

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 456 of 2004

**Md. Abdul @ Bapi
-Vs-
The State of West Bengal**

For the Appellant : Mr. Souryadeep Ghosh
(Amicus Curiae)

For the State : Mr. Avishek Sinha

Heard on : 17.12.2025

Judgment on : 24.03.2026

Ananya Bandyopadhyay, J.:-

1. This appeal is directed against an order and judgment dated 30.03.2004 passed by the Learned Additional District & Sessions Judge, Fast Track Court - III, Alipore, South 24 Parganas in Sessions Trial No.56(7) of 2002 arising out of Sessions Case No.17(1) of 2002 in connection with Beniapukur P.S. Case No.281 of 07.08.2001, thereby convicting the appellant under Sections 395/397 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.2,000/- in default to suffer rigorous imprisonment for another 4 months.
2. The prosecution case precisely stated on 7th August, 2001 at about 07:30 p.m., three miscreants forcibly entered into the flat of Mohasina Begum while she was tutoring her daughter Anna Jabi. Out of those 3 persons, the

said Mohasina Begum could identify one person named Sk. Manna, who used to work under her father. The said Sk. Munna threatened Mohasina Begum at the point of revolver and dragged her into the flat of Alam and in the meantime confined her daughter in a room. Upon entering into the flat of Alam, three persons placed revolver at (the head of Alam's wife) Anwara Begum and also threatened her to deliver the keys of almirah. On her refusal those persons assaulted Anwara Begum with the butt of a revolver. Hesitantly her daughter Tamanna gave them the keys of almirah. They opened the almirah and snatched jewellerys and cash of Rs.25,000/-.

When the aforesaid perpetrators entered into the flat of Alam, two other persons were present in the room of the said flat. The miscreants snatched a pair of gold earring from Meherunisa and a wrist watch from Sk. Jonny (music teacher) and cash of Rs.320/-. After procuring all those articles, on threatening the inmates of the house to be silent, at about 08:00 p.m., they escaped.

The Sub Inspector of Police was on his round, in the course of his official duty was requested by the Duty Officer of the Beniapukur P.S. over phone to visit 4K, Tiljala Road because of certain disturbance in the locality for commission of the aforesaid crime. On his reaching at 4K, Tiljala Road, he learnt of the dacoity.

3. Based on the basis of a written complaint, Beniapukur Police Station Case No.281 dated 07.08.2001 under Sections 395/397 of the Indian Penal Code was initiated for investigation.

4. Upon conclusion of the investigation, the Investigating Agency submitted a charge-sheet against the appellant under Sections 395/397 of the Indian Penal Code to which he pleaded not guilty and claimed to be tried.
5. In order to prove its case, the prosecution examined 21 witnesses and examined certain documents.
6. The Learned Advocate representing the appellant submitted as follows:-

- i. The appellant was shown arrested in the case on 07.09.2001 and the order for suspension of sentence was passed on 14.08.2006 but since the appellant was facing difficulty in furnishing the bail bond, he applied for reduction of the bail bond and by an order dated 16.02.2007 the bail amount was reduced and thereafter, the appellant was released on bail. Thus, the appellant already underwent imprisonment for 5 years and 5 months.
- ii. The conviction and sentence of the appellant under Sections 395/397 of the Indian Penal Code could not be sustained in law and liable to be set aside because of the following reasons:-

- a) The essential ingredient of Section 391 of Indian Penal Code was the participation of five or more persons in the commission of the offence.

In the present case, on completion of investigation, charge-sheet was submitted against the four accused persons under Sections 395/397 Indian Penal Code and the charges under Sections 395/397 of Indian Penal Code were framed against the four accused persons and while convicting the appellant and three others under Sections 395/397 of Indian Penal Code, the

Trial Court did not arrive at a finding that there was involvement of five or more persons in the commission of the offences and in the absence of such finding no conviction could be made out under the aforesaid sections. The Learned Trial Court, without recording any finding in that regard, simply mentioned in the judgment that *“therefore, in view of discussions in the foregoing paras it was held unhesitatingly that accused persons were amongst those who committed the wrong and that all 4 (four) accused persons are liable for commission of dacoity. The ingredient of offence u/s. 395 I.P.C. appears to have been proved against them beyond all reasonable doubts.”* The abovementioned finding was not sufficient to conclude that five or more persons were involved in the offence and not sufficient to convict the appellant and three others, total four in number, for the offence of dacoity.

Moreover, the prosecution in the present case also failed to prove beyond reasonable doubt, that there was involvement of five or more persons in the commission of the offence. There were inconsistencies in the deposition of the witnesses with regard to the number of persons who participated in the commission of the offence although all the witnesses were interested witness.

PW-3 Mohsina Begum (the complainant) – *“All the said miscreants were identified. Two of the miscreants were speaking in Bengali and two were speaking in Hindi.”*

PW-5, Sk. Jani – “on the date of incident I found 3/4 persons (miscreants)”.

PW-8 Mehrunnisa – “Through our door three persons with Mousina Begum with revolver pointing at the head of Mousina Begum entered into our flat. I did not see any other person. May be some other person standing outside the flat.”

From the deposition of PW-20 (1st I.O.) and PW-21 (2nd I.O.) nothing was revealed as to the fact that apart from the four accused persons there were other persons involved in the commission of the offence as well. Thus the conviction of the appellant under Section 395 of Indian Penal Code could not be sustained in the present case.

- b) No deadly weapons had been recovered from the possession of any of the accused persons. The injuries inflicted were also simple in nature. That apart, the term 'offender' under Section 397 of the I.P.C. referred to the culprit who actually used deadly weapon. When only one had used the deadly weapon, others could not be awarded the minimum punishment. It only envisaged the individual liability and not any constructive liability. Section 397 Indian Penal Code was attracted only against the particular accused who used the deadly weapon or did any of the acts mentioned in the provision. The other accuseds were not vicariously liable under the said Section for acts of the co-accused.

In the present case, the PW-3, Mohsina Begum, the complainant, in the written complaint stated that *“At that time the lad named Munna said the adjacent room belongs to Alam and pointing a revolver at me took me to Alam’s flat facing ours.”*

The other prosecution witnesses though identified the present appellant but never deposed that he used any firearm or deadly weapon.

Thus the conviction of the appellant under Section 397 of Indian Penal Code could not be sustained in the present case.

The appellant was identified by the witnesses in the Test Identification Parade as well as in the Court.

The appellant was shown arrested in the present case on 07.09.2001 and the T.I. Parade was conducted on 29.09.2001. Thus there was a delay of 22 days in conducting the TIP and the reason for the said delay was not explained by the prosecution during the trial.

Further, on 15.09.2001 the police personnel along with the appellant and other accused Munna visited the place of Munna and the appellant for conducting search and seizure where they were exposed to a large number of persons and from the deposition of PW-15, it was not revealed that the accused persons were put on mask on their faces.

From the deposition of PW-21 it revealed the appellant was forwarded before Learned A.C.J.M., Sealdah on 20.09.2001.

Thus there was every possibility that the appellant was exposed to the witnesses.

Moreover, the appellant at the time of his examination under Section 313 of the Cr.P.C., in reply to question no. 8, specifically stated that *“when we were in police custody, the police identified us (to them). That's why they identified us at the T.I. Parade.”*

It was a settled principle of law that if the witnesses had the opportunity to see the accused before the TIP, the evidence of the TIP was not admissible as a valid piece of evidence and if identification in the TIP had taken place after the accused was shown to the witnesses, then not only the evidence of TIP was inadmissible, even an identification in a court during trial was meaningless.

Thus in the present case, TIP was vitiated and the conviction could not be sustained in law.

- c) In the present case, the trial court patently erred in relying on the recovery made from the appellant to convict the appellant because of the following reasons:-

There was no statement of the appellant recorded under Section 27 of the Evidence Act leading to the recovery of ornaments.

The statement which was admissible under Section 27 of the Evidence Act was the one which was the information leading to discovery. Thus, what was admissible being the information, the

same had to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles had to be proved. It was, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information should be adduced through evidence.

Thus, the recovery of ornaments could not be relied upon since no confessional statement of the appellant was proved under Section 27 of the Evidence Act.

PW-15, seizure witness, deposed a pair of gold earrings and two 'gents' finger rings were recovered from the appellant. In one finger ring there was inscription – 'MA' and on the other there was inscription 'ma'.

PW-6, Anwara Begum, identified these ornaments 'to be of her own.' However, PW-6, previously deposed *"the said persons asked me to give my ear rings and neckless to them. Under threat, I had to give those articles to them. They slapped me."*

Those articles were recovered from the possession of Munna, the other accused person and the same had been identified by the PW-6. However, the pair of gold earrings and two 'gents' finger rings recovered from the appellant which the PW-6 identified to be of her own' were not claimed to have been stolen from the possession of PW-6 in her deposition.

- d) In the present case, unlike Munna and Saiful, the other two accused persons, the prosecution witnesses did not assign any individual role to the appellant in the commission of the offence.

To bring home the charges, the prosecution did not examine a single independent witness and all the witnesses examined were interested witnesses.

As per the formal F.I.R., the incident occurred in between 7:30 p.m. to 7:55 p.m. and the place of occurrence was 4K, Tiljala Road, Calcutta 46, a densely populated area.

PW-6, Anwara Begum, during her examination, deposed that *“we reside in 3rd floor (top floor) of the building. There are tenants living in the other floors and there was also a watch factory in the ground floor. There was a main gate which was collapsible one for making entry in the building. That was the only gate for entrance into the building. There was a office of my husband in the ground floor of the building.”*

PW-20, the First I.O., deposed that *“not a fact that I did not examine the tenants of the said building.*

It was true that I did not record their statement under Section 161 Cr.P.C.

PW-21, the second I.O., deposed that “I did not examine any employee of the office of Akbar Hussain.”

Thus from the aforesaid facts, it could not be believed that save and except the prosecution witnesses, no one had seen the accused persons on the date of occurrence.

However, the prosecution chose to examine only the inmates of the said two flats being the family members (PW-3 to PW-8), their maid servant (PW-9) and a close acquaintance (PW-10) although there being availability of independent witnesses which created a strong suspicion as to the story of the prosecution.

e) Although P.W. 10, Akrari Begum, deposed that she knew the appellant before and she saw the appellant roaming with Munna and also deposed that she saw 6/7 person on that date and they were carrying arms, bhojali and bombs etc. but her testimony was not reliable because of the following reasons:-

- i. Her presence in the place of occurrence on that date was not corroborated by any other prosecution witnesses.
- ii. Her testimony with regard to number of persons and the weapons were not corroborated by any other prosecution witnesses.
- iii. She was an interested witness. "Alam bhai was a social worker. Since last 13/14 years I have acquaintance with Alam Bhai. We get help from Alam Bhai."

Thus the conviction and sentence of the appellant under Sections 395/397 of the Indian Penal Code could not be sustained in law and liable to be set aside.

However, without prejudice to the aforesaid arguments on merit and in the alternative it needed to be mentioned that the appellant was on bail in the case from 2007 and had been now

working as a daily labourer and the only breadwinner of a family of five members consisting of her mother, wife and two unmarried daughters. He had already suffered incarceration for a period of 5 years and 5 months. So, his case may be considered sympathetically.

7. The Learned Advocate for the State submitted as follows:-

- i. In the instant case the *de facto* complainant vehemently argued as only four persons were convicted, the same was bad in law, in as much as, it did not fulfil the minimum requirement of five persons as envisaged under Section 391 of Indian Penal Code.
 - a) As it has been elicited from the complaint itself that at least five persons were involved with the crime. *“Thereafter one of them detained us in Alam's room brandishing revolver and told us to keep quiet. The other two, demanded the keys to the almirah from me before entering our room. As I refused, they slapped me on my cheek. Thereafter those two men and two others who were in my room from before, were told by the men named 'Munna' I know where they keep the keys. Come on, I shall show you”.*
 - b) The deposition of PW-3, the *de facto* complainant narrated altogether five persons were involved..... *“The said three persons then asked me for the keys. I refused to give them keys. Then they pushed me inside the room of Alam. Two persons were waiting outside the flat. They entered then into my flat and at the*

point of Revolver at her head they threatened my daughter and forced her to my room”.

- c) PW-6 another injured eye witness corroborated the evidence of *de facto* complainant of presence of five or more persons during the incident..... *“Three persons suddenly entered into my room with Mohsina Begum. They placed a Revolver at her head”..... “The other three persons were keeping guard at the main door of my flat”.*
- d) PW-9, domestic help of the household also supported the prosecution case. So far as the number of miscreants was concerned stating that *“I, after making entry into the room, found three other persons demanding the keys of almirah from Mohsina Begum. I also found those persons taken out money from the almirah”..... Two miscreants kept watch on us i.e. myself Amna, daughter of Mousina. Three miscreants took Mousina to the flat of Alam.”*
- e) PW-10, a localite claimed to have found 6/7 persons standing at the floor of Alam. It was further stated that the miscreants had arms, *bhojali* and bombs in the bag.

In the backdrop of above discussion and keeping in mind that charge under Sections 395 and 397 of Indian Penal Code were framed against named accused persons along with “others” which meant that the appellants had been made aware of unknown associates and hence convicted under Sections 395 and 397 Indian Penal Code was well justified.

ii. In a case of Dacoity the prosecution is only required to prove proper identification and recovery from the accused persons:-

- a) Identification of accused person in the instance case was forthcoming from the very initiation, i.e. the complaint itself. The *de facto* complainant had vividly given the age bracket, physicality description of wearing apparels as well as the language in which the miscreants were conversing.
- b) So far as appellant Munna was concerned, it had been proved beyond reasonable doubt that he was acquainted with the *de facto* complainant and his family members prior to the incident. Hence, identification of the said appellant could not be doubted.
- c) The witness had also identified all the four convicts during the Test Identification Parade.
- d) PW-4, daughter of PW-3 and another eye witness had stated in the examination in chief that they could identify Munna and Md. Abdul @ Bapi during Test Identification Parade. During the course of trial she had identified all the four convicts.
- e) PW-5, the music teacher of PW-7 was also present at place of occurrence. He deposed to the effect due to his appendix operation he could not attend the Test Identification Parade. However, during the course of trial he identified all the four miscreants.
- f) PW-6, the injured eye witness deposed that he identified all the four convicts during Test Identification Parade. He had further identified the miscreants during the course of trial.

- g) PW-7 had also categorically identified all the miscreants during Test Identification Parade.
- h) PW-9, the domestic help stated she could identify appellant Abdul @ Bapi and Munna during the Test Identification Parade. During course of trial, she identified all the four miscreants.
- i) PW-10, one of the local persons identified Munna, Bapi @Md. Abdul and Zakir during the course of trial. PW-14 and PW-18, were the two Judicial Magistrates who held the Test Identification Parade in respect of the suspects 14.01.2002 and 29.09.2001 respectively and corroborated the version of eye witnesses as aforesaid.

Hence it could be concluded that the accused persons were identified both at the earliest opportunity during the Test Identification Parade. It was needless to say that identification during trial was a substantive evidence and in the instant case the same could not be rebutted.

- j) The articles which were recovered from the appellant during the course of investigation were placed for identification before PW-6, the injured eye witness and the same were identified by the said witnesses during the course of trial.

iii. The other material evidence required to prove a case of dacoity i.e. recovery and seizure:-

- a) PW-12 and PW-13 were the independent witnesses to seizure at the instance of appellant Munna and Md. Abdul @ Bapi. They

have stated to have witnessed the seizure of one gold chain and one pair of earrings with pearls from the aforesaid appellant.

- b) Similarly, PW-15, another independent witness deposed to be a witness to seizure of one pair of gold earring's and two gents finger rings at the instance of appellant Munna and Md. Abdul @ Bapi. The version of aforesaid witness was corroborated by three official witness PW-11, PW-16 and PW-19, who also stated that on 15,09.2001 they had witnessed seizure of aforesaid articles.

On the basis of aforesaid discussion, it was proved beyond reasonable doubt that booties from the dacoity were recovered from two of the appellants which were being substantiated by both the independent as well as the police witnesses.

- c) PW-6, the injured witness stated the miscreants assaulted her with a revolver and had sustained injury at her head. She was medically examined by PW-7 at Calcutta Medical College wherein it was noted that appellant Munna and four others have assaulted her. However, PW-17 stated he did not find any external injury though the patient had complained of pain on the back of head.

It was trite law that to attract Section 397 of Indian Penal Code the prosecution need not prove any injury. The Section itself suggested that mere usage of a deadly weapon without

causing any injury was sufficient to prosecute under Section 397 of Indian Penal Code.

Hence, in the backdrop of aforesaid discussion it could be argued that the prosecution had been able to prove the case beyond reasonable doubt and as such it did not require any interference by this Hon'ble court.

8. A circumspection of evidence of the prosecution witnesses revealed as follows:-

- i) PW-1 deposed on 08.08.2001, he was posted at Plan Making Section, DD, Lal bazar as an A.S.I. of police. He made a plan of 4K, Tiljala Road and its surroundings in connection with Beniapukur P.S. Case No.281 of 07.08.2001. As per order of O.C., Plan Making Section, he went to the said place for drawing plan. He prepared rough sketch map, final map and blue print which were marked as Exbt.-1, Exbt.-1/1 and Exbt.-1/2 respectively.
- ii) PW-1 in his cross-examination stated that he had not brought the requisition of the O.C., directing him to proceed to the spot and to prepare the plan. The spot was shown to him by S.I. of Beniapukur P.S. The plan prepared by him concerned mainly the rooms on the 3rd floor of the building. He had also drawn the periphery of the ground floor of the said buildings. He had not specifically mentioned the room on the ground floor. He had recorded in his plan that the building was four storied.

- iii) PW-2 deposed he was a constable, photographer. On 07.08.2001, as per order of the O.C. Control Lalbazar, he went to Beniapukur P.S. As per instruction of the I.O., he went to the P.O. with the I.O. He took five photos along with negatives of the place of occurrence which were marked as Mat. Exbt.-I collectively, Mat. Exbt.-II collectively, Mat. Exbt.-III collectively, Mat. Exbt.-IV collectively and Mat. Exbt.-V collectively. During his cross-examination stated that those photos did not bear any addresses of the concerned premises and the case number.
- iv) PW-3, the de facto complainant deposed that there were two flats face to face in the 3rd floor of 4K, Tiljala Road. In one flat the de facto complainant PW-3 with her husband Akbar Hossain, her daughter Amna Zedi, her father Hyder Ali (a Social Worker), her brother Sayed Ali, and her mother resided together. In other flat PW-6 with her husband Md. Alamgir, daughter Tamanna and others resided. On 07.08.2001 at about 7:30 p.m., PW-3 was coaching her daughter on a sofa in her flat and the door was not locked from inside. Three persons knocked at the door and entered into the flat. Sk. Munna was one of them. Sk. Munna was known to PW-3 since before as he worked under her father. PW-3 went forward to them when they placed revolver at her head, and threatened her. Sk. Munna asked Mohsina about presence of one Nasim and Alam in the flat or not. Thereafter, they asked for keys of the Almirah from PW-3. On her refusal, she was pushed by them into the room of Alam. Two persons were waiting outside. They

entered into the room of Mohsina and forced her daughter (Amna Jabi) at the point of revolver to remain in the room and not to raise alarm.

The said three persons with Mohsina after entering into the flat of Alam, asked for keys from Anwara Begum, wife of Alam which she refused. Then the said persons assaulted PW-6 with the butt of a revolver. PW-7 her daughter gave them the keys of the Almirah. They opened the Almirah and took away all the jewelleries and cash of Rs.25,000/-. When they entered into the room of Alam, one Meherun Nisa, Tamanna, Anwara Begum and one Joni (Music Teacher) were present in the room. The said persons took away gold ear-rings and gold chain from PW-3 and also from Anwara Begum. They also took away gold ear-ring from Meherun Nisa. From PW-5, they took away wrist-watch and cash of Rs.320/-. After taking all these the said persons asked them all under threat to keep silence. One person remained with them with a revolver. The other two persons Munna and another accused went to the flat of Mohsina where her daughter was kept in a room under threat by other two persons. All those 4 (four) accused persons took away cash of Rs.20,000/- by opening the Almirah of Mohsina with the keys. Thereafter all 5 (five) miscreants left the place at about 8.00 PM with the jewelleries and cash and while going away they threatened Mohsina and others not to make noise. At about 8.15 Akbar the husband of Mohsina and Mr. Sahid the brother of Mohsina came back to the flat. Immediately thereafter

father of Mohsina was also came back to the flat and the incident in details was narrated to them. Rs.20,000/- was not found in the locker of the Almirah in the flat of Mohsina. Anwara, being the Chachi of Mohsina came to her (Mohsina's) flat from her (Anwara's) flat and narrated that Rs.25,000/- was not found in the locker of their Almirah and all belongings had also been taken by the said miscreants. PW-3 also deposed that after the incident the police came to their flat. She (Mohsina) made statement to the police which was reduced into writing. After writing it was read over and explained to her. Admitting the writing to have been correct she put her signature thereon which was marked as Exbt.2/1. PW-3 also stated that she had to go to hospital for treatment as the accused persons gave her slaps. That witness identified all four accused persons in T.I. parade. That witness had been cross-examined at length. During cross-examination PW-3 had admitted that accused Munna used to work in the office of her father but she did not know how long accused Munna worked in the office of her father. This witness has denied the defence suggestion that any strained relation grew between her father and Munna over the payment of wages. PW-3 had also denied the defence suggestion that she saw the accused persons in P.S. before T.I. Parade and that she identified the accused persons as pointed out to her by the police personnel. This witness has stated during cross-examination that she does not know the contents where she put her signature Exbt.-2/1. Only discriminating statement that she

did not know the contents of the writing appears to be very trifling in view of her testimony in examination-in-chief that the police officer reduced into writing her statement and after writing it was read over and explained to her and that thereafter admitting the writing to have been correct she put her signature thereon and in view of the testimony of the police officer about his reducing in writing the statement of Mohsina.

- v) PW-4 and PW-5 corroborated the statements of PW-3.
- vi) PW-6 deposed on 07.08.2001 at 07:30 p.m., three persons suddenly entered into her room with PW-3 and they placed a revolver at her head. The said miscreants asked PW-6 to give her ear rings and neckless to them under threat and she had to give those articles to them. The miscreants also took away the wrist watch and money from PW-5. The miscreants also opened the almirah with the keys and took away all jewelleries and cash of Rs.25,000/- from the almirah. Thereafter, they fled away. Then, PW-6 and others were taken to Chittaranjan hospital for treatment as advised to take them to hospital by the police came to their flat. In the month of September, 2001 she was asked to went to jail to identify the miscreants. Accordingly, she went to the jail and identified two miscreants in the jail before the Ld. Magistrate. She also identified one miscreants in the T.I. Parade. PW-6 also deposed that the police had informed, some articles had been recovered. One pair of ear rings and one neckless were found in the 'dibba' which were marked as Mat. Exbt.-VI collectively.

- vii) PW-7 and PW-8 corroborated the statements of PW-3 and PW-6.
- viii) PW-9 deposed on 07.08.2001 at about 07:45 p.m., in the evening, she was returning to the residence of Mohsina Begum after taking snacks, sweets etc. She saw two persons standing at the outside of the flat. On her reaching there, the said two miscreants caught hold of her and pushed her inside the flat of Mohsina at the point of revolver at her head. The said persons also forcibly took away the ear ring and cash of Rs.300/- from her. She further deposed that she also found the said persons taking away ornaments from the body of Mohsina. The said miscreants assaulted Mohsina and forcibly took her to the residence of Alam Bhai opposite to the flat of Mohsina Begum. Two persons kept watch on PW-9 and Amna Javi in the flat of Mohsina Begum and they threatened to kill them in case of their making noise. After sometimes all those miscreants left the place.
- ix) PW-10 deposed on 07.08.2001 at about 08:00 p.m., she was going to the residence of Alam Saheb. After climbed the first floor of the building when she was climbed next floor through steps, she found 6/7 persons standing on the floor of Alam Bhai. They had arms, bhojali and bombs in the bags. She concealed herself and stealthily noticed those persons while they were going down with those articles in hand.
- x) PW-11 and PW-15 were the seizure witnesses. Both PW-11 and PW-15 had deposed that in their presence the appellants brought out a 'dibba' from a Jhupri and that a pair of ear rings and two

gents' finger ring were recovered from a plastic container. The materials were weighed in their presence and seized. Both of them had also sign on the seizure list which were marked as Exbt.-3/1 and Exbt.-3/2 respectively. They had also put the signatures on the label which was marked as Mat. Exbt.-VII collectively.

- xi) PW-12 and PW-13 were the seizure list witnesses. Both of them had deposed that in their presence recovery and seizure was made. Exbt.-4/1 and Exbt.-4/2 were the signatures of those two witnesses on the seizure list. Both of those witnesses had identified the seized materials Mat. Exbt.-VI collectively.
- xii) PW-15 deposed he held T.I. Parade on 14.01.2002 in connection with Case No.281 dated 07.08.2001. There was one suspect only and his name was Saifullah Kayal @ Saifulla. T.I. Parade was held at the Presidency Correctional Home. Mohasina Begum and Tamanna Alam identified the suspect. The T.I. Parade report prepared by him, was marked as Exbt.-5. On 21.03.2002, he held another T.I. Parade in connection with Case No.281 dated 07.08.2001. There was one suspect only and his name was Zakir Koyal @ Mursalin and T.I. Parade report prepared by him, was marked as Exbt.-5/1.
- xiii) PW-16 deposed he was a S.I. of police. On 15.09.2001 he was holding the same assignment. He put his signature on the seizure list prepared by the I.O. of the case. The seizure was made in respect of one gold chain and a pair of ear-rings, which was marked as Exbt.-4/3. As the request of D.D. Officers, he assisted

them in conducting the search and seizure in connection with Case no.281 dated 07.08.2001. He accompanied the D.D. Officer and the team together with accused persons to 44E, Tiljala Road, Calcutta-46. It was a tile-shed room. It was 03:40 p.m., when they reached the said spot.

- xiv) During his cross-examination PW-16 stated that there was nothing mentioned as to his place of posting as S.I. of Topsia P.S. at the relevant time beneath his signature (Exbt.-4/3) on the seizure list. He made G.D. entry in respect of his accompanied the D.D. Officers and team in conducted search and seizure.
- xv) PW-17 deposed he was a medical officer. On 07.08.2001 at 11:40 p.m., he had examined one Mohasina Begum. The patient stated to PW-17 that she had been assaulted with slaps, blows by Munna and 4 others who entered her house and also they snatched away Rs.20,000/- from her house and both ear-rings. On examination the patient, no marks of external injury seen. Patient complained of pain on the back of head. The medical certificate issued by him, was marked as Exbt.-6.

On the same day at 11:35 p.m., he had examined one Anwara Begum brought by Md. Alamgir of 4A, Tiljala Road, Calcutta – 46 under Beniapukur P.S. The patient stated that she had been assaulted with butt-end of a revolver by three unidentified persons who entered her room and assaulted her. They snatched away gold ornaments and money. On examination he found one lacerated wound $\frac{1}{2}$ " X $\frac{1}{4}$ " into skin-deep on the

lateral aspect of left upper eye-lid, with hematoma. The injuries were fresh and recent which was dressed. The medical certificate issued by him, was marked as Exbt.-6/1.

- xvi) During his cross-examination stated that in the medical certificate of Mohasina Begum, only G.D. entry number was mentioned. The injuries on Anwara Begum might be caused by other means also.
- xvii) PW-18 deposed on 29.09.2001 he was posted as Judicial Magistrate, 1st class, 3rd Court at Sealdah. On that date, he held T.I. Parade in connection with Case No.281 dated 07.08.2001 for two suspects namely Sk. Munna and Md. Abdul @ Bapi, at the Presidency Correctional Home. PW-3, PW-4, PW-6 and PW-8 identified both the suspects. He observed all formalities and took necessary caution for holding T.I. Parade. The T.I. Parade report, prepared by him, was marked as Exbt.-5/2. During his cross-examination stated that he had not mentioned about the height of the persons mixed up with the suspects.
- xviii) PW-19 deposed he was a Sub-Inspector, Anti-Dacoity and Robbery Section, D.D. Dept., Lal Bazar. At the verbal requisition of the I.O. of the Beniapukur P.S. Case No.281 dated 07.08.2001, he accompanied the I.O. on 15.09.2001. With the assistance of the local P.S., they first went to the house of the appellant, as led by the custody accused, at the western side of the railway track and northern side of park circus railway station. It was a Jhupri made of plastic and bamboo. As per the appellant's identification, a plastic container was brought out by him from the brick-rack

wherein it was kept concealed. On opening the plastic container, two finger rings and one pair of ear-ring, all made of gold were found out. Then, the I.O. prepared a seizure list in presence of him which was marked as Exbt.-3/3. The seized article were packed, sealed 'x' labelled, which was marked as Mat. Exbt.-VII/3. Those ornaments seized by them, were marked as Mat. Exbt.-VII (collectively).

Thereafter, he accompanied the I.O., Md. Samim Khan, S.I. of police, in their raid to the house of other accused Sk. Munna, within Topsia P.S. With the assistance of local P.S. and as per identification of Sk. Munna, they went to his house, being led by him, at 44/E, Tiljala Road. As per identification of the Sk. Munna, a container was recovered from underneath a wooden chair. On open the container, a gold neck-chain and one pair gold ear-ring were recovered. The articles were seized in presence of the witnesses and he signed in the seizure list, which was marked as Exbt.-4/4. The I.O., packed the materials, sealed and labelled, which was marked as Mat. Exbt.-VI/2. The articles recovered and seized from the house of Sk. Munna as per his identification Mat. Exbt.-VI (collectively).

- xix) During his cross-examination stated that in there D.D., there was no procedure to make a G.D. entry before proceeding to perform any duty.
- xx) PW-20 deposed on 07.08.2001 he was posted as S.I. at Beniapukur P.S. On that day at about 08:55 p.m., when he was on

the round during the course of his official duty, he was requested by the duty A.S.I. over air to go to 4K, Tiljala Road because of some disturbance having taken place there due to commission of some crime. He left the P.S. for round duty after making G.D. entry no.660 dated 07.08.2001. On reaching the P.O. he found a gathering of some people and from them he learnt about commission of dacoity at the P.O. One Mohasina Begum made a statement which reduced into writing by him, was marked as Exbt.-2.

Thereafter, he took up investigation. He recorded the statement of witnesses. He took the injured Anwara Begum and Mohasina Begum to the Chittaranjan Medical College and Hospital. After treatment both of them were released and collected their injury reports. Thereafter, he returned to P.S. and recorded a case bearing no.R-1 Case No.281 dated 07.08.2001 on the basis of the complaint. The formal F.I.R., was marked as Exbt.-2/2.

- xxi) During his cross-examination stated that he started investigation of the case at the spot after taking cognizance. Thereafter, he came back to P.S. and filed in the formal F.I.R., on the basis of the complaint of Mohasina Begum by putting the case number. He made no seizure. During investigation, list of article taken away was submitted to him. He forwarded the list to the Ld. Court under a forwarded note. But no signature of mine or seal of P.S. was put on the list.

xxii) PW-21 deposed he was a S.I. of police attached to Anti-dacoity & Robbery Squad, D.D. Lalbazar. On 07.08.2001 he received the case diary with other relevant papers of Section R1 Case No.281 dated 07.08.2001. Thereafter, he started investigation of that case. He visited the place of occurrence and examined the available witnesses who corroborated their previous statement. He interrogated the said two accused persons and recorded their statement. In pursuance of their statement, being led by them some articles were recovered from respective residence and seized under proper seizure list which was marked as Exbt.-3.

On 15.09.2001 they first went to the house of the appellant, as led by the custody accused, at the western side of the railway track and northern side of park circus railway station. It was a Jhupri made of plastic and bamboo. As per the appellant's identification, a plastic container was brought out by him from the brick-rack wherein it was kept concealed. On opening the plastic container, two finger rings and one pair of ear-ring, all made of gold were found out. Then, the I.O. prepared a seizure list in presence of him which was marked as Exbt.-3/3. The seized article were packed, sealed 'x' labelled, which was marked as Mat. Exbt.-VII/3. Those ornaments seized by them, were marked as Mat. Exbt.-VII (collectively).

9. The genesis of the prosecution case was traceable to the evening of 07.08.2001 at about 7:30 PM, when as deposed by PW-3, the defective complainant, a group of miscreants numbering more than five for entered

the residential premises situated at 4K, Tiljala Road, within the jurisdiction of Beniapur Police Station. The entry was neither casual nor accidental; it was accompanied by overt acts of criminal intimidation, the display of arms and coordinated design to commit the offence. Among the assailants one Sheikh Munna was identified as known to PW-1 and the presence of multiple accomplices was consistently asserted across the testimonies of PW-3, PW-6, PW-7 and PW-9.

10. The evidence of PW-3 delineated with particularity that the miscreants upon entry placed a revolver at her head, demanded keys of the Almirah and upon resistance, resorted to physical assault and pain. The criminal enterprise extended beyond the singular act, the offenders moved across adjacent flats, restrained, occupants, and systematically removed cash and Gold ornaments. The looted articles included jewellery and cash approximately Rs.25,000/- from one flat and Rs.20,000/- from another along with ornaments belonging to multiple inmates thereby establishing the collective and concerted nature of the offence.
11. PW-6, PW-7 and PW-8, corroborated the said occurrence, each affirming that the miscreants were armed; threats were administered at gun point and valuables were snatched. PW-9 fortified the prosecution case by defaulting that she was accused at the entrance, for taken inside and dispossess of her belongings. The evidence, thus, consistently established that the number of offenders exceeded five and that the offence was committed conjointly.
12. The information regarding the occurrence was transported to the police, where upon PW-20, the sub inspector attached to Beniapur P.S. upon receiving communication during his round duty at about 8.55 PM proceeded

to the place of occurrence after registering GD entry No.660 dated 07.08.2001. Upon arrival, he found a gathering and recorded the statement of Mohsina Begum, which was reduced into writing and marked as Exhibit-2. On the basis of the formal complaint, First Information Report was registered as Beniapukur P.S. Case No.281 dated 07.08.2001 marked as Exhibit-2.

13. The investigation was thereafter undertaken initially by PW-20 and subsequently by PW-21 attached to the Anti-Dacoity and Robbery Squad, Lal Bazar. During the course of investigation, statement of witnesses were recorded, injured persons were sent for medical examination at Chittaranjan Medical College and Hospital and the place of occurrence was documented through sketch maps prepared by PW-1 marked as Exhibit-1, Exhibit-1/1 and Exhibit-1 /2.
14. The prosecution further relied upon photographic evidence taken by PW-2 marked as Exhibit-1 to 5 collectively.
15. The evidentiary chain assumed significance in the context of test identification parade. The Learned Magistrate conducted the Test Identification Parade on 29.09.2001 comprising of suspects including Shaikh Munna and Mohammed Abdul alias Bapi. The present appellant was put up for identification. Witnesses including PW-3, PW-4, PW-6 and PW-8 identified the accused persons. The T.I. parade report was marked as Exhibit 5 /2. Earlier PW 15 had also conducted T.I. parade on 14.01.2002 and 2 103 2002 marked as Exhibit-5 and Exhibit 5/1, wherein suspects were identified by the witnesses. The identification of Mohammed Abdul alias Bapi, in such

proceedings, constituted a material circumstance linking him to the occurrence.

16. A further incriminating circumstance arises from the recovery of stolen articles. The evidence of PW-11, PW-12, PW-13, PW-15, PW-16 and PW-9 established, pursuant to statements by the accused persons while in custody, recovery were effected from places pointed out by them. Notably, on 15.09.2001, acting on the lead furnished by the accused, the Police proceeded to a '*jhupri*' near Park Circus railway station, where from a plastic container concealed in a brick rack was recovered. Upon opening the same, gold finger rings and earrings were found and seized under Exhibit-3/3 and marked as Mat Exhibit-8/3. Similarly, from the residence of Sheikh Munna at 44/E Tiljala Road, a container was recovered from beneath a wooden chair, with a gold chain and earrings, seized under Exhibit-4/4 and marked as Mat Exhibit-6/2. These recoveries, effected in the presence of independent places, assume relevance under Section 27 of the Indian Evidence Act.

17. The medical evidence adduced through PW-17 indicated the victims had been subjected to assault, though the injuries were not of a grave nature in all the cases. One victim sustained a lacerated injury, while others complained of pain, thereby corroborating the use of force during the commission of the offence. The medical evidence though not demonstrative of severe violence, nonetheless, corroborates the use of first weapon, contemporaneous with the occurrence.

18. From the cumulative evidentiary perspective, the essential ingredients of Section 395 of the Indian Penal Code stand primarily attracted. The offence

of dacoity is constituted where five or more persons, conjointly, commit or attempt to commit robbery. The corroborative and consistent testimony of multiple witnesses that the offenders were more than five in number, coupled with their concerted act in committing robbery across multiple flats, satisfied this statutory requirement.

19. Further, the applicability of Section 397 IPC is discernible from the uncontroverted evidence that the offenders were armed with deadly weapons, particularly firearms, and that such weapons were used to intimidate and facilitate the commission of the offence. The act of placing a revolver at the head of PW-3 and others as consistently deposed postulates the case within the ambit of aggravated robbery as envisaged under Section 397 of the Indian Penal Code.
20. The role of the present applicant, Md. Abdul alias Bapi, as emerging from the evidence is not that of passive spectator but of an active participant in the conjoint enterprise. His identification in the T.I. Parade, his association with a group of offenders and the recovery of stolen articles pursuing to statements attributable to the accused persons, collectively form a chain of incriminating circumstances pointing towards his complicity.
21. It is, however, equally settled that any confession before the police is inadmissible except to the limited extent permissible under Section 27 of the Indian Evidence Act, namely the discovery of facts pursuant to such confession. In the present case, the evidentiary value of statements is confined to the recovery effected and not to the confessional narrative *per se*. The evidently value of such recoveries lies in the nexus between the accused and the recovered articles and the identification of such articles as belonging

to the victims. The seizure witnesses namely PW-11, PW-12, PW-13 and PW-15 have supported the factor of recovery and seizure, thereby lending considerable degree of assurance to this aspect of the prosecution case.

22. The defence contention, articulated during the examination of applicant under Section 313 Cr.P.C. that he had been exposed to the witnesses prior to the test identification cannot be permitted to pass without judicial engagement. Yet its evaluation must be anchored in principle rather than conjecture. Plea of prior exposure, if substantiated, is capable of corroding the evidentiary worth of identification, however, the law does not recognise such a plea as self validating. It must derive credibility from demonstrable circumstances, either elicited in cross-examination or discernible from the conduct of the investigation. In absence of such foundational support, the plea remains assertion, insufficient to displace otherwise cogent evidence.
23. In the present case, the Test Identification Parade was conducted by PW-18, a Judicial Magistrate on 29.09.2001 and the proceedings have been proved through Exhibit-5/2. The Magistrate had deposed the parade was held upon due observance of legal procedure. No suggestion had been advanced, much less established, that the accused persons were brought into the view of the identifying witnesses prior to the parade. The record is conspicuously silent as to any circumstance indicative of such exposure. The absence of any infirmity in the conduct of the Magistrate, who is an independent authority, lends presumption of regularity to the proceedings, which cannot be even lightly uncertain.
24. What lends greater assurance to the identification is not merely the formality of the parade, but the substantive context in which it arose. The occurrence,

as narrated by PW-3, PW-6, PW-7, PW-8 and PW-9 was neither fleeting nor obscured. The assailants remained within the premises for a discernible duration, traversing rooms, issuing threats, confining occupants, and executing the act of robbery in a manner that necessitated physical proximity with the victims. The witnesses were not casual observers, they were participants under duress, compelled to interact with the offenders at an intimate range. The opportunity for observation, therefore, was ample, direct and unimpeded.

25. It is in this factual matrix that the identification of Md Abul alias Bapi assumed significance. The applicant was identified not by a solitary witness but by multiple witnesses i.e. PW-3, PW-4, PW-6 and PW-8, each of whom had been present during the commission of the offence. Their identification in the Test Identification Parade was neither isolated nor imaginary, it reflected a convergence of recollection, rooted in shared experience. The consistency of such identification, across independent witnesses, furnished a degree of assurance that transcended the fragility ordinarily associated with singular identification.

26. The defence has not succeeded in elucidating in cross-examination, any circumstance suggestive of prior exposure. No witness has admitted to have seen the accused in police custody prior to the parade, no suggestion has been substantiated that the investigating agency had acted in a manner calculated to compromise the furtherance of the process. The plea raised under Section 313 of the Code of Criminal Procedure therefore remained uncorroborated by any material circumstance. Cardinaly, while such a statement is entitled to consideration, it cannot, in the absence of supporting

evidence, he elevated to a position where it neutralises otherwise reliable testimony.

27. The identification in the test identification is further reinforced by the identification of the applicant in Court. The continuity between the two stages i.e. Test Identification Parade and Dock Identification constituted a consistent evidentiary thread the parade served as a contemporaneous test of memory, the identification in Court on oath and subject to cross-examination, provided the substantive affirmation. In the absence of any intervening circumstance, casting doubt upon the fairness of the process, the two stages read together assumed considerable evidentiary value.
28. The prosecution case did not rest upon identification alone. It is fortified by the circumstance of recovery. The evidence of PW-11, PW-15, PW-16 and PW-19 established that on 15.09.2001 acting on information furnished by the accused persons, while in custody, the investigating agency effected recoveries of stolen articles from locations pointed out by them. From a concealed plastic container in a '*jhupri*' near Park Circus railway station, gold ornaments were recovered and seized under Exhibit-3/3 marked as Mat Exhibit-7/3. From the residence of accused Sk. Munna at 44/E, Tiljala Road, a gold chain and earrings were recovered under Exhibit-4/4 marked as Mat Exhibit-6/2. These recoveries to the extent that they were attributable to information leading to discovery are admissible under Section 27 of the Indian Evidence Act and constituted a material link in the chain of circumstances.
29. The absence of any explanation from the applicant as to the presence or concealment of such articles, coupled with their identification as stolen

property, reinforced the interference of his participation in the offence, the evidentiary value of such recovery did not lie merely in the physical retrieval of articles wherein the nexus was established between the accused and the crime.

30. When the evidence is appreciated in its cumulative effect, the prosecution succeeded in establishing on 7.8.2001 at about 7:30 PM, a group of more than five persons acting conjointly and armed with firearms committed dacoity at the premises in question. The number of offenders, consistently deposed to be more than five by multiple witnesses, satisfied the essential ingredient of Section 395 I.P.C. The use of deadly weapons, particularly the act of placing a revolver at the head of the victims to subdue resistance, attracted the aggravated provision under Section 397 I.P.C.
31. Thus the prosecution case as constructed through ocular testimony, documentary exhibits, identification proceedings, and recoveries seeks to establish that on 7.8.2001, a group of more than five armed individuals, including the present applicant committed dacoity at the premises in question employing deadly weapons and criminal force and thereafter concealed the stolen articles, which had been subsequently recovered during investigation.
32. In view of the above conspectus is the identification of the applicant cannot be regarded as the product of suggestion or afterthought. It is the outcome of direct perception during the occurrence, tested through a structured identification process and corroborated by attendant circumstances arising from investigation. The prosecution has succeeded in establishing the participation of Mohammed Abdul alias Bapi in the commission of the

offence, fulfilling the statutory requirements of Section 395 and 397 of the Indian Penal Code with the degree of certainty that the criminal Law demands.

33. The conviction of the appellant under Section 395/ 397 of the Indian Penal Code is not interfered with. However, the applicant has already undergone incarceration to the extent of five years and above. Since 25 years have passed from the date of occurrence of the incident, the sentence is reduced to the extent of judicial custody undergone by the appellant.

34. In view of the above discussions, the instant criminal appeal is disposed of.

35. I record my appreciation for the able assistance rendered by the Learned Advocate, Mr. Souryadeep Ghosh as *Amicus Curiae* appearing for the appellant, in disposing of this appeal.

36. There is no order as to costs.

37. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

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

(Ananya Bandyopadhyay, J.)