper by the police forcefully. Here, it is important that as per the evidence of this witness, the police recovered a black colour Pulsor motorcycle from the possession of the appellant Guddu Singh but as per the FIR, the motorcycle used by the accused in the occurrence was of *Honda* company.

23. P.W.-18, Abhay Singh, stated that from the house of the appellant Guddu Singh only a black colour motorcycle was recovered. In the cross-examination, he stated that the police got his signature on a blank paper and he did not have any information regarding the occurrence.

24. The evidence of other witnesses of the seizure list is also in the same manner.

25. Now, we come to the evidence of the

Investigating Officer, namely, Chandra Shekhar Singh who was examined as P.W.-25 and his evidence can be deemed to be very important in respect of the alleged recoveries. The witness deposed in his examination-in-chief that on the basis of a secret information the appellant Guddu Singh's institute was raided and from the appellant's person, a country made *katta* was recovered and from his office, a 9 mm bullet was recovered regarding which a P.S. case in Muffasil police station was lodged. He further stated that on the basis of the confessional statement-cum-disclosure statement made by the appellant Guddu Singh, 2 lakh rupees, two live cartridges of 12 bore and a double barrel gun, which was looted from the possession of the deceased guard (Naresh Pandey) bearing Arsenal No. 472, were recovered from the house of Guddu Singh (appellant) and regarding these recoveries, the seizure lists Exhibit Nos. '1', '2' and '3' were prepared. He further stated that the motorcycle which was used in the occurrence was also recovered of which seizure memo Exhibit- '10' was prepared. Further on the basis of the disclosure made by the appellant, Guddu Singh, the co-accused Nitish Kumar was arrested and from his person, a pistol and bullet were recovered, regarding which a police case in Muffasil police station was lodged and thereafter, on the basis of

the confessional statement of the arrested co-accused Nitish Kumar, 1.95 lakh rupees of the denominations of Rs. 500 and 100 was recovered from the house of co-accused Nitish Kumar regarding which the seizure memo Exhibit- '4' was also prepared. He further stated that from the possession of the co-accused Nitish Kumar, one gold chain which had been purchased from the looted money was also recovered. He further stated that during investigation, the house of the co-accused Raj Kumar was also raided and Rs. 20,000/- which was a part of the looted money was recovered, regarding which the seizure list Exhibit- '6' was prepared and thereafter, on the basis of the statement of co-accused Nitish Kumar, a motorcycle of *Yamaha* company which was used by the accused in the alleged crime was recovered from the motorcycle stand of Gaya railway station by way of seizure list Exhibit- '14'. He further stated that the appellant Mohit Kumar was arrested with a country made pistol and his statement was recorded and on that basis, Rs. 2,70,000/- which was also a part of the looted money was recovered from his in-law's house (*sasuraal*) and a sum of Rs. 1,70,000/- was also recovered from his rented house, by way of seizure memos Exhibit- '15' and '16'. He further deposed that the appellant Pappu Rao was arrested during the investigation

and from his person, a mobile phone of Micromax company was recovered and on the basis of his disclosure statement, Rs. 1,50,000/- of the denomination of Rs. 500 and 100 was recovered from his village house regarding which the seizure list Exhibit- '20' was prepared. He further stated that when the house of appellant Karu Singh was raided, he was found absconding and from his house, a black colour blood stained trouser and white colour socks containing blood stains were recovered and the same were sent to FSL, Patna for forensic examination. According to this witness, the appellant Deepak Kumar Giri was also apprehended during investigation and he accepted his involvement and then on the basis of his confessional statement, two live bombs were recovered from a land situated behind the house of one Shravan Kumar regarding which, another P.S. Case was lodged at Muffasil police station.

From the evidence of the Investigating Officer (P.W.-25) regarding the above discussed recoveries of the Indian currency notes of different denominations, firearms, bombs and the motorcycle, the prosecution does not get any kind of help to prove its case. As regards the seized money which was of different denominations, the prosecution miserably failed to establish that the said seized money was of the looted money of

the present matter. As in this regard, no identification from the concerned bank official was made despite the fact that the looted money was withdrawn from the banks in large amount by the informant and his companions and the same were in different packets and further the evidence of the seizure lists' witnesses discussed above is also not sufficient to prove these recoveries. So far as the recovery of the gun and the motorcycle which was allegedly used in the crime is concerned, as per the FIR a motorcycle of *Honda* company was used by the accused in the occurrence while as per P.W.-25 the seized motorcycle was of *Yamaha* company and any documentary evidence so as to prove the recovered gun as being of the deceased guard was not given by the prosecution, so, mainly on this ground that a gun was recovered from one of the accused, it can not be deemed that the same was of the deceased guard. In order to prove the recovered gun as being of the deceased guard, the documentary evidence to prove the gun number of the guard's gun as well as the seized gun's number ought to have been given, but in this regard, no attempt was made by the prosecution. So far as the recovery of the other firearms such as bullets, cartridges and bombs is concerned thereof, relevance also could not be established by the prosecution and further in respect of these

recovered firearms, separate cases at different police stations were lodged against the concerned accused. So far as the seized blood stained trouser and socks from the house of Karu Singh are concerned, these clothes were sent to FSL, Patna for forensic examination but as per the evidence of the Investigating Officer, no examination report of these articles was produced before the trial court and further, the seized clothes were not produced before the trial court as per the evidence of P.W.-25. Here, it is important to mention that the Investigating Officer accepted that he did not make any investigation regarding the gun number or license number of the deceased guard's gun and he also accepted that the rupees seized from the possession of the accused was not put on test identification. The witness stated that on the seized notes, there was no bank slip. The statement goes against the prosecution as according to the prosecution story, the looted money along with other large amount was withdrawn from the banks just before the occurrence and the same were in different packets, so, non-finding of any bank slip on the seized packets of money makes the prosecution story suspicious. As such, the evidence of this witness (P.W.-25) is also not sufficient to prove the alleged seized Indian currency of different denomination from the possession of the appellants

and co-accused as being of the looted money of the alleged crime of *dacoity* and further, the evidence of this witness as well as other witnesses of the seizure lists casts a serious doubt in the alleged recoveries.

Furthermore, it would not be safe to draw an inference that the appellants were involved in the alleged occurrence merely on account of recoveries of the above mentioned articles as after the commission of the offence of *dacoity* there was a possibility of passing of the looted articles from one person to another and such recoveries can only rise a suspicion regarding the appellants' involvement in the alleged occurrence. But it is a settled principle of law that suspicion should not take the place of proof. In this regard, the observations made by the Hon'ble Apex Court in paragraphs No. '18' and '19' of the judgment passed in the case of **State of Rajasthan vs. Talevar and Another** reported in (2011) 11 SCC 666 are relevant which are being reproduced as under: -

"18. Thus, the law on this issue can be summarised to the effect that where the only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the

stolen property had committed the murder. It also depends on the nature of the property so recovered, whether it was likely to pass readily from hand to hand. Suspicion should not take the place of proof.

19. In the instant case, accused Kuniya was arrested on 24-12-1996 and a silver glass and one thousand rupees were alleged to have been recovered on the basis of his disclosure statement on 29-12-1996. Again, on disclosure statement dated 2-1-1997, a scooter alleged to have been used in the dacoity, was recovered. Similarly, another accused Talevar was arrested on 19-1-1997 and on the basis of his disclosure statement on 26-1-1997, two thousand rupees, a silver key ring and a key of an Ambassador car alleged to have been used in the crime were recovered. Thus, it is evident that recovery on the basis of disclosure statements of either of the respondent-accused persons was not in close proximity of time from the date of incident. More so, recovery is either of cash, small things or vehicles which can be passed from one person to another without any difficulty. In such a fact situation, we reach the inescapable conclusion that no presumption can be drawn against the said two respondent-accused under Section 114 Illustration (a) of the Evidence Act. No adverse inference can be drawn on the basis of recoveries made on their disclosure statements to connect them with the commission of the crime.”

26. Here, it is important to mention that as per the prosecution story, the informant and his companions were employees of CMS company and they used to fill/load Indian currency notes in the ATMs of different banks as per the direction of their company and on the alleged day of occurrence i.e. on 10.02.2016 at 11:30 A.M., a large amount of Rs. 1,22,00,000/- (rupees one crore twenty-two lakhs) was withdrawn from PNB and thereafter, some more money was withdrawn from other banks and in the alleged occurrence, a bag containing Rs. 16,00,000/- which was being carried by Naresh Kumar Singh who was accompanied by informant and Naresh Pandey (the deceased guard), was snatched by the accused after causing firearm injury at the head of the deceased guard. But during investigation, the Investigating officer did not collect any documentary evidence regarding the withdrawal of the said money by the CMS employees from the different banks and in this regard, the statement of the Investigating Officer is relevant. Further, there is a contradiction regarding the bag containing Rs. 16,00,000/- which was allegedly snatched as according to the FIR the said bag was of black colour but as per the evidence of P.W.-8, the withdrawn money was not kept in a bag (*jhola*) rather the same was kept in a box. It is relevant to

mention that the prosecution did not produce any documentary evidence to show that the informant and his companions were employees of CMS company and they had authority to withdraw such large amount of money from the banks and fill/load the same in different ATMs and in this regard, these witnesses were cross-examined but none of them gave satisfactory answer which also creates a doubt in the credibility of the evidence of P.W.-4, P.W.-5, P.W.-6 and P.W.- 8.

Conclusion: -

27. After having discussed the relevant evidences available on the case record of the trial court, we find that in the instant matter the prosecution has miserably failed to establish the identity of all the appellants as being involved in the alleged crime of *dacoity* with murder and admittedly, they were not put on *Test Identification Parade* before P.W.-5 and P.W.-8 who are said to have witnessed the alleged occurrence despite they being able to identify the accused persons and in this regard, the Investigating Officer completely remained careless. Though, P.W.-5 and P.W.-8 claimed to have identified the appellants Pappu Rao, Mohit Kumar and co-accused persons, namely, Falak @ Rajak and Rohit Kumar in the court room when both the witnesses appeared to record their evidence but no reliance

can be placed upon their said claim as the possibility of giving knowledge to both the witnesses about the identity of the said co-accused/appellants by the prosecution before recording their evidence cannot be ruled out and further they claimed to have identified the said appellants and co-accused after seeing them on two occasions only, first at the time of incident and second at the time of recording their evidence, in between them there was a gap of about 14 to 16 months, so, reliance cannot be placed upon the said claim. Though, as per the prosecution, the looted money and the looted gun are said to have been recovered from the possession of the accused persons including some of the appellants but the prosecution miserably failed to establish the connection or link between the seized articles and the articles which were actually concerned to the alleged occurrence. Further the investigation remained completely faulty as the Investigating Officer accepted that he did not record the statements of the seizure list witnesses and not make investigation from the banks from which the alleged money was withdrawn by the informant and his companion. Further, there is serious contradiction with regard to the seized motorcycle and the motorcycle of which details has been given in the FIR. So far as the offence under Section 412 of IPC is concerned, the

same also does not attract in this case as in the present matter, it has been concluded above that the prosecution miserably failed to prove the money (currency notes of different denomination) and other articles which were allegedly seized from the possession of the appellants as belonging to the offence of *dacoity* or the same being stolen property and in this regard, no evidence was given by the prosecution. Accordingly, we are of the considered opinion that the evidences of the prosecution were not appreciated by the learned trial court in right perspective and we find no sufficient evidence to justify the conviction of the appellants for the charged offences and the judgment impugned holding the appellants to be guilty of the charged offences is completely perverse and it is not liable to be affirmed as such the impugned judgment convicting the appellants and the order impugned sentencing the appellants for the charged offences are hereby set aside and all these appeals stand allowed.

28. The appellants, namely, Deepak Kumar Giri @ Deepak Pandey @ Deepak Giri, Mohit Kumar and Karu Singh are on bail so they as well as their sureties are discharged from their respective bonds.

29. The appellants, namely, Guddu Singh and

Pappu Rao @ Birendra Rao are in judicial custody so they are directed to be released forthwith if their custody is not required in any other case.

30. Let the judgment's copy be sent immediately to the trial court as well as the jail authority concerned for information and needful compliance.

31. Let the LCR be sent back to the trial court concerned forthwith.

32. We acknowledge the assistance rendered by Mr. Manish Kumar No. 2, learned Advocate as learned *Amicus Curiae*. A consolidated sum of Rs. 10,000/- shall be paid to the learned *Amicus Curiae* by the Patna High Court Legal Services Authority within one month from the date of receipt of a copy of this judgment.

(Rajeev Ranjan Prasad, J)

(Shailendra Singh, J)

annu/-

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