IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.269 of 2011

CNR No. BRHC010611322011

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1. Chandrika Yadav, son of late Baida Yadav.
2. Rajendra Yadav, son of Chandrika Yadav.

Both residents of village - Mothabari, P.O. + P.S.- Katoreya, District-Banka.

... ... Appellants

Versus

The State of Bihar

... ... Respondents

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Appearance :

For the Appellants	:	Mr. Ravi Prakash Diwedi, Advocate
		Mr. Praveen Kumar, Advocate
		Mr. Nihar Nandan Ambasta, Advocate
For the State	:	Mr. Jharkhandi Upadhyay, APP

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CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR

C.A.V. JUDGMENT

Date : 28-10-2026

The present appeal is directed against the judgment of conviction dated 23.02.2011 and the order of sentence dated 28.02.2011 passed by the learned Additional District & Sessions Judge, F.T.C. - III, Banka, in Sessions Trial No.497 of 2006 (Trial No. 16 of 2011), arising out of Katoria P.S. Case No.68 of 1990 (G.R. No. 750 of 1990), whereby both the appellants have been convicted for the offences punishable under Sections 395 and 397 of the Indian Penal Code. Each of them has been sentenced to undergo rigorous imprisonment for eight years and to pay a fine of Rs.5,000/- for the offence under Section 395 I.P.C.. In default of payment of fine, they have been directed to undergo simple imprisonment for six months. They have further

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been sentenced to undergo rigorous imprisonment for seven years for the offence under Section 397 I.P.C. Both the sentences have been directed to run concurrently.

2. The prosecution case, as set out in the *fardbeyan* of the informant, Jhuri Yadav (P.W.-10), recorded on 19.06.1990 at 10:00 A.M. at Katoria Police Station, is that on the previous night, i.e. on 18.06.1990 at about 9:00 P.M., the informant, after taking his meal, was sleeping on the eastern *verandah* of his house and his brother, Fuleshwar Yadav (P.W.-1), on the western *verandah*, while the womenfolk were still taking their meal, when his wife suddenly raised an alarm that miscreants had entered the house. The informant saw that 10 to 12 miscreants, armed with weapons, had broken open the door and entered the courtyard. Out of fear, he climbed on to the roof of the house, began raising alarm and started pelting roof-tiles at the miscreants. His son, Saudagar Yadav (P.W.-9), who was sleeping by his side, also woke up and exclaimed that Chandrika Yadav, Rajendra Yadav and Sukhdeo Chamar, along with 7 to 8 others, had entered the house and while saying so he ran away. It is alleged that at this time a bomb was hurled at his son by which he sustained injuries. Two bombs were also thrown at the informant but he escaped. The informant claimed that he, too,

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identified the aforesaid three persons in the light of the torches of the miscreants themselves. The miscreants, who, according to the informant, wore *pyjama*, full-pant and *kurta* and spoke a particular dialect, were armed with swords, *lathis* and bombs. They looted brass and bell-metal utensils, a silver *hasuli*, other silver ornaments, Rs. 1,225/- in cash, two woollen *chadars* and a pair of gold ear-ornaments snatched from the ears of the informant's mother. The informant further stated that the aforesaid miscreants remained in the house for about twenty minutes and fled towards the west when the villagers began to gather on the alarm. The value of the looted articles was put at about Rs.5,000/-by the informant in his *fardbeyan*.

3. As to the motive, the informant stated in the *fardbeyan* itself that about fifteen days prior to the occurrence his daughter, Mungo Devi (P.W.-7), and her husband, Rajendra Yadav, who is arrayed herein as the appellant no.2, had come to his house, and the appellant no.2 had asked for the *bidagari* of his wife, which the informant deferred on the ground that he had yet to arrange clothes and other articles. It is further stated that on the fourth day, when his daughter was returning from the jungle after collecting firewood, his *samdhi*, the appellant no.1 herein, Chandrika Yadav, caught hold of her hand and began

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dragging her towards his house, and when the informant's brother, Fuleshwar Yadav (P.W.-1), protested, the appellant no. 1 slapped him two or three times and took the daughter and the son-in-law away by force and under threats. The informant alleged that this was the reason why Rajendra Yadav and Chandrika Yadav had brought outside *dacoits* to kill him.

4. On the basis of the said *fardbeyan*, Katoria P.S. Case No.68 of 1990 was registered under Sections 395 and 397 I.P.C. After investigation, charge-sheet was submitted against the accused persons including the present appellants and cognizance was taken thereupon. Thereafter the case was committed to the Court of Sessions. The trial of the co-accused Jago Laya @ Biho Rana, Bhuvaneshwar Kamar @ Rana, Sukhdeo Chamar and Kameshwar Kamar was separated by the committing Court on 18.11.2005 on account of their non-appearance, and only the case of the two appellants was committed on that date. Charges under Sections 395 and 397 I.P.C. were framed against the appellants, to which they pleaded not guilty and claimed to be tried. The defence of the appellants was one of total denial and of false implication on account of enmity arising out of the matrimonial dispute between the appellant no. 2 and the daughter of the informant.

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5. In order to prove its case, the prosecution examined altogether eleven witnesses, who are as under:-

P.W.-1	Fuleshwar Yadav (brother of the informant)
P.W.-2	Hemo Yadav
P.W.-3	Dulo Yadav (declared hostile)
P.W.-4	Gopal Yadav (declared hostile)
P.W.-5	Kuna Yadav (declared hostile)
P.W.-6	Rajendra Yadav (brother of the informant)
P.W.-7	Mungo Devi (daughter of the informant)
P.W.-8	Suraji Devi (wife of the informant)
P.W.-9	Saudagar Yadav (son of the informant and the injured)
P.W.-10	Jhuri Yadav (informant)
P.W.-11	Dr. Umesh Chandra Sahay (Medical Officer)

6. The only document exhibited on behalf of the prosecution is the injury report of Saudagar Yadav (P.W.-9), marked as Ext.-1. The Investigating Officer was not examined. Neither the *fardbeyan* nor the formal F.I.R. nor any seizure list finds mention in the impugned judgment as having been proved or exhibited. No defence evidence was led in the trial. The trial Court after appreciating the evidence and going through the materials on record, convicted the appellants by the impugned judgment as indicated above.

7. Mr. Ravi Prakash Diwedi, learned counsel for the appellants, has submitted that the entire case of the prosecution rests upon the testimony of five members of one

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family, namely, the informant, his son, his two brothers and his wife, who, on the prosecution's own showing, were on inimical terms with the appellants on account of the matrimonial dispute concerning P.W.-7, and not a single independent witness has supported the participation of the appellants in the occurrence. It is submitted that P.W.-2 is admittedly a hearsay witness, P.W.-3 to P.W.-5 were declared hostile, and that P.W.-7, the daughter of the informant and the wife of the appellant no.2, being the prosecution's own witness, has deposed that she was at Mothabari, in the house of the appellants, on the day of occurrence, which does not place the appellants at the place of occurrence. Learned counsel has submitted that the occurrence took place at about 9:00 P.M. in the night in a rural household and that the only source of light disclosed in the *fardbeyan* is the torch-light of the miscreants themselves which casts a doubt and points towards false identification of the appellants owing to the pre-existing enmity. It has been emphasised by the learned counsel for the appellants that in the absence of the Investigating Officer, nothing is known about the source of light at the place of occurrence or about the statements of the witnesses recorded during investigation or most crucially whether the informant had in fact identified the appellants.

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8. Learned counsel has next submitted that the non-examination of the Investigating Officer has caused serious prejudice to the appellants, since the defence was deprived of the opportunity of confronting the witnesses with their previous statements. It is argued by the learned counsel for the appellants that it is inherently improbable that a father-in-law and a son-in-law, who are men of means, would commit a *dacoity* in the house of their own relatives, with uncovered faces, in the company of eight to ten strangers, and that the far more probable explanation is that a *dacoity* by unknown persons did take place and the informant's family seized the opportunity to implicate the appellants, with whom they had quarreled a fortnight earlier to settle personal scores.

9. So far as the conviction under Section 397 I.P.C. is concerned, learned counsel has submitted that the section postulates the individual act of the offender who himself uses a deadly weapon or causes grievous hurt, and that constructive liability has no place in it. It has been emphasised on behalf of the appellants that, even assuming the prosecution case to be true, no overt act of any kind is attributed to the appellant no.2 and the appellant no.1 is, at the highest, alleged to have exhorted the other miscreants. It is next submitted by the

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learned counsel that the injuries of P.W.-9, which the learned trial Court has described as grievous, were in fact, found to be superficial and the nature of the injures was opined by P.W.-11 to be simple.

10. The learned counsel for the appellants has placed reliance upon the decisions of the Hon'ble Supreme Court in the cases of ***Shri Phool Kumar vs. Delhi Administration*** reported as ***(1975) 1 SCC 797***, ***Dilawar Singh vs. State of Delhi*** reported as ***(2007) 12 SCC 641*** and ***Ganesan vs. State represented by S.H.O.*** reported as ***(2022) 15 SCC 634***.

11. Learned counsel has also relied upon the judgments of this Court in ***Maheshwari Mandal @ Bachi Mandal vs. State of Bihar, Criminal Appeal (DB) No.369 of 1996*** decided on ***01.07.2026*** and ***Singhasan Sahni @ Sahdeo Sahni vs. State of Bihar, Criminal Appeal (SJ) No.200 of 2013,*** decided on ***09.01.2025***, to contend that where the identification in the night rests upon the torch-light of the miscreants and there is neither recovery nor independent corroboration, it is unsafe to sustain such conviction.

12. Mr. Jharkhandi Upadhayaya, learned A.P.P. for the State, has supported the impugned judgment. It is submitted that the appellants were persons well known to the

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witnesses, and the question of mistaken identity does not, therefore, arise. It has next been submitted that the informant named the appellants in the *fardbeyan* itself at the earliest opportunity and P.W.-9 is an injured witness whose presence at the place of occurrence cannot be doubted and whose evidence stands corroborated by Ext.-1 and also by the deposition of P.W.-11. It has next been submitted that all the five eye-witnesses are consistent on the participation of the appellants and nothing has been elicited in their cross-examination to discredit them and mere relationship with the informant is no ground to discard the testimony of natural witnesses who were the inmates of the house.

13. It has further been submitted by the learned APP for the State that the motive, far from supporting the defence, explains why the appellants would bring outsiders to the house of the informant. It is also submitted that the non-examination of the Investigating Officer is not fatal where the ocular evidence is otherwise reliable, and the evidence of P.W.-7 that the appellants had left their house on the evening of the occurrence is a circumstance which supports the prosecution case.

14. I have considered the submissions of learned

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counsel for the parties and have carefully perused the impugned judgment and the materials on record.

15. Two questions arise for consideration, *first*, whether the conviction of the appellants under Section 397 I.P.C. could at all have been recorded on the evidence led by the prosecution and, *secondly*, whether the prosecution has proved beyond reasonable doubt that the appellants were among the persons who committed *dacoity* in the house of the informant on the night of 18.06.1990.

16. Section 397 I.P.C. provides that if, at the time of committing robbery or *dacoity*, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, then such offender shall be sentenced to imprisonment which shall not be less than seven years. The Section does not create a distinct offence, it prescribes a minimum sentence for the offender who himself does one of the acts enumerated therein. In ***Phool Kumar (supra)***, the Hon'ble Supreme Court, while construing the word ‘uses’ in Section 397 I.P.C., has held as follows:-

> *"5. Section 392 of the Penal Code provides:*
>
> > *“Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between*

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sunset and sunrise, the imprisonment may be extended to fourteen years."

The sentence of imprisonment to be awarded under Section 392 cannot be less than seven years if at the time of committing robbery the offender uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person: vide Section 397. A difficulty arose in several High Courts as to the meaning of the word "uses" in Section 397. ***The term "offender" in that section, as rightly held by several High Courts, is confined to the offender who uses any deadly weapon. The use of a deadly weapon by one offender at the time of committing robbery cannot attract Section 397 for the imposition of the minimum punishment on another offender who had not used any deadly weapon****. In that view of the matter use of the gun by one of the culprits whether he was accused Ram Kumar or somebody else, (surely one was there who had fired three shots) could not be and has not been the basis of sentencing the appellant with the aid of Section 397. So far as he is concerned he is said to be armed with a knife which is also a deadly weapon. To be more precise from the evidence of PW 16 "Phool Kumar had a knife in his hand". He was therefore carrying a deadly weapon open to the view of the victims sufficient to frighten or terrorize them. Any other overt act, such as, brandishing of the knife or causing of grievous hurt with it was not necessary to bring the offender within the ambit of Section 397 of the Penal Code."*

17. The said principle was reiterated by the Hon'ble Supreme Court in ***Dilawar Singh (supra)*** in the following words:-

"20. As noted by this Court in Phool Kumar v. Delhi Admn. the term 'offender' under Section 397 IPC is

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confined to the offender who uses any deadly weapon. Use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397 IPC for the imposition of minimum punishment on another offender who had not used any deadly weapon. There is distinction between 'uses' as used in Sections 397 IPC and 398 IPC. Section 397 IPC connotes something more than merely being armed with deadly weapon."

18. More recently, the Hon'ble Supreme Court in ***Ganesan (supra)***, after noticing both the aforesaid decisions, has held as under:-

"24. Section 392 and Section 390 IPC are couched in different words. In Sections 390, 394, 397 and 398IPC the word used is "offender". Therefore, for the purpose of Sections 390, 391, 392, 393, 394, 395, 396, 397, 398IPC only the offender/person who committed robbery and/or voluntarily causes hurt or attempt to commit such robbery and who uses any deadly weapon or causes grievous hurt to any person, or commits to cause death or grievous death any person at the time of committing robbery or dacoity can be punished for the offences under Sections 390, 392, 393, 394, 395 and 397 and 398IPC. For the aforesaid the accused cannot be convicted on the basis of constructive liability and only the "offender" who "uses any deadly weapon…." can be punished. However, so far as Section 391IPC "dacoity" and Section 396IPC — "dacoity with murder" is concerned an accused can be convicted on the basis of constructive liability, however the only requirement would be the involvement of five or more persons conjointly

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committing or attempting to commit a robbery — dacoity/dacoity with murder.

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28. *In light of the above observations and the law laid down by this Court in the aforesaid two decisions the case on behalf of the accused in the present appeals is required to be considered. Even as per the case of the prosecution and even considering the evidence on record it can be seen that the present accused A-1 and A-3 are not alleged to have used any weapon. The allegation of use of any weapon was against Benny and Prabhakaran. Therefore, in absence of any allegations of use of any deadly weapon by the appellants herein Accused 1 and 3, Section 397 IPC shall not be attracted and to that extent the learned counsel appearing on behalf of the appellant-accused are right in submitting that they ought not to have been convicted for the offence punishable under Section 397 IPC."*

19. Tested on the principle laid down in the aforesaid decisions, the conviction of the appellants under Section 397 I.P.C. cannot be sustained. So far as the appellant no.2, Rajendra Yadav, is concerned, no overt act whatsoever has been attributed to him by any witness, he is merely said to have been one of the 10 to 12 persons who entered the house. So far as the appellant no.1, Chandrika Yadav, is concerned, P.W.-9 has stated that he was telling the miscreants to enter the western room of the house and that he told the other miscreant to hit him (P.W.-9) with a bomb. Even taking this evidence at its face

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value, the bomb was thrown by some unidentified miscreant and not by the appellant no.1. Neither appellant is said to have carried, brandished or used any weapon. *Pertinently*, neither of the two appellants is said to have caused any hurt to anyone. The learned trial Court has, in its concluding finding, observed that the appellants caused grievous injuries to Saudagar Yadav. This finding is unsupported by the evidence noticed in the judgment itself, which attributes the throwing of the bomb to an unnamed miscreant and the nature of the injuries, as recorded by P.W.-11 in Ext.-1, has not been found by the learned trial Court to be grievous. Further, it has been asserted on behalf of the appellants, without contradiction from the State, that P.W.-11 found the injuries to be superficial and simple in nature. The learned trial Court has not addressed the question of the individual liability of either appellant at all and has imposed the minimum sentence prescribed by Section 397 I.P.C. on both of them on the footing of constructive liability, which the law does not permit. The conviction under Section 397 I.P.C. is, therefore, unsustainable in any event.

20. Now turning to the principal question, namely, whether the participation of the appellants in the *dacoity* has been proved beyond reasonable doubt. It is

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necessary at the outset to notice the nature of the evidence on which the prosecution case rests. Out of the eleven witnesses, P.W.-11 is the doctor. P.W.-2 is admittedly a hearsay witness, who came to know the names of the accused from P.W.-9. Thereafter, P.W.-3, P.W.-4 and P.W.-5, who were declared hostile, speak, at the highest, of having come to the house of the informant after the occurrence and having heard of the *dacoity*, and say nothing whatsoever about the participation of the appellants. P.W.-7 was admittedly not present at the place of occurrence. The evidence of the participation of the appellants thus comes exclusively from five members of one family, namely, P.W.-10 (the informant), P.W.-9 (his son), P.W.-1 and P.W.-6 (his two brothers) and P.W.-8 (his wife). There is no independent witness, no recovery of any looted article or weapon, no seizure of any torch, bomb-splinter or other material object from the place of occurrence. Therefore, the case, in substance, is one of identification of known persons, in the night, by the members of a family admittedly at loggerheads with the accused.

21. The learned trial Court has approached this evidence on the premise that the informant and the accused are related to each other and therefore the identification of the

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accused cannot be challenged. In the considered opinion of this Court, relationship or prior acquaintance between the witness and the accused does no more than exclude the possibility of mistaken identity, it does not exclude the possibility of deliberate false implication. Where the relationship is itself the source of the enmity, the prior acquaintance, far from guaranteeing the truth of the identification, is the very reason why the evidence must be scrutinized with even greater care.

22. The Hon'ble Supreme Court in the case of ***State of Rajasthan vs. Kalki & Anr.*** reported as ***(1981) 2 SCC 752***, has held that relationship by itself is no ground to discard the testimony of a natural witness, observing as under:-

> *"7. As mentioned above the High Court has declined to rely on the evidence of PW 1 on two grounds: (1) she was a "highly interested" witness because she "is the wife of the deceased", and (2) there were discrepancies in her evidence. With respect, in our opinion, both the grounds are invalid. For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True, it is, she is the wife of the deceased; but she cannot be called an "interested" witness. She is related to the deceased.* ***"Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of a litigation; in the***

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decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be "interested". *In the instant case PW 1 had no interest in protecting the real culprit, and falsely implicating the respondents."*

(emphasis supplied)

23. In an another decision, the Hon'ble Supreme Court has equally laid down in the case of ***Raju @ Balachandran & Ors. vs. State of Tamil Nadu*** reported as ***(2012) 12 SCC 701***, as noticed and followed in ***Mohd. Jabbar Ali vs. State of Assam*** reported as ***(2023) 19 SCC 672***, has held that:-

"29. The sum and substance is that the evidence of a related or interested witness should be meticulously and carefully examined. In a case where the related and interested witness may have some enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying a standard of discerning scrutiny. However, this is only a rule of prudence and not one of law, as held in Dalip Singh (1953) 2 SCC 36 : AIR 1953 SC 364 : 1953 Cri LJ 1465 : 1954 SCR 145] and pithily reiterated in Sarwan Singh [(1976) 4 SCC 369 : 1976 SCC (Cri) 646] in the following words:

"10. ... The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such

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witnesses should be scrutinised with a little care. Once that approach is made and the court is satisfied that the evidence of interested witnesses have a ring of truth such evidence could be relied upon even without corroboration."

24. In ***Mohd. Jabbar Ali (supra)***, it was further noticed, with reference to ***Ganapathi & Anr. vs. State of Tamil Nadu*** reported as ***(2018) 5 SCC 549***, that in cases where only family members are present at the time of the incident and the case of the prosecution is based only on their evidence, the Courts have to be cautious and meticulously evaluate the evidence. A Division Bench of this Court, in the case of ***Bipin Singh & Ors. vs. State of Bihar*** reported as ***2026 SCC OnLine Pat 6148*** which was a case of identification in torch-light by related witnesses who were admittedly on inimical terms with the accused, has held that enmity is a double-edged weapon, which cuts both ways. While enmity may be a reason for committing an offence and the same may also be a reason for either falsely implicating an enemy as an accused or roping in an enemy, who may be innocent. In the present case, the learned trial Court has considered only one edge of the weapon. It has reasoned that since enmity may equally be a motive for the crime, the plea of false implication cannot help the defence. In

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the considered opinion of this Court, that is not the correct approach. The admitted enmity required the trial Court to ask whether the evidence of the family witnesses, tested by the standard of discerning scrutiny, carried such assurance that the possibility of false implication could be safely excluded. That exercise has not been undertaken at all by the trial Court.

25. When the evidence is so tested, the following features emerge. The first concerns the source of light. The occurrence took place at about 9:00 P.M. inside a village house. The *fardbeyan* does not speak of any lamp, lantern or other light burning in the house. The informant's own claim is that he identified the three named persons in the light of the torches of the miscreants themselves. No torch was seized, and in the absence of the Investigating Officer there is no evidence of what, if anything, was found at the place of occurrence by way of a source of light. A Division Bench of this Court, in ***Maheshwari Mandal (supra)***, which was a case of *dacoity* in the night, had held as under:-

> *"70. The identification of the accused persons, including the appellant, is also doubtful inasmuch as the occurrence had taken place in the midnight and the only source of light was the torches allegedly carried by the miscreants themselves. The informant has also admitted that some of the miscreants had covered their faces with gamchhas. Further, the*

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description of the 7–8 accused given by the informant was vague and general, referring only to differences in height, complexion and facial appearance. Such broad descriptions are insufficient to inspire confidence regarding the correct identification of unknown persons."

26. Identification in the light of a torch flashed by a miscreant is, by its nature, a momentary glimpse in a beam directed at the victim and not at the face of the person holding it. The Hon'ble Supreme Court in the case of ***Umesh Kamat vs. State of Bihar*** reported as ***(2005) 9 SCC 200***, which was also a case of *dacoity* in a village house, had declined to accept the identification claimed by the injured inmate of the house in the light emanating from the torches flashed by the *dacoits*, and had observed as under:-

"11. Amongst the eyewitnesses, it is the evidence of PW 4 which assumes more importance because he was the injured and he would have had the opportunity to notice the offenders from close range and there was a reasonable possibility of PW 4 having in his mind the imprint of the image of criminals who attacked him and his brother. PW 4 identified the accused in the course of evidence. However, even his evidence does not inspire confidence in ultimate analysis. Contrary to what PW 1 stated, he took the stand that there was a lantern at the place (baithak) where he was sleeping. Of course, that lantern which was described as "old" was not even seized by the police. Assuming there was a lantern, in all probability, it would have been quite dim as it is

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common knowledge that while going to sleep, normally the lamp is kept at the minimum level in rural areas. PW 4 further stated in the chief examination that he could identify the four dacoits in the light emanating from the torch (flashed by the dacoits) and the moonlight. The High Court observed that it was not a moonlit night as per the admission of some of the witnesses. According to PW 4, the appellant herein is not the person who aimed the gun at his brother. The question is whether at that juncture when he was being subjected to blows soon after he woke up and his brother was being simultaneously attacked by the armed miscreants, he would have really observed each one of the four persons with covered faces so keenly and minutely as to identify them by the uncovered portion of the nose and eyes. The answer could only be in the negative. It is pertinent to note that PW 4 did not spell out the distinctive features of the appellant (who was admittedly a stranger to him) on the basis of which he could identify him despite the mask.

12. *Thus, there is any amount of doubt on the point whether PW 4, in the situation in which he was placed, could closely observe the identifiable features of the appellant in mask that too in the glow of dim lantern and in the light emitted by the torches flashed at him or other inmates of the house. This doubt has to be viewed in the context of two things, firstly — there was no recovery of property, nor any other corroborating evidence linking the appellant to the crime. The second aspect is that the trial court was not inclined to believe the evidence of the identification of three other accused at the same identification parade held on 19-7-1994 and*

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> *commented that they were falsely implicated. If so, the evidence of PW 4 should have been scrutinised with greater caution instead of proceeding on a premise that he was a truthful witness. One more aspect which deserves notice is that PW 4 did not have the occasion to observe the dacoits' operations inside the house. He would have noticed them only initially for a short while before they entered the house. It is his case that he became unconscious a little later as a result of injury inflicted on him. These are all the various doubts which loom large over the prosecution story of identification of the appellant. Unfortunately, the High Court did not analyse the evidence of prosecution witnesses so as to test the credibility of their evidence in the light of admitted or undeniable facts apparent from the record."*

27. The appellants in the present case were, no doubt, known to the witnesses, which makes mistaken identity less likely than in the case of ***Umesh Kamat (supra)***, but the observations of the Hon'ble Supreme Court on the limited opportunity afforded by the torches of the *dacoits* to a panic-stricken inmate apply with equal force to the question whether the witnesses here actually saw what they claim to have seen, as distinct from naming whom they expected to see.

28. The learned A.P.P. has rightly pointed out that P.W.-9 is an injured witness. The injury of P.W.-9, corroborated by Ext.-1 and by P.W.-11, establishes beyond

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doubt that he was indeed present in the house and that a bomb was thrown at him by one of the miscreants. His presence at the place of occurrence is, therefore, not open to question. But the presence of a witness is one thing and the reliability of his identification of a particular accused is quite another. The injured witness in the case of ***Umesh Kamat (supra)*** was equally present and equally injured, and yet his identification was not accepted because the circumstances in which he claimed to have made it did not permit a dependable observation. In the present case, the injury of P.W.-9 proves the *dacoity*, it however does not, by itself, prove who the *dacoits* were or whether the appellants, with whom the witnesses had a pre-existing enmity, were among them.

29. The second feature concerns the circumstances in which the witnesses claim to have made the identification. On the prosecution's own showing, the reaction of every inmate of the house was instant flight. The informant, by his own account, climbed on to the roof out of fear and started raising alarm and pelting roof-tiles. P.W.-1 states that on seeing the miscreants he at once fled towards the south through the door and was chased, with a bomb being thrown at him. P.W.-9 states that he fled behind his uncle, and that a bomb was thrown

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at him as he ran. The womenfolk, according to the *fardbeyan*, left the informant's mother and went out and stood in the lane. The witnesses, in other words, were in a state of panic and in flight within moments of the entry of 10 to 12 armed men, in the night, in a house where no light is shown to have been burning. In such circumstances, the opportunity for a dependable identification of individual faces among a group of ten to twelve was, to say the least, fleeting and cannot be the sole basis for conviction.

30. The third feature concerns the manner in which the names of the appellants surfaced. The *fardbeyan* makes it clear that the first person to name the appellants was P.W.-9, who, while running away, exclaimed that Chandrika Yadav, Rajendra Yadav and Sukhdeo Chamar had entered the house. The informant states that he also identified them. P.W.-2 admittedly came to know the names from P.W.-9. Thereafter, P.W.-1 claims to have identified only the appellant no.1 before fleeing, and does not name the appellant no.2 at all. This limited identification sits uneasily with the *fardbeyan*, in which the informant stated that his brother Fuleshwar Yadav had already fled along with Saudagar Yadav and had raised the alarm of *dacoits* in the village. P.W.-6 and P.W.-8 have supported and

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corroborated the prosecution case, without any indication as to whether either of them claimed to have seen and identified the appellants on their own, or merely repeated what P.W.-9 had shouted. The identification, in substance, thus traces back to a single source, namely, the exclamation of P.W.-9, who, on his own showing, was running away under a hail of bombs at the time.

31. The *fardbeyan*, which is the earliest version, attributes no role to either appellant beyond their presence among the miscreants. The informant does not say that either of them did anything. At the trial, P.W.-9 has deposed that the appellant no.1 was directing the miscreants to enter the western room and that he had told the other miscreant to hit him with a bomb. Whether this was stated by P.W.-9 to the Investigating Officer could not be ascertained, since the I.O. was never examined in the trial, but the emergence of an overt act attributed to the appellant no.1, for the very first time in the trial is a circumstance which calls for caution.

32. It is also to be noticed that the *fardbeyan* was not recorded at the place of occurrence on the night of the incident but at Katoria Police Station at 10:00 A.M. on the following day, about thirteen hours after the occurrence.

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Whether the police had reached the village in the meantime, whether any earlier information of the *dacoity* had been received at the police station, and what was stated by the villagers who, according to the informant, had chased the *dacoits*, are matters on which the impugned judgment is silent.

33. The non-examination of the Investigating Officer has therefore, in the facts of this case, assumed a decisive character. The law on the point is well settled. Non-examination of the Investigating Officer is not, by itself, fatal to the prosecution. The question in each case is whether prejudice has been caused to the accused. In the case of ***Bahadur Naik vs. State of Bihar*** reported as ***(2000) 9 SCC 153***, the non-examination of the Investigating Officer was held to be of no consequence because the credibility of the eye-witnesses had not been shaken, no material contradiction had been shown and no prejudice was demonstrated. In the case of ***Mohd. Naushad vs. State (NCT of Delhi)*** reported as ***(2024) 12 SCC 494***, it was reiterated that non-examination of an investigating officer, where testimonies of independent witness inspire confidence, would not make the prosecution case false. The converse is equally true. Where the prosecution case rests entirely on the testimony of related and inimical witnesses, where the

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identification is in the night in the torch-light of the miscreants themselves, and where only the Investigating Officer could have answered the questions, namely, what the witnesses had stated during investigation, whether the overt act now attributed to the appellant no.1 was stated at the earliest, what source of light existed at the place of occurrence and whether any torch, bomb-splinter or looted article was ever found, his non-examination deprives the accused of the only means of testing the prosecution case and causes prejudice.

34. In the case of ***Bipin Singh (supra)***, it was the evidence of the Investigating Officer that enabled the defence to prove that the claim of identification in torch-light had not been made during investigation, and the Division Bench has held as under:-

> *"91. It is well settled that every omission or contradiction is not sufficient to discard the testimony of a witness. However, omissions touching the identity of the assailants, the source of identification, the attribution of individual overt acts, and the very foundation of the prosecution case assume a different character. In the present case, the omission proved through the Investigating Officer are not confined to peripheral matters but relate to the core features of the prosecution version. These omissions, read together with the admission made by P.W.-4 and P.W.-5 in cross examination, require the ocular testimony to be evaluated with considerable*

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caution."

35. The appellants in the present case were denied even the opportunity of proving such omissions. No explanation whatsoever has been offered by the prosecution for not examining the Investigating Officer, and the learned trial Court has not even adverted to his absence.

36. Further, the *fardbeyan* names Suresh Yadav, a cousin of the informant, as one of the persons in whose presence it was recorded, and states that the villagers had helped the family of the informant to chase the *dacoits* towards the west, yet no villager has deposed to having seen the appellants at or fleeing from the place of occurrence, and the three villagers who were examined, P.W.-3 to P.W.-5, did not support the prosecution. No looted article was ever recovered from either appellant, nor was any weapon or bomb ever recovered. The injury of P.W.-9 proves that a bomb was thrown at him by one of the miscreants, it however does not prove who the miscreants were. In the case of ***Maheshwari Mandal (supra)***, the Division Bench, in materially similar circumstances, had held as under:-

"86. Significantly, there is no recovery of any looted property or weapon from the appellant nor there is any independent evidence corroborating his alleged involvement in the occurrence. In these

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circumstances, it would be unsafe to sustain the conviction solely on the basis of the identification made by PW 5. The cumulative effect of the infirmities in the prosecution case creates a reasonable doubt regarding the appellant's participation in the alleged dacoity."

37. It is well settled, since ***Vadivelu Thevar vs. State of Madras*** reported as ***(1957) 1 SCC 700***, that oral testimony falls into three categories, which the Hon'ble Supreme Court has described as under :-

"18. Generally speaking, oral testimony in this context may be classified into three categories, namely: (1) Wholly reliable. (2) Wholly unreliable. (3) Neither wholly reliable nor wholly unreliable. In the first category of proof, the court should have no difficulty in coming to its conclusion either way—it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial."

38. It is settled position of law that evidence has to be weighed and not counted. In the present case, the learned trial Court has, in effect, counted five witnesses from one household and treated their number as a substitute for quality. The evidence of the five family witnesses in the present case,

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given the admitted enmity, the circumstances of the identification, the informant's own description of the miscreants as outsiders and the manner in which the names of the appellants surfaced, cannot be placed in the first category as held in the case of ***Vadivelu Thevar (supra)***. It falls, at best, in the third category, in which corroboration in material particulars was indispensable. However, in the facts of the present case, there is none. This Court is therefore, unable to hold that the evidence of these witnesses, uncorroborated as it is, can safely be made the sole basis of the conviction of the appellants.

39. The learned A.P.P. has laid emphasis on the fact that the appellants were named in the *fardbeyan* itself. The naming of a known enemy at the earliest opportunity is not, by itself, a guarantee of truth. The very promptness with which the names of the *samdhi* and the son-in-law, with whom the family had quarrelled a fortnight earlier, were attached to a gang of *dacoits* is, in the facts of this case, as consistent with the hypothesis of false implication as with that of guilt. The Hon'ble Supreme Court, in the case of ***Kali Ram vs. State of Himachal Pradesh*** reported as ***(1973) 2 SCC 808*** has held as follows:-

> *"25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the*

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accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the Court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the Court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. Of course, the doubt regarding the guilt of the accused should be reasonable; it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that is is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by report to surmises, conjectures or fanciful considerations. As mentioned by us recently in the case of State of Punjab v. Jagir Singh [(1974) 3 SCC 227 : 1973 SCC (Cri) 886] a criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the offence with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis

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> *would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the Courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."*

40. Weighed by the yardstick of probabilities, the intrinsic worth of the evidence and the animus of the witnesses, the prosecution case against the appellants does not meet the threshold of proof which the law requires. This Court is conscious that the doubt which entitles an accused to acquittal must be a reasonable doubt and not a vague apprehension.

41. In the considered opinion of this Court the doubt in the present case is of a reasonable and substantial nature. It arises from the evidence and from the lack of it. Whether a dacoity was committed in the house of the informant on the night of 18.06.1990 may well be true, however, whether the appellants were among the *dacoits* has not been proved beyond reasonable doubt.

42. In view of the foregoing discussions, this Court finds that the conviction of the appellants under Section 397 I.P.C. is unsustainable in law for want of any individual act attributable to either of them, and that the prosecution has failed to prove beyond reasonable doubt the participation of the

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appellants in the *dacoity* so as to sustain their conviction under Section 395 I.P.C. The learned trial Court has fallen into error in proceeding on the footing that the identification of related accused cannot be challenged, in treating the absence of contradictions as a point in favour of the prosecution when the Investigating Officer was never examined, in drawing an adverse inference from the evidence of P.W.-7, and in recording a finding of grievous injury which has no basis in the evidence. The impugned judgment of conviction and the order of sentence therefore cannot be sustained.

43. In the result, this appeal is allowed. The judgment of conviction dated 23.02.2011 and the order of sentence dated 28.02.2011 passed by the learned Additional District and Sessions Judge, F.T.C.-III, Banka, in Sessions Trial No.497 of 2006 (Trial No.16 of 2011) are set aside. The appellants, Chandrika Yadav and Rajendra Yadav, are acquitted of the charges under Sections 395 and 397 of the Indian Penal Code by giving the benefit of doubt to them.

44. Since the appellants are on bail, they are discharged from the liabilities of their bail bonds. The fine, if any, deposited by the appellants shall be refunded to them.

45. It is made clear that the observations made in

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this judgment are confined to the case of the appellants and shall have no bearing on the trial, if any, of the co-accused whose case was separated on 18.11.2005.

46. Let a copy of this judgment, along with the lower court records, be sent back to the learned trial Court forthwith.

(Sandeep Kumar, J)

pawan/-

AFR/NAFR	N.A.F.R.
CAV DATE	29.08.2026
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