



HIGH COURT OF JUDICATURE AT ALLAHABAD

CRIMINAL APPEAL No. - 1030 of 1989

Reserved

Shiv Kumar and others

.....Appellant(s)

Versus

State of U.P.

.....Respondent

Counsel for Appellant(s) : S.A.N. Shah

Counsel for Respondent(s) : A.G.A.

Court No. - 88

HON'BLE SANJIV KUMAR, J.

1. This appeal under Section 374 (2) Code of Criminal Procedure, 1973, (in short Cr.P.C.), has been filed by appellants, namely, Shiv Kumar, Nanhey, Babu and Om Pal against the judgment and order dated 26.04.1989 passed by Special Judge, (Anti Dacoity), Budaun in Special Session Trial No.14 of 1987 connected with Special Session Trial No.41 of 1987 under Section 395 I.P.C., Police Station Dataganj, District Budaun.

2. By the impugned judgment and order, the appellants were convicted for the offence punishable under Section 395 I.P.C. and sentenced to undergo rigorous imprisonment for five years each. However, they were acquitted of the charge punishable under Section 397 I.P.C.

3. During the pendency of the present criminal appeal, appellants Nos. 1, 3 and 4, namely, Shiv Kumar, Babu and Om Pal, respectively, died, and the appeal stood abated qua them vide orders dated 10.07.2020 and 07.05.2026. The present appeal now survives only on behalf of appellant No. 2, Nanhey.

4. The brief facts of the case are that Nathu Singh, son of Jhajhan Singh Thakur, resident of Palia Guzar, Police Station Dataganj, District Budaun, lodged an F.I.R. by submitting a written application (*Tehrir*, Ext. Ka-1) dated 25.01.1987, stating therein that in the intervening night of 24/25.01.1987, he was sleeping in his house along with his family members, while his father was sleeping on the roof. A lantern was lit in the *verandah*, as usual. At about midnight, 10-12 miscreants, armed with guns, *tamanchas*, *lathis* and *dandas*, entered the house through the roof, overpowered his father and assaulted him. Thereafter, they looted household goods, ornaments, utensils and other articles mentioned in the list. Upon being awakened, the informant and his family members raised an alarm and the informant's brother, Bhikam Singh, rushed out of the house shouting for help, whereupon Dhanpal Singh, Prem Pal Singh and other villagers came running, flashing their torches. On account of the pressure exerted and exhortation made by the villagers, the miscreants fled away with the looted articles. Owing to fear, they could not be chased. It was further stated that the informant, his family members and the co-villagers had identified the miscreants in the light of the lantern and the torches flashed by the villagers and they could also identify the looted articles. The informant, his father and the women members of the family sustained injuries during the incident. The informant described the looted articles in his *Tehrir* (Ext. Ka-1) and also submitted a separate list of the articles looted by the miscreants/*dacoits* (Ext. Ka-2).

5. Upon the aforesaid information, F.I.R. bearing Crime No. 17 of 1987, under Sections 395 and 397 I.P.C. was registered on 25.01.1987 at 8:35 a.m. The investigation was conducted by Inspector Bheem Singh. During the course of investigation, the Investigating Officer recorded the statements of the witnesses, inspected the place of occurrence, and prepared its site-plan (Ext. Ka-3). On 06.02.1987, the appellant Nanhey and co-accused Shiv Kumar were arrested by the Investigating Officer and kept *bapurdah*. On 07.02.1987, co-accused Om Pal and Babu were brought to the Police Station. On 08.04.1987, the Investigating Officer arrested co-accused Nandan Singh and kept him *bapurdah*. Test

identification parade of the suspected accused was conducted in District Jail, Budaun. After collecting the evidence, the Investigating Officer submitted charge-sheet against the surviving appellant Nanhey and co-accused Shiv Kumar, Babu and Prem Pal on 28.02.1987 and against Nandan Singh on 04.06.1987 before the concerned Magistrate. The Magistrate took cognizance of the offence and summoned the accused. Upon their appearance, copies of the relevant prosecution papers were supplied to them, and thereafter the case was committed to the Court of Session for trial.

6. Before the Sessions Court, both the Sessions Trials were consolidated and Sessions Trial No. 14 of 1987 was treated as the leading case. The accused were charged with offence punishable under Sections 395 and 397 I.P.C., to which, they pleaded not guilty and claimed to be tried.

7. The prosecution has examined six witnesses, namely, P.W.1 Nathu Singh (the first informant), P.W.2 Bhikam Singh, P.W.3 Prem Pal, P.W.4 Inspector Bhim Singh (the Investigating Officer), P.W.5 Head Constable Ram Vilash, and P.W.6 Constable Nand Lal Yadav.

8. Out of these witnesses, P.W.1, Nathu Singh, is the first informant and an eyewitness to the alleged incident. It was at his house that the *dacoity* was committed. He has stated that he was sleeping on the fateful night when 10-12 miscreants entered his house and caught hold of his father on the roof, where he was beaten. Upon hearing the alarm, all the inmates of the house awoke and raised alarm. The miscreants looted the articles mentioned in the list. While committing the *dacoity*, they were flashing torches and a lantern was also lit. In that light, they identified the miscreants/*dacoits*. He has also stated that he himself, his father and the women of the house were assaulted during the *dacoity* and were medically examined thereafter. Subsequently, he lodged the F.I.R. after submitting a written application before the concerned police station. He further stated that he was taken to the District Jail for the identification of the suspected accused, where he identified Nanhey and the other accused, namely, Shiv Kumar, Babu and Prem Pal. He stated that they

had committed the dacoity in his house and they were not known to him prior to the incident. He further stated that he had neither seen them after the incident nor anywhere before identifying them in the District Jail.

9. P.W.2, Bhikam, is also an inmate of the house. He is the brother of the informant and has stated the same version as has been narrated by the first informant. He has further stated that he was taken to the District Jail, where he identified the accused.

10. P.W.3, Prem Pal, is a co-villager of the first informant. He turned hostile and did not support the prosecution case. He stated that *dacoity* had taken place at the house of the first informant, but he had not seen the faces of the *dacoits*. He further deposed that there was no light when the *dacoits* were fleeing from the spot. He stated that accused Nanhey was a relative of his co-villager, Ram Dayal and he identified him only for that reason. However, he categorically stated that he had not seen the accused committing the *dacoity*. P.W.3 was declared hostile and was cross-examined by the prosecution, but nothing material came out in his cross-examination in support of the prosecution case.

11. P.W.4, Inspector Bhim Singh, is the Investigating Officer of the case. He has stated about the investigation carried out by him and deposed that he had arrested appellant Nanhey on 06.02.1987 for offence under Section 25 of the Arms Act. He further stated that the appellant was kept *bapurdah* (with his face covered) at the spot, as he had confessed of committing the *dacoity*. He denied the suggestion that the accused was shown to the witnesses at the police station during the night.

12. P.W.5, Head Constable Ram Vilash, is a formal witness. He has stated that on 07.02.1987, appellant Nanhey and two other accused were brought to the lock-up (*Hawalat*) of the police station in *bapurdah* condition and were thereafter taken to the District Jail, Budaun. He further stated that the accused were not shown to any person while they remained in the lock-up.

13. P.W.6, Constable Nand Lal Yadav, is also a formal witness. He has stated that on 07.02.1987, he brought the appellants and the other co-

accused to the District Jail, Budaun in *bapurdah* condition. He further stated that the accused were not shown to any person while they remained in his custody.

14. After the closure of the prosecution evidence, the statements of the accused were recorded under Section 313 Cr.P.C., wherein they denied the prosecution case. Appellant Nanhey, in particular, stated that his two sisters were married to Angnoo and Ram Dayal, the co-villagers of the first informant, in which village the incident had occurred. Angnoo had died and Ram Dayal is crippled. He further stated that he had been residing in the same village and looking after their agricultural land, therefore, the witnesses had known him even prior to the incident.

15. In defence, the accused examined D.W.1, Sahodra, D.W.2, Smt. Ram Kuwar, D.W.3, Raj Pal, D.W.4, Ghanendra Pal and D.W.5, Amar Singh. Out of these defence witnesses, D.W.1 and D.W.2 stated that the appellant, Nanhey, is their cousin brother. They further stated that Sahodra's husband, Ram Dayal, is crippled and unable to move and it is the appellant, Nanhey, who comes to their village whenever they call him and helps them with their agricultural work. They also stated that the villagers have known Nanhey for the last 20-25 years.

16. The Trial Court, on the basis of the evidence adduced by both the parties, came to the conclusion that the identification of the accused, namely, Shiv Kumar, Nanhey, Babu and Om Pal, by the witnesses during the test identification parade held in jail as well as in Court, has supported the prosecution case. Accordingly, all the aforesaid four accused were held guilty of the offence punishable under Section 395 I.P.C. However, they were acquitted of the charge under Section 397 I.P.C. for lack of evidence to prove that they were carrying any arms or deadly weapons at the time of the commission of the offence. The co-accused, Nandan Singh, was given the benefit of doubt and acquitted. Consequently, the appellants were convicted under Section 395 I.P.C. and sentenced to the term indicated above.

17. Heard Sri Avneesh Tripathi, learned Counsel for the surviving appellant No.2 and Sri Akhilesh Kumar Mishra, learned A.G.A. for the State.

18. It is submitted by the learned counsel for the appellants that the prosecution case is highly doubtful. There was no sufficient light to identify the miscreants. It is also submitted that the identification of the appellants in jail as well as in court was not in accordance with law. It is next submitted that appellant Nanhey was shown to the witnesses at the police station and the witnesses also knew him prior to the incident, as he usually came to the village to help in the farming activities of his cousin sisters, who were married there. Therefore, the test identification parade is worthless. It is also submitted that no looted property was recovered from the possession of the appellants. The source of light, torches and lantern, were not produced before the court. Therefore, the learned Trial Court failed to appreciate the evidence on record correctly and reached at wrong conclusion regarding the guilt of the appellant.

19. Per contra, learned A.G.A. for the State has submitted that the prosecution case is proved beyond reasonable doubt. There was a proper source of light in which the appellants were identified. In the Test Identification Parade conducted in jail as well as during the examination of the witnesses of fact before the Court, the appellants were identified. It is also submitted that the defence has not proved any enmity so as to show that the first informant had any reason to falsely implicate the appellants in this case. It is further submitted that soon after the incident, the appellants were arrested and their identification took place in the District Jail within 18 days. Therefore, on the basis of the evidence on record, the prosecution case stands proved and the present appeal has no force and is liable to be dismissed.

20. Considering the submissions advanced by learned counsel for the parties and upon perusal of the record, the prosecution case is that the *dacoity* was committed at the house of the first informant on the intervening night of 24/25.01.1987. In this regard, P.W.1, Natthu Singh, the first informant, and P.W.2, Bhikham Singh, his brother, who were

inmates of the house at the time of the incident, have supported the prosecution case by stating that 10-12 miscreants entered the house of the first informant and committed *dacoity*. In this regard, their testimonies are consistent and reliable which establishes that *dacoity* was committed at the house of the first informant and various items and articles were looted therefrom.

21. The question that now arises for consideration is whether the appellants were among the miscreants constituting the gang of *dacoits* that committed the *dacoity*. In this regard, the prosecution case is that the appellants were not known to the witnesses prior to the incident and that, in the Test Identification Parade (TIP) conducted during the course of investigation as well as at the time of recording of statements, the first informant P.W-1 Natthu Singh and his brother P.W.-2 Bhikham Singh correctly identified the appellant, Nanhey. Therefore, it is established, that, Nanhey, was one of the members of the gang of *dacoits*, who committed *dacoity* in the house of the first informant. On the other hand, the defence case is that the appellant, Nanhey was known to the witnesses since prior to the incident, as his two cousin sisters were married in the same village where the incident took place and he used to visit the village to assist them in agricultural activities.

22. So first of all, let us see whether the appellant, Nanhey, was known to the witnesses since prior to the incident or not. In this regard let us first examine the defence evidence. The defence has examined D.W.1, Sahodra who has stated that she was married to one Ram Dayal, who is unable to move and the appellant Nanhey is her cousin brother. She further stated that he comes to the village whenever they call him to help them with their agricultural work. D.W.1 has further stated that all the villagers have known the appellant Nanhey very well for the last 20-25 years. D.W.2, Ram Kunwar has also stated that the appellant Nanhey is her cousin brother, who has been coming to the village for the last 20-25 years whenever, called by her. She has stated that her husband, Angan Lal, has died and that it is Nanhey who helps her and her sister in

agricultural work. Nothing adverse has come out in their cross-examination.

23. Therefore, it is proved that the appellant Nanhey's cousin sisters are married in the same village where the incident took place. Therefore, being their cousin brother, it is natural for him to visit the village. Consequently, it cannot be said that he was a stranger to the witnesses, belonging to the same village. Therefore, it appears that the appellant Nanhey was known to P.W.1 and P.W.2 prior to the incident. So his identification before the Court as well as in the District Jail is of no evidentiary value.

24. Now, if we come to the prosecution case, the appellant Nanhey was not known to the witnesses. Though this fact is not proved and even assuming this as true, the evidence adduced by the prosecution does not prove that the appellant was one of the members of the gang of *dacoits*, who committed the *dacoity*. According to the prosecution, the incident took place on the intervening night of 24/25.01.1987. The appellant Nanhey was arrested by the Investigating Officer on 06.02.1987 under Section 25 of the Arms Act and was kept *bapurdah*. His test identification parade was conducted in the District Jail on 24.02.1987. However, the prosecution has not produced any documentary evidence to prove that the appellant Nanhey was kept *bapurdah* from the date of his arrest till he was lodged in the District Jail. The link evidence of P.W. 5 Ram Vilas and P.W.6 Nand Lala Yadav is not believable as P.W.5 has not stated the period during which he was on duty at the Police Station and P.W.6 has not stated the period during which the appellant remained in his custody. This is a very material factor which raises serious doubt regarding his identification and it can not be ruled out that the appellants were shown to the witnesses at the police Station as alleged by them.

25. The alleged incident had occurred during the night and, according to the prosecution, the source of light was a lantern and torches, which were inspected by the Investigating Officer and given in *supurdagi* to their respective owners. However, these source of light were not produced before the Court. It has also come in evidence that some of the

dacoits were on the roof, catching hold of the father of the first informant, while some overpowered the first informant and tied him at one place and the other *dacoits* were roaming around the house while committing the *loot*. The prosecution has not clarified what role the appellant Nanhey was playing at the time of the alleged incident. If, at the time of the *dacoity*, the *dacoits* were performing different acts simultaneously, then it was the duty of the prosecution to prove what specific act was committed by the appellant, Nanhey during the commission of the *dacoity*.

26. A perusal of the test identification parade memo shows that it does not mention the role or act committed by the appellant, Nanhey. The witnesses who identified him in the District Jail have not clarified what act he committed at the time of the incident. Similarly, during his identification before the Court, the witnesses again did not clarify any specific role played by him during the incident.

27. In regard to Test Identification Parade (TIP), the Hon'ble Supreme Court in ***Tukesh Singh and Others v. State of Chhattisgarh, 2025 INSC 683***, held in paragraph 21 as under:

*“21. In a case where there are eyewitnesses, one situation can be that the eyewitness knew the accused before the incident. The eyewitnesses must identify the accused sitting in the dock as the same accused whom they had seen committing the crime. Another situation can be that the eyewitness did not know the accused before the incident. In the normal course, in case of the second situation, it is necessary to hold a Test Identification Parade. If it is not held and if the evidence of the eyewitness is recorded after a few years, the identification of such an accused by the eyewitness in the Court becomes vulnerable. Identification of the accused sitting in the Court by the eyewitness is of utmost importance. **For example, if an eyewitness states in his deposition that “he had seen A, B and C killing X and he knew A, B and C”.** Such a statement in the examination-in-chief is not sufficient to link the same to the accused. **The eye witness must identify the accused A, B and C in the Court.** Unless this is done, the prosecution cannot establish that the accused are the same persons who are named by the eyewitness in his deposition. If an eyewitness states that “he had seen one accused assaulting the deceased with a sword, another accused assaulting the deceased with a stick and another accused holding the deceased to enable other accused to assault the deceased.” In such a case, the eyewitness must identify the accused*

in the open Court who, according to him, had assaulted the accused with a stick, who had assaulted the deceased with a sword and who was holding the deceased. Unless the eyewitnesses identify the accused present in the Court, it cannot be said that, based on the testimony of the eyewitnesses, the guilt of the accused has been proved.”

28. In **Jayan v State of Kerala, LL 2021 SC 582**, the Hon’ble Supreme Court has held that :

“18. It is well settled that T.I Parade is a part of investigation and it is not a substantive evidence. The question of holding T.I Parade arises when the accused is not known to the witness earlier. The identification by a witness of the accused in the Court who has for the first time seen the accused in the incident of offence is a weak piece of evidence especially when there is a large time gap between the date of the incident and the date of recording of his evidence. In such a case, T.I Parade may make the identification of the accused by the witness before the Court trustworthy.”

29. In **Kattavellai v. State of Tamil Nadu, 2025 SCC Online SC 1439**, it has been held by Hon’ble Supreme Court that:

“no provision of law casts an obligation upon the investigating authorities to conduct a test identification parade. If it is conducted, the provision that governs is Section 162, Cr.P.C. The onus to show that the T.I.P. has been conducted in accordance with law lies on the prosecution, and only after this burden stands prima facie discharged, does the question of considering objections in this regard arise. It is not a substantive piece of evidence. Its only purpose is for the investigating authorities to analyse the correctness, or lack thereof, of the direction in which they are steering the investigation. The prosecution must establish that prior to the test identification parade being conducted, the witness had no opportunity to see the accused. In other words, the accused must be kept ‘baparda’. If the above has not been ensured, the evidence of the T.I.P. becomes inadmissible. It has also been held that if, prior to the T.I.P. the witness has the opportunity to see even the photograph of the accused person, such process becomes inconsequential”.

30. In view of the above, the failure to explain the specific act committed by the appellant, Nanhey, raises a serious doubt regarding his involvement in the said incident. The documents relating to the Test Identification Parade have been exhibited as the defence has admitted their genuineness. However, the prosecution did not examine the Executive Magistrate before whom the Test Identification Parade was

conducted in the District Jail. Mere admission of the genuineness of the document does not amount to an admission of the truth or correctness of their contents. The non-examination of the concerned Executive Magistrate is a serious lapse on the part of the prosecution, as it was he who was required to explain before the Court that the Test Identification Parade was conducted in a fair and proper manner. This omission also raises a serious doubt over the prosecution case.

31. In view of the above discussion, I come to the conclusion that the prosecution has not been able to prove its case beyond reasonable doubt and has failed to establish that the appellant, Nanhey, was one of the members of the gang of *dacoits* who committed *dacoity* on the fateful night at the house of the first informant. Thus, he deserves to be given the benefit of doubt. Therefore, the charge under Section 395 I.P.C. has not been proved against the appellant, and the Trial Court failed to appreciate the evidence on record correctly. Hence, the impugned judgment of conviction and order of sentence are liable to be set aside.

32. Therefore, the instant appeal is **allowed** and the impugned judgment and order dated 26.04.1989 of the Trial Court is **set aside**. The appellant, **Nanhey** is **acquitted** of the offence punishable under Section 395 I.P.C.

33. The appellant is on bail. His bail bond and personal bond are cancelled and the sureties are discharged of his liabilities. The appellant need not surrender.

34. Let a copy of this order be sent to the Trial Court concerned alongwith the Trial Court record for information and necessary compliance.

(Sanjiv Kumar,J.)

August 06, 2026

Amit/-