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**HIGH COURT OF JUDICATURE AT ALLAHABAD
LUCKNOW**

CRIMINAL APPEAL No. - 866 of 1988

Vishwa Nath Tewari and others

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s)	: S.k.shukla, Ashok Kumar Verma, Manju Gupta, Pradeep Kumar Tripathi, Ripu Daman Shahi
Counsel for Respondent(s)	: Govt.advocate,

Court No. - 28

**HON'BLE RAJIV GUPTA, J.
HON'BLE PRAMOD KUMAR SRIVASTAVA, J.**

(Per Pramod Kumar Srivastava, J.)

1. Heard Shri R.D. Shahi, learned counsel for the appellant no. 3 Mangoo Lal & appellant no. 5 Maqbool, Ms. Manju Gupta, learned counsel for the appellant no. 2 Bhai Lal, and Shri H.P. Maurya, learned AGA for the State.

2. At the very outset, it was brought to our notice by the learned counsel for the appellants that appellant Nos. 1, Vishwa Nath Tewari, 4, Lallu, and 6, Jagatoo, have since died. Therefore, the appeal against them has already been abated vide order dated 17.02.2022. This appeal, therefore, survives and is being adjudicated only in respect of the three surviving appellants: appellant nos. 2 Bhai Lal, 3 Mangoo Lal, and 5 Maqbool.

3. The instant appeal has been preferred against the impugned judgment and order dated 17.12.1988 passed by the learned I Additional Sessions Judge, Lakhimpur Kheri, in Sessions Trial No. 40 of 1988 (State Vs.

Vishwa Nath Tewari and others), arising out of Case Crime No. 123 of 1986 dated 21.10.1986, under Section 396 IPC, Police Station Isha Nagar, District Lakhimpur Kheri, whereby the learned Trial Court convicted the accused appellants for the offence under Section 396 IPC and awarded the sentence of imprisonment for life.

Factual Matrix

4. The brief facts of the case are that the prosecution case is based on the FIR lodged by the informant, Brij Mohan (PW-1). The incident is stated to have occurred on the night of 20.10.1986 at about 08:30 PM at the informant's house in Village Hasanpur-Katauli, Police Station Ishanagar, District Kheri. The family was taking dinner when a group of seven accused persons, including the appellants, all residents of the same village and well-known to the informant, forcibly entered the house. The house was illuminated by a lantern and a " (small kerosene oil lamp). The accused were allegedly armed with deadly weapons, specifically Banka (curved knife), Lathi (stick), Danda (cudgel), and a Tamancha (country-made pistol). It is alleged that accused Shesh Tiwari opened fire on the informant's father, Puttu Lal, and inflicted a fatal blow with a Banka on Smt. Munni (informant's mother), who tragically succumbed to her injuries. The informant, Brij Mohan, and his son, Rajendra Prasad (PW-5), also sustained injuries. It is also alleged that the miscreants proceeded to loot valuable items, including a silver 'Kardhani' (waist chain), other silver jewellery, and a nose ring. The informant claimed to have clearly identified all the miscreants in the available light of the lantern, , torches, and moonlight.

5. On the very next day, 21.10.1986, informant Brij Mohan (PW-1) presented a written report (Tehrir, Exhibit Ka-1) regarding the incident before the Police Station Isha Nagar. The FIR (Exhibit Ka-2) was consequently lodged on 21.10.1986 at 08:15 AM (8:15 hours) against the seven accused persons, namely: Shesh Tiwari, Vishwa Nath Tewari, Mangoo Lal, Bhai Lal, Jassu, Lallu, and Maqbool.

6. During the course of the investigation, the Investigating Officer (I.O.) prepared the Inquest Report (Exhibit Ka-4) and sent the deceased, Smt. Munni's body for post-mortem. The I.O. also visited the place of occurrence, collected blood-stained, simple earth and prepared (Memo Exhibit Ka-5), and prepared the Site Plan (Exhibit Ka-6). The lantern (Memo Exhibit Ka-7) and a torch (Memo Exhibit Ka-8) were taken into possession. The injured, Rajendra Prasad (PW-5), Brij Mohan (PW-1), and Puttu Lal, were medically examined.

7. The following injuries were found on the person of the injured Brij Mohan:

1. Incised wound 8 Cm. x 1 cm. x bone. 6 Cm. of the root of the nose.
2. Abraded contusion of 3 cm x 1.5 cm on left mastroid regions.
3. Contusion of 8 cm x 2 cm below lateral aspect of left fore arm .10 cm below the elbow joint.

8. On the same date, another injured, Rajendra (PW-5), was also examined, and the following injuries were found:

1. Incised wound 9 cm x 2 cm x bone above post skull 7 cm above right mastroid.
2. Incised wound 5 x 5 cm x 1 cm x bone on postero right skull 1 cm.
3. Incised wound 6.5 cm x 1.5 cm x bone post.
4. Incised wound 5 cm x 1.5 cm x bone 2 cm. above mastoid right skull.
5. Incised wound 5 cm x 2 cm x bone on dorsum of right.
6. Incised wound 6.5 cm x 2 cm x muscle deep on post. right.

7. Incised wound 13 cm x 6 cm x bone deep on back of right elbow.

All the injuries were kept under observation and advice was given for an X-Ray. The Doctor's opinion was that all injuries were caused by a sharp-edged weapon and duration was half to one day old.

9. As per the autopsy report, the following injuries were found on the body of the deceased Smt. Munni:

1. Incised wound: 9 cm x 2 cm x bone deep, on the front side of the head, 4 cm above the right eyebrow, extending obliquely towards the upper end of the right ear. The underlying right frontal bone was cut, and the underlying membrane was also found cut.

2. Incised wound: 1.5 cm x 0.5 cm x bone cutting wound 1.5 cm deep, on the aspect of the left index finger in the middle and distal part, passing through the hand, which resulted in the finger hanging.

3. Lacerated wound: 3 cm x 1 cm x bone deep, on the back right side of the upper arm, 4 cm from the top of the shoulder, and the underlying humerus (arm bone) was found fractured.

The cause of death was opined to be due to haemorrhage and shock as a result of the ante-mortem injuries.

10. Puttu Lal Giri also sustained the following injuries:

1. Incised wound: 7 cm x 1.8 cm x Muscle deep on the left side, on the circle of the jaw, with clotted blood present.

2. Firearm wound of entry: 3.5 cm x 2 cm on the dorsum of the right hand, 1 cm below the wrist.

3. Firearm wound of exit: 6 cm x 2.6 cm on the palmar side of the right hand, laterally situated.

4. Contusion: 7 cm x 2 cm on the back of the chest, left side, 12 cm below the left Scapula.

11. The Doctor opined that all injuries were ante-mortem, being about half to one day old. Specifically, Injury No. 1 was caused by a sharp weapon, Injury No. 2 by a firearm, and Injury No. 3 by a blunt object.

12. The Investigating Officer prepared the site plan recorded the statements of the witnesses and, after concluding the investigation, a charge sheet (Exhibit Ka-21) was submitted against the seven accused persons under the relevant sections before the Court.

13. Upon the submission of the charge sheet, the learned Chief Judicial Magistrate, Lakhimpur Kheri, vide his order dated 21.01.1988, took cognizance of the offence. Finding the case to be exclusively triable by the Court of Session, the same was committed to the Sessions Court, where it was registered as Sessions Trial No. 40 of 1988 and made over to the court of the 1st Additional Session Judge, Kheri, for trial.

14. The learned Trial Court framed the charges against the accused-appellants under Section 396 IPC. The said charge was read over and explained to the accused persons, but they denied the charges leveled against them, pleaded not guilty, and claimed to be tried.

15. On the commencement of the trial, in order to prove the case against the accused persons, the prosecution examined the following witnesses:

PW-1 Brij Mohan (Informant/Injured), PW-2 Kripa Ram (Hostile Public Witness), PW-3 Bahori Lal (Hostile Public Witness), PW-4 Turri (Hostile Public Witness),

PW-5 Rajendra Prasad (Injured Son), PW-6 Smt. Shyama Devi (Wife of PW-1)

16. Prosecution also adduced the following documentary evidence:

Exh. Ka-1: Written Report (Tehrir), Exh. Ka-2: FIR (Copy of General Diary), Exh. Ka-3: GD Carbon Copy, Exh. Ka-4: Inquest Report, Exh. Ka-5: Memo of Collecting Simple and Blood-Stained Earth, Exh. Ka-6: Site Plan, Exh. Ka-7: Memo of Lantern and , Exh. Ka-8: Memo of Torch, Exh. Ka-9: Letter to CMO, Exh. Ka-10: Challan Form, Exh. Ka-11: Photo Lash (Panchayatnama), Exh. Ka-12: Sample of Seal Unit, Exh. Ka-13 to Exh. Ka-20: Memo of Attachment of Property and other reports. & Exh. Ka-21: Charge Sheet. Injury Report of Rajendra (PW-5): Exhibit Ka-22, Injury Report of Brij Mohan (PW-1): Exhibit Ka-23, Injury Report of Puttu Lal: Exhibit Ka-24, Post-Mortem Report of deceased Munni: Exhibit Ka-25.

Testimony of PW-1 Brij Mohan Lal

17. PW-1, Brij Mohan Lal, is the first informant and the son of the deceased, Smt. Munni, is as follows: He deposed that the accused persons are residents of his village. He knows Buddha Singh. He further stated that he runs a betel shop and Buddha Singh often used to come to his shop. Buddha Singh had enmity with Lallu and Shesh Tiwari. Accused Lallu and Shesh Tiwari objected and asked him that Buddha Singh should not be allowed to come, on this, he stopped Buddha Singh from coming to his place, and thereafter Buddha Singh did not come to his shop.

18. He further stated that on October 20, 1986, at midnight, dacoits in came to his house. At that time, he was sitting in the verandah (baramda in local language) at the door. A small lamp (dibri) was illuminating the area, and his mother and father were present inside the house. He further stated that his son, Rajendra, was present at the

door. There were two lanterns illuminating inside the house. The night was bright, and moonlight was spreading all around.

19. He further stated that seven miscreants entered into his house to commit dacoity, and they were villagers of his village. He had seen all the dacoits. Accused Shesh Tiwari was carrying a Katta (country-made pistol) and a Banka (a type of curved weapon), while accused Vishwanath was carrying a firearm and a Banka. The other accused were carrying Lathi (sticks), Banka, and Gupti (swordstick).

20. He further stated that the accused persons opened fire. When he resisted their entry into the house, accused Vishwanath inflicted a blow with the Banka on his head, and thereafter, the accused entered the house.

21. He further stated that accused Shesh Tiwari opened fire on his father. When his mother rushed to rescue him, Shesh Tiwari assaulted her with the Banka. Due to sustaining these injuries, his mother succumbed. He further stated that accused Shesh Tiwari inflicted a Banka blow on Rajendra.

22. After hearing the hue and cry, neighbors Bahori Lal, Kripa Ram, and Turri arrived there. He further deposed that when the witnesses scolded them, the accused persons ran away with the looted articles. He deposed that he had seen and recognized the accused persons in the light of the torch and moonlight.

23. He also stated that some of miscreants was carrying a torch in their hand, and when they were moving from one room to another, they were flashing the torch. He also stated that one injured, Puttu Lal, is unable to move due to paralysis and is not able to give evidence.

24. Testimony of PW-2 Kripa Ram

Another witness of fact, Kripa Ram (PW-2), deposed that at the time of the alleged incident, at about 9–10 PM, he was staying in his house. He had heard the hue and cry and the sound of firing. He

stated that he did not see the dacoits. He further stated that when the dacoits fled away, he arrived at Puttu's house. He further stated that when most of the people in the village had arrived, he also rushed there. He did not support the prosecution version and turned hostile.

25. Testimony of PW-3 Bahori Lal

Another witness, PW-3 Bahori Lal, deposed that he did not know who infact committed dacoity in Puttu's house. He categorically stated that the accused persons—Shesh Tiwari, Vishwanath, Mangoo Lal, Jattoo, Lallu, and Maqbool—did not commit the dacoity. He also turned hostile.

26. Testimony of PW-4 Turri

Another witness, PW-4 Turri, also deposed that he did not know who committed dacoity in Puttu's house. He categorically stated that the accused persons—Shesh Tiwari, Vishwanath, Mangoo Lal, Jattoo, Lallu, and Maqbool—did not commit the dacoity. He also turned hostile.

27. Testimony of PW-5 Rajendra

PW-5, Rajendra, who is the injured son of the informant Brij Mohan Lal, deposed that at about 8:30 to 9:00 PM, dacoity was committed in his house. At that time, he was awake. His father, Brij Lal, was sitting on the south side at the door, and a small lamp was illuminating inside the door. The door was open on the north side. He further deposed that some dacoits entered the house. Among them, Shesh Tiwari, Vishwanath, Bhai Lal, Mangu, Maqbool, Jagatu, and Lallu were villagers, had no means of light.

28. He further deposed that accused Shesh Tiwari was carrying a Banka and a Katta, while accused Vishwanath was carrying a Banka, Mangu was carrying a Lathi, and Bhai Lal was carrying a Gupti. He further stated that Shesh Tiwari inflicted blows with the Banka on him. Thereafter, Shesh Tiwari inflicted blows upon Brij Mohan, and Shesh Tiwari opened fire on the deceased, who was his grandmother.

After sustaining injuries, she died instantaneously. He also deposed that the dacoity continued for 2 to 2 and a half hours. Upon his screaming, witnesses Kripa Ram, Bahori Lal, and Turri arrived there, who were carrying torches. He further stated that at the time of the occurrence, there was moonlight. He further stated that he recognized the accused persons in the light of the torch, lantern, small lamp, and moonlight.

29. Testimony of PW-6 Smt. Shyama Devi

PW-6, Smt. Shyama Devi, the wife of the informant Brij Mohan, deposed that at about 8–9 PM, dacoits had committed dacoity in her house. At that time, a small lamp was illuminating at the door and inside the house. The night was bright. Accused persons Shesh Tiwari, Vishwanath, Mangoo, Lallu, Jattu, Maqbool, and one other accused entered her house. Shesh Tiwari was carrying a fire arm weapon and a Banka in his hands, while Vishwanath was carrying a Banka, Mangoo was carrying a Lathi, and other accused persons were also carrying Lathi.

30. She further deposed that the accused persons started to loot goods as they entered the house. Shesh Tiwari inflicted blows on the deceased, Munni Devi and she succumbed. She further deposed that Shesh Tiwari also opened fire over her father-in-law and also inflicted a Banka blow on Rajendra. She also stated that the dacoits committed dacoity in her house for one hour. When the villagers arrived there, the dacoits fled away. The dacoits were armed. She also stated that the accused fired shots at the door to terrorize the villagers.

31. Testimony of PW-7 S.I. Ved Prakash Chaturvedi

PW-7, S.I. Ved Prakash Chaturvedi, who conducted the investigation, deposed that on the basis of the written report (tahreer), Ex. Ka 1, the checked FIR was lodged by Head Muharrir Kaushlendra Sharma, who was posted with him, and the same was entered into the General Diary (GD) by the Head Muharrir.

32. He further stated that he had recorded the statement of the informant, Brij Mohan. After reaching the place of occurrence, he had recorded the statement of the injured, Rajendra Kumar and Puttu Lal, and thereafter sent them for medical examination along with an official letter (Majroobi Chitthi). He further deposed that he had conducted the inquest of the body of the deceased, Munni, and thereafter sent the dead body for post-mortem through Constable Daya Ram Trivedi.

33. He further stated that he visited the place of occurrence and collected the sample of blood-stained and simple earth from the spot. After getting them sealed, he prepared the seizure memo (Fard). He also deposed that the lantern and small lamp were also inspected by him and had given the same to the informant for its safekeeping (supurdagi), and a memo was prepared in this respect. He also testified to the Police papers which were prepared at the time of the inquest.

34. He further deposed that during the investigation, he recorded the statements of witnesses Brij Mohan, Kripa Ram, Bahori Lal, Turri, Rajendra, Smt. Shyamu, and others. He also stated that due to the absconding of the accused persons, he had executed the process of attachment/confiscation (Kurki) against them. He further deposed that after January 24, 1986, the investigation was handed over to SHO V.K. Rai, who had made entry of the injury report and post-mortem report in the case diary. After concluding the investigation on November 14, 1986, he had submitted the charge sheet, Ex. Ka 21, against the accused persons.

35. Upon the closure of the prosecution evidence, the statement of the accused persons under Section 313 of the Code of Criminal Procedure, 1973, was recorded. All the accused persons denied the prosecution's case and maintained that they were innocent and had been falsely implicated due to existing political rivalry. The accused, Vishwanath

Tiwari, also stated that he suffered a paralysis attack in his right hand, and therefore, he can neither hold nor eat anything with his right hand.

36. At the stage of defence evidence, the accused persons did not produce any oral or documentary evidence.

37. Having heard the learned counsel for both the parties, the trial court considered the evidence adduced by the prosecution, the statements given by the accused persons, and the material available on record, found that the accused-appellant had committed dacoity. The court further found that the prosecution had succeeded in proving the charge under Section 396 of the IPC against the accused person beyond reasonable doubt hence convicted them for the offence under Section 396 of the IPC and consequently sentencing them to imprisonment for life.

38. Being aggrieved by the impugned judgment and order, this instant Criminal Appeal No. 866 of 1988 has been preferred by the six appellants, namely Vishwa Nath Tewari, Bhai Lal, Mangoo Lal, Lallu, Maqbool, and Jagatoo. However, during the pendency of the appeal, three appellant accused, namely Vishwa Nath Tewari, Lallu, and Jagatoo, have already passed away, and their appeals have abated vide order dated 17.02.2022. Now, the instant appeal survives only for the three remaining accused appellants, namely Bhai Lal, Mangoo Lal, and Maqbool. It is notable that Shesh Tiwari, who was said to be armed with a Katta (country-made pistol) and a Banka (curved knife) is not an appellant in this appeal. The appeal now survives against the three accused persons (Bhai Lal, Mangoo Lal, and Maqbool) against whom it is alleged that they were armed with a Lathi (stick).

39. It is expedient to mention that the prosecution did not examine the doctor who prepared the medico-legal report of the injured and the doctor who conducted the autopsy of the deceased Munni Lal. Nevertheless, the learned trial court proceeded to rely upon the unproven medical and post mortem report.

40. **Submission of the appellants**

(i). Learned counsel for the appellants submitted that the entire prosecution story is unnatural, highly improbable, and concocted, primarily due to political enmity stemming from the recent Pradhan election, which provided a strong motive for the complainant's family to falsely implicate their opponents. It was argued that the object of the miscreants who entered the house, Shesh Tiwari and Vishwanath, appeared to be marpeet (assault) rather than robbery, suggesting the intention was to wreak vengeance and to settle scores arising from the feud, and making the allegation of looting a mere embellishment to attract the graver Section 396 IPC.

(ii). Learned counsel for the appellants further submitted that the appellants are not hardened criminals should be accepted, making the open-face dacoity allegation by known door neighbours is entirely unnatural and unbelievable. This lack of precaution is considered a significant factor that creates a rational doubt in the prosecution's version of the facts.

(iii). Learned counsel for the appellants further submitted that the prosecution's case loses all its credibility because the key independent witnesses named in the FIR—PW-2 Kripa Ram, PW-3 Bahori Lal, and PW-4 Turri—all turned hostile. They clearly deposed that they did not recognize the accused persons, as they arrived at the house only after the dacoits had run away. Furthermore, the statements of the injured prosecution witnesses regarding the source of light are contradictory, noting that PW-5 Rajendra stated in his cross-examination that the lantern was extinguished.

(iv). Learned counsel for the appellants further submitted that the charge of dacoity is critically weakened by the absence of recovery of any looted articles and the overall defective investigation. Moreover, the learned Trial Court made a fundamental error by admitting and relying upon the Injury Reports and Post-Mortem Report even though they were not lawfully proved by the Doctor who prepared them empty cartridge were also not recovered.

(v). Learned counsel for the appellants further submitted that if the sole object of the miscreants was to commit dacoity and rob the informants, it remains an unexplained factor why they should have spared the deceased, Smt. Munni Devi, who was wearing silver and gold jewellery. This contradiction is highly perverse, suggesting the primary motive was vengeance (or murder) rather than dacoity, and the principles governing dacoity under Section 396 IPC should not have been attracted.

(vi). On the basis of aforesaid submission, learned counsel for the appellants submitted that the impugned judgment and order passed by the Trial Court is not sustainable in the eyes of law and is liable to be set-aside by this Court.

41. Submission of the respondent

(i). Per contra, learned AGA vehemently countered the submissions raised by the appellants' counsel, asserting the correctness of the Trial Court's judgment. He emphasized the settled legal position that the testimony of the injured witnesses (PW-1 Brij Mohan, PW-5 Rajendra, and PW-6 Smt. Shyama Devi) stands on a higher pedestal in law, as their presence at the scene is guaranteed by their injuries, which acts as an in-built guarantee of their presence. He argued that the deposition of the injured witness should be relied upon unless there are strong grounds for its rejection based on major contradictions and discrepancies, which he contended are absent in this case.

(ii). Learned AGA further submitted that non-support of the independent public witnesses, such as Kripa Ram (PW-2), Bahori Lal (PW-3), and Turri (PW-4), should not be allowed to demolish the entire prosecution case, contending that their failure to support is often attributable to the fear, pressure, and terror generated by the accused party in the village.

(iii). He further submitted that the argument regarding the non-concealment of identity is not absolute. He argued that this incident was driven by deep-seated enmity and village rivalry, turning it into a desperate act of vengeance, and that when the accused are highly inimical, they may act like "daredevils" without concealing their identity.

(iv). He next submitted that the identification of the accused was instantaneous and clear because they were well-known neighbours and were seen in the available light. The light from the lantern, dibri, torches, and moonlight was sufficient for recognizing known persons.

(v). Learned AGA further submitted that once the factum of dacoity by five or more persons is established, and a murder takes place during the commission of that dacoity, all the participants are vicariously liable for the murder under Section 396 IPC.

(vi). He further submitted that the discrepancies pointed out by the defense regarding the number of fires or who stood outside are minor and natural deviations that do not go to the root of the matter or detract from the essential prosecution story, which is consistently supported by the three injured eyewitnesses.

(vii). On the basis of above, learned AGA submitted that the learned Trial Court has rightly and in accordance with law convicted and sentenced the appellants. The impugned order does not suffer from any illegality or error which may call for any interference by this Court.

42. On the basis of the facts and the submissions advanced by the learned counsel for the parties, we formulate the following Points of Determination:

(A) Whether the prosecution has proved its case beyond reasonable doubt?

(B) Whether the trial court is right in convicting the accused appellants?

43. **Point No.** (A) Whether the prosecution has proved its case beyond reasonable doubt- On the basis of this point, it has to be seen whether the prosecution has proved its case beyond a reasonable doubt?

44. At the outset, it is expedient to mention here that, as per the prosecution version, many villagers arrived after hearing a hue and

cry. Out of them, the villagers named as eyewitnesses, namely Kripa Ram, Bahori Lal, and Turri, arrived at the place of occurrence.

45. The prosecution examined them, but they did not support the prosecution case and turned hostile. Therefore, the benefit/weight of their evidence cannot be extended to the side of the prosecution.

46. Now, there remain three witnesses of fact, and the prosecution strongly relies on their deposition, as two of them are said to be injured witnesses. It is the case of the prosecution that, being injured, the statements of PW-1 Brij Mohan, PW-2 Kripa Ram, and PW-5 Rajendra Prasad cannot be discarded. The law gives high value to the evidence of an injured witness, and the prosecution also relied on the cases of Hon'ble Apex Court in **Abdul Sayeed Vs. State of M.P., (2010) 10 SCC 259** that injured testimony is important. However, the rule states such testimony must be discarded if there are strong grounds for major contradictions and discrepancies. The Hon'ble Apex Court has emphasized that even injured testimony must be scrutinized for credibility. The relevant paragraph 30 of the said judgment is extracted herein below:

“30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.”

47. Here, it is to be made clear that the cited case law does not belong to the case of dacoity, although the principle is laid down regarding the testimonial valuation and veracity of the injured witness. In view of that, we proceed to analyze the statements given by the witnesses who are said to be injured in the alleged incident.

48. As per the testimony of Brij Mohan (PW-1), he has specifically stated in his examination-in-chief that the accused Shesh Tiwari and another accused, Vishwanath Tiwari were carrying Katta and Banka

but with regard to the surviving appellant/accused, those witness has not stated specifically, the one who was having the lathi, and who was having the Banka, and one who was having the Gupti. From his evidence, it is also apparent that the deceased Smt. Munni Devi sustained the Banka injuries inflicted by Shesh Tiwari, and Shesh Tiwari also inflicted the blows of Banka on the person of injured Rajendra. Furthermore, Shesh Tiwari also opened fire on the person of the informant's father. The informant did not state any single word that the surviving appellant/accused person also inflicted blows with the Banka or any other weapon to the injured or deceased. Thus, there is a deviation from the core version of the F.I.R., where averment is made that all accused persons inflicted blows with lathis, Bankas, and a firearm.

49. Another witness Rajendra (PW-5), the son of the informant, whose examination-in-chief has already been elicited hereinabove on cross-examination he has stated that, except for Vishwanath Tiwari and Shesh Tiwari, Mangoo was armed with a lathi and Bhai Lal was armed with a gupti. However, he did not state that the surviving accused persons, namely Bhai Lal, Mangoo Lal, and Maqbool, had inflicted blows by using any of these weapons on the person of the injured or the deceased.

50. On his cross-examination in Paragraph 7, Rajendra (PW-5) has stated that he had not seen what weapon Mangoo was carrying. He specifically stated that none of the miscreants was carrying a lathi. Another witness of fact, Smt. Shyama Devi (PW-6), the wife of the informant Brij Mohan, whose statement has been elicited hereinabove, also restricted her testimony by stating that Mangoo and Bhai Lal were carrying a lathi. However, she also did not state that the surviving accused persons, namely Bhai Lal, Mangoo Lal, and Maqbool, participated in the commission of inflicting blows by using a lathi or with any other weapon on the person of the injured and deceased.

51. On her cross-examination also, she did not state a single word that the surviving accused person also inflicted blows. Thus, there are major contradiction in respect of the role attributed to the surviving accused persons in the FIR and the role attributed in the testimony of this witnesses of fact.

52. Now, we proceed to consider the other major contradictions in their statements, particularly with regard to the source of light and the absence of a role for miscreants who caused the occurrence.

53. On the perusal of the record, it transpires that the prosecution has examined Brij Mohan (PW-1) and Rajendra (PW-5) as injured witnesses. Brij Mohan (PW-1) has stated that all the accused persons are residents of his village. He also stated that he has a betel shop in his village, where one Budhdha Singh, resident of Betigaon, used to come to chew betel. He admitted that there is enmity among Lallu, Shesh Tiwari, and Budhdha Singh. Lallu and Shesh Tiwari objected, and asked him to prevent Budhdha Singh to come to his shop. He further stated that on 20.10.1986, at about midnight, he was sitting in his Verandah (Baranda), which was on the North side, and a Dibri was illuminating inside the house. His mother and father were present, and Rajendra was present at the door. A lantern was illuminating inside the house, and no other source of light was outside the house, but the night was bright. He further stated that seven accused persons, who belong to the same place, came to his house to commit the dacoity. Shesh Tiwari was having a Lathi and a Banka, Vishwanath was also having one firearm and one Banka, and others were having a Lathi, Gupti, and Banka. He stated that two shots were fired from the firearms, and he resisted them from entering the house. Vishwanath inflicted a blow of Banka, and Shesh Tiwari opened fire on his father. When his mother rushed to rescue him, then Shesh Tiwari inflicted a blow of the Banka over his mother, and she succumbed (died). Shesh Tiwari also inflicted a Banka blow on Rajendra, who suffered injuries. Thus, the whole of the examination-in-chief of this witness reveals that the blow of Banka that caused the death was inflicted by accused Shesh Tiwari, and he also inflicted injuries

through a Katta (firearm), and accused Vishwanath inflicted a blow with a Banka. With regard to other accused persons, he did not state a single word about who inflicted injuries, but he has stated that the accused persons committed dacoity and robbed the articles.

54. On his cross-examination, this witness stated that he has a licensed gun for his safety, and at the time of the alleged incident, his gun was kept in the house of Lallan Bihari. He also admitted that there is enmity between Lallan Bihari and Shesh Tiwari. He further stated that there was an election of Village Pradhan, where the accused persons were on the side of the winning contestant, Radhey Shyam, whereas Lallan Bihari was on the side of the defeated contestant, Guru Prasad; thereafter enmity had taken place between Lallan Bihari and the accused persons (Muljiman). He also admitted that after the incident, on the very next date, Lallan Bihari came into his house, and he told Lallan Bihari the names of the accused persons. Then Lallan Bihari asked him that only the names of those he has witnessed should be mentioned in the FIR. He also stated that his father's portion of the property was separate from his share. From the cross-examination, it reflects that he is a license holder of a firearm, and though he admitted he is a betel shop keeper, he did not disclose why he did not make any effort to obtain his licensed gun, which was kept in the house of Lallan Bihari, whose house is adjacent to his house at about 200 feet. But he admitted that all the accused persons did not wear any mask or cover their faces to conceal their identity, and their mouths were open. He further stated that only two accused persons entered the house, and the remaining were outside the house.

55. Thus, as per the statement given by this witness in examination-in-chief, accused Vishwanath and Shesh Tiwari entered inside the house, meaning thereby the present appellants (Bhai Lal, Mangoo Lal, Maqbool) did not make any effort to go inside the house nor inflicted any blow to any of the injured witnesses. Although this is a case of dacoity, there is no necessity for their common intention or common object because they conjointly committed the crime. Therefore, their presence is verified, then for the purpose of the charge leveled against

them, their role would be considered sufficient. He also stated that he did not clarify in the statement which particular appellants were outside the house. Thus, from the injured witness, it shows that Shesh Tiwari and accused Vishwanath came into his house, and when they inflicted blows from a Katta, Lathi, and Banka. From the statement of this witness, it does not reflect that the miscreants who came there first tried to commit robbery or theft or loot of household or jewelry, etc. It also reflects that the intention of accused Shesh Tiwari and Vishwanath was to commit Marpeet (assault), not to commit robbery, etc. Otherwise, the miscreants who entered would first look for valuable articles and money, and bearing that in mind, they would use violence, if resistance occurred. It also shows that the testimony of this witness also reflects that the events did not happen as such stated in the FIR.

56. Now we come to the evidence of another eye witness who is claimed to be injured, Rajendra Prasad, son of informant Brij Mohan, has been examined as PW-5. He has stated in his examination-in-chief that at the time of the incident, he was sitting on the Varandah, while his father Brij Mohan was sitting at the door, and there was light of a Lantern at the door, and inside the house, there was light of a Dibri. He stated that some miscreants entered his house, whose names are Shesh Tiwari and Vishwanath, Mangoo, Maqbool, Jattu, Lallu (All seven names), who are residents of his village. He stated that accused Shesh Tiwari inflicted blows with a Banka on his body. Thereafter Vishwanath inflicted blows on Brij Mohan, and Shesh Tiwari also opened fire on the deceased Grand Mother, and he also inflicted blows to the injured Puttu Lal (Grand Father). But the surprising fact is that this witness has stated that the incident of dacoity continued for two and a half hours. In cross-examination, he has stated that when the dacoits entered his house, the Lantern was not illuminating; it was Bujha Huwa (kept off). He further stated that the Dibri was also off, therefore he could not ascertain which one of the dacoits was in the house and which one was outside the house, but certainly, none of the dacoits was covering their face. Thus from his evidence, it transpires that he has deviated from his earlier version as in

his cross-examination. One thing is also very surprising that as per his testimony miscreants had fired 10-12 shots, and villagers also fired 10-12 shots, but none of the empty cartridges was recovered by the Investigating Officer. As per the statement of the informant, only two fires were open, while this witness said 10-12 fires were opened by them. Thus, there is major contradiction in the testimony of this witness, which is not consistent with the statement of the informant witness, who is also alleged to be injured. Therefore, the testimony of the witnesses do not fall in the category of fully reliable witnesses.

57. Another witness of fact, Smt. Shyama Devi i.e wife of the informant, has been examined as PW-6. She has stated that at the time of the incident, her father-in-law and son Rajendra were sitting inside the house, and her husband was outside the house, and a Dibri was illuminating, but the night was bright. She also stated that miscreant Shesh Tiwari and (all seven names: Vishvanath, Mangoo, Bhai Lal, Jassu, Lallu, Maqbool) came and entered her house. In her cross-examination, she admitted that the persons who were inside the house could not be recognized and identified, and she also stated that the accused persons who are present before the court, did not enter the house. She also admitted that the accused persons were not covering their faces. She further stated that there were more than 7-8 miscreants outside the house, and another 7-8 persons were inside the house who were committing the loot. Total number of dacoits was 15-16. Thus, she sets up the new facts which is not corroborated by the testimony of injured witnesses. Thus the testimony of these witnesses is not of such quality that it may be called wholly reliable, as there is a contradiction in their evidence compared to other witnesses which could not be said to be minor in nature.

58. It is a settled proposition of law that where the evidence of such a witness is partly reliable in nature, then in that case, some corroborative evidence which may either be ocular or documentary should be produced. As earlier we have discussed that other remaining ocular evidence who are the neighbours and claimed to have witnessed the

incident have turned hostile, thus the evidence of these injured witnesses is not substantiated or not fortified with another independent witnesses.

59. Here one thing is more important that the injury report of the injured persons as available on record, which shows injuries on the person of Brij Mohan, Rajendra Prasad, and Puttu Lal. But these papers were not proved in a lawful manner, despite of the fact the trial court admitted them in evidence and relied upon them. Moresoover, there is a post-mortem report in the trial court's records, but it is also not proved by the doctor, even though it is relied upon by the trial court.

60. The documents which are not duly proved cannot be relied upon by the Court as documentary evidence. Thus, the injured statement in respect of sustained injuries on them is not substantiated by medical evidence.

(B) Whether the trial court is right in convicting the accused appellants?

61. Now we will consider the arguments advanced by both sides in respect of the identity of accused persons and the law cited by them in this regard. As it is apparent that PW-1, PW-5, and PW-6 unanimously deposed in their testimony that accused persons were not covering their face to conceal their identity.

62. The Hon'ble Apex Court in various cases has laid down separate principles for assessing the evidence of the witnesses in the case of Dacoity and Murder. The very object of dacoity is to exhaust valuable property by force, being in fear of death or grievous hurt. During the exhaustion, nobody is spared by the accused, even death if one resists or creates obstruction in the exhaustion. The principle of dacoity is that no one commits dacoity without taking precautions to conceal his identity in the house of a known person. In the ordinary course of nature, known persons are not expected to commit dacoity without concealing their identity. In case somehow the identity of any dacoit is exposed to the inmates of the house where the dacoity is committed or to the witnesses, he will incur the risk of prosecution. However, in the case of Murder, the

paramount object is to take revenge because of enmity. There may be cases where murder is committed, and any member of the assailant party takes away property also in a casual manner. In such a case, the nature of the offence should not be changed, and it will remain a case of Murder and not of the Dacoity, and hence the principles of dacoity will not be attracted. Sometimes certain portions of the evidence are fabricated to show that it was a case of dacoity and not of a murder, and the deceased and injured persons have sustained injuries during the course of dacoity.

63. Further the Hon'ble Apex Court, in the case of **Ramji Lal and Another Vs. State of U.P.**, reinforces that the failure of local accused to conceal their identity is a fatal flaw in the dacoity charge. The relevant paragraph-7 of the said case is extracted herein below:

*"7. The most striking feature of this case, so far as Ramjilal and Jagdish are concerned, is that they are residing within a distance of a few furlongs (two furlongs) from the scene of occurrence and are already well known to the witnesses... and inspite of that there is not a whisper in evidence to show that they even attempted to conceal their identity in any manner whatsoever. It is of course true that facts and circumstances of each case will have to be looked into and a general law can not be laid down to say that unless known persons try to conceal their identity, they can never be expected to take part in a dacoity in their own village or in the neighbouring village. Generally when a dacoity takes place... the persons of the neighbourhood who take part in it, take every precaution to conceal their identity so that they may not be Identified and implicated in the case afterwards... When a known person is desperate and very much inimical, he can go to commit dacoity without taking the usual precaution of covering his face. It was so held in the case of **Siyaram v. State of Bihar by the Supreme Court...**"*

64. The Hon'ble Apex Court, in the case of State of U.P. vs. Gokaran and others, has held that the applicability of the exception regarding non-concealment of identity in criminal acts "really depends upon the frame of the mind in which the participants were at the time of the incident." This ruling confirms that the argument of known neighbours committing an offence without concealing their faces may only be accepted when such an extraordinary degree of criminal audacity and desperation is demonstrably established by the prosecution's evidence.

65. We find that this principle is inapplicable to the facts of the instant appeal, as the prosecution has failed to establish that the present

appellants were persons of such desperate character, making the non-concealment of their identity remain a most striking feature that casts a significant shadow of doubt on the veracity of the identification.

66. The claim of clear identification is further shattered by the contradiction noted in the statement of PW-5 Rajendra, who deposed that the lantern was extinguished.

67. In view of the above points of determination, we also find that the foundational charge of dacoity coupled with murder under Section 396 IPC is highly doubtful and unsustainable. It is an undisputed fact that the parties were involved in an intense political rivalry (partybandi), which renders the identification of the appellants—who were known next door neighbours and did not conceal their faces—extremely suspect, suggesting the primary motive was one of vengeance (marpeet) rather than robbery. This suspicion is reinforced by the highly improbable circumstance that the miscreants, if their intent was genuinely dacoity, would have spared the deceased's jewellery (including a silver 'Kardhani') which was allegedly being worn. A clear and fatal factor that further diminishes the prosecution's case is the complete failure of the Investigating Officer to recover any looted article from the accused or even empty cartridges from the spot, despite the clear allegation of dacoity. The legal principle is well-established that when the primary motive of dacoity is shrouded in high doubt, particularly when the identification is questioned due to pre-existing enmity, the grave charge under Section 396 IPC must necessarily fail, resulting in the appellants being entitled to the benefit of the doubt.

68. The entire investigation appears defective, necessitating judicial intervention. Since the foundational crime of dacoity is not proven and the identification of the Appellants is highly questionable given the deep-rooted political enmity, the Appellants are legally entitled to the benefit of the doubt. Furthermore, because the primary element of dacoity is not conclusively established, the question of punishing all co-accused for the murder under the vicarious liability and deeming fiction

of Section 396 IPC does not arise or operate. Consequently, the findings of the learned trial court are deemed perverse, being based on an incorrect appreciation of evidence.

69. On the consideration of material available on record and the facts in their entirety, it is revealed that the genesis and origin of the prosecution version have been suppressed and the true version has been prevented from coming into the FIR. In this respect, it is settled law that when the prosecution has not produced the true version of the events, the Court cannot create a new case for the prosecution in support of an unreliable prosecution story. The Hon'ble Apex Court observed that if the genesis and origin of the occurrence are suppressed by the prosecution, then the accused person will be entitled to the benefit of the doubt.

70. It is notable that the main allegation of inflicting injuries with a Baka is against the accused since deceased and the allegation for opening fire and inflicting blows with a Baka is against accused Shesh Tiwari, who has passed away during the pendency of the appeal with regard to role of the surviving appellants, the evidence adduced by the prosecution is neither reliable, clinching, nor cogent, and also it does not inspire confidence.

71. In view of the above and considering the case in hand in the light of the law as discussed, this Court finds that the cumulative effect of the evidence leads to the undeniable conclusion that the prosecution has failed to prove the guilt of the appellants beyond all reasonable doubt. The conviction against the accused is not sustainable in the eyes of law due to the confluence of the admitted political enmity, the complete hostility of the independent witnesses, and the inherent improbability of open-face dacoity by known neighbours. The learned Trial Court erred fundamentally in ignoring these vital deficiencies. The hypothesis that the crime was committed by unknown miscreants and that the appellants were falsely implicated due to the ongoing political 'partybandi' is a highly probable and reasonable hypothesis that the prosecution has

utterly failed to exclude from the realm of possibility. The entire investigation also appears defective. Since the identification is highly questionable and the underlying crime of dacoity itself is not proven, the appellants are legally entitled to the benefit of the doubt.

72. Thus, considering the overall facts, evidences and circumstances of the case, we are of the view that the impugned judgment and order dated 17.12.1988 passed by the Ist Additional Sessions Judge, Lakhimpur Kheri, in Sessions Trial No. 40 of 1988, convicting the appellants under Section 396 IPC and sentencing them to life imprisonment, is hereby liable to be set-aside.

73. The appeal is, accordingly, **allowed**. Consequently, the judgment and order of conviction and sentence are set-aside. The appellants are acquitted of the charges levelled against them. The appellants, namely, Mangoo Lal, Maqbool, and Bhai Lal, are reported to be on bail. They need not surrender. Their bail bonds are stood cancelled, and sureties are stood discharged.

74. Let a copy of this judgment, along with the lower court record, be sent to the court concerned for immediate compliance and necessary action.

(Pramod Kumar Srivastava,J.) (Rajiv Gupta,J.)

January 06, 2026

Haseen U.