

**Reserved**

**AFR**

**Court No. - 45**

**Case :-** CRIMINAL APPEAL No. - 1826 of 1983

**Appellant :-** Prem And Others

**Respondent :-** State of U.P.

**Counsel for Appellant :-** , Ajay Kumar Pandey, Bharat Singh, Preet Pal Singh Rathore

**Counsel for Respondent :-** A.G.A., S.S. Tomar

**Hon'ble Manoj Misra, J.**

**Hon'ble Sameer Jain, J.**

**(Delivered by Manoj Misra, J)**

1. This appeal is against the judgment and order dated 03.08.1983 passed by Special Judge, Badaun in Sessions Trial No. 318 of 1981 thereby, convicting the appellants under Sections 396 I.P.C. and sentencing them to imprisonment for life. The appeal was filed by seven persons, namely, Prem, Mohar Singh, Ramesh, Banwari, Bhagwan Singh, Rajendra and Rajpal. Out of them, appellant no.1 (Prem); appellant no.3 (Ramesh); and appellant no.4 (Banwari) have died and their appeal was abated by order dated 20.11.2015. Therefore, this appeal survives for appellant no.2 (Mohar Singh son of Nathu); appellant no.5 (Bhagwan Singh son of Happu); appellant no.6 (Rajendra son of Happu); and appellant no.7 (Rajpal son of Khannu).

**INTRODUCTORY FACTS**

2. On an oral report made by Ganga Sahai (PW-1), a first information report (FIR) (Exb. Ka-1) was registered on 16.05.1980, at 22:00 hours, as Case Crime No. 96 of 1980, under Section 395/397 I.P.C., at P.S. Sahaswan, district Budaun, against twelve persons out of whom, eight persons, namely, Gajram (not put to trial as he had died), Prem

(appellant no.1 - died during appeal), Mohar Singh (appellant no.2), Ramesh (appellant no.3 - died during appeal), Banwari (appellant no.4 - died during appeal), all sons of Nathu; Bhagwan Singh (appellant no.5), Rajendra (appellant no.6), both sons of Happu; and Rajpal (appellant no.7), son of Khannu, were named. In the FIR it is alleged that at about 9 pm while informant's brother Ram Singh (the deceased) and informant's nephew Ranbir Singh (PW-4), son of the deceased Ram Singh, were at their shop, the informant heard their shrieks. In response, the informant and his brother Dhan Singh (PW-2) and others picked up lathi, torches and went to the spot. Where they saw, informant's brother - Ram Singh and informant's nephew - Ranbir Singh being assaulted by 10-12 persons, who had guns, pistol, *Ballam*. When the informant party challenged them, one of the miscreants assaulted Ranbir Singh with Ballam and, a fellow villager, namely, Gajram son of Khayali, shot Ram Singh and aimed at the informant party, which terrified the informant party and they retreated to the safety of their homes and from there they started pelting brickbats, etc. upon the miscreants. But the miscreants (i.e. dacoits) kept looting articles. In the meantime, informant's wife set haystack on fire, which lit the area. After looting the house of the informant, the dacoits went to the house of Nem Chand son of Lakhan (not examined), and as soon as Kalyan son of Lakhan (not examined) opened the door, a shot was fired at him by a dacoit and the pellets of that shot struck Kalyan's wife Champa Devi (not examined). Thereafter, the dacoits went to the house of Saudan Singh (not examined), Hari Ram (PW-5), Naresh Pal (not examined) and Baburam (not examined) and looted articles. It is alleged that the dacoits took away mare of Hari Ram (PW-5). After looting the articles, the dacoits went

away towards west. After alleging as above, it was stated that amongst 12 persons who committed dacoity, the informant party, in the light of torches, etc., could identify 8 fellow villagers, namely, Gajram, Prem, Mohar Singh, Ramesh, Banwari, Bhagwan Singh, Rajendra and Rajpal. Having made the allegations as above, it was also alleged that the accused Bhagwan Singh had falsely implicated the informant in the murder of Bhure and Happu; in respect of which, a case is pending. It was alleged that because of that case, the present set of named accused were inimical to the informant. It was also alleged that out of 10-12 dacoits, Gajram and 2 or 3 others were wearing Khakhi coloured clothes whereas, the rest were normally dressed. The FIR also gave details of the articles looted.

3. On a Chhitthi Majroobi (letter for medical examination of the injured), dated 16.05.1980, Ranbir Singh (PW-4) was medically examined for his injuries on 17.05.1980, at 1 am, at PHC - Sahaswan. The injury report (Exb. Ka-5), the genuineness of which was admitted, reveals following injuries:-

(i) Incised wound 0.5 cm x 0.25 cm x muscle deep on left side of chest, 3 cm below left nipple;

(ii) Incised wound 1.5 cm x 0.25 cm x muscle deep on front of abdomen on right side, 1 cm above the umbilicus.

According to the opinion of doctor, all injuries were simple in nature, caused by sharp edged weapon; and fresh in duration.

4. Similarly, Smt. Champa Devi was also examined on 17.05.1980 at PHC Sahaswan. Her injury report (Exb. Ka-6) reveals following injuries:-

(i) Firearm wound of entry 0.25 cm x 0.25 cm x skin deep on outer side of right upper arm, 4 cm above the elbow joint.

According to the opinion of the doctor, injury was simple, caused by firearm; and fresh in duration.

NOTE: The defence accepted the genuineness of this document and therefore it was marked an Exhibit.

Interestingly, in this injury report, the time of examination mentioned is 2 pm on 17.05.1980.

5. The other injured, namely, Ram Singh, died on 08.06.1980, at about 3.20 pm, in the District Hospital. His post-mortem examination was conducted on 09.06.1980 at 4 pm. The post-mortem report (Exb. Ka-4) of which the genuineness was admitted, reveals that he died of Septic due to Pus formation. It be noticed that there is no dispute that the deceased (Ram Singh) had suffered gun shot injuries in the incident.

6. Sri R.D. Yadav, S.O., Sahaswan (not examined) started the investigation. He collected the kerosene lamp (Dibby) of the informant as also the torches in the light of which the incident could be seen. The custody of these items were provided back to its owners of which custody memos were separately prepared, which were exhibited as Exhibit Ka-2 and Ka-3, respectively. He collected blood-stained and plain-earth from two spots, namely, the shop of Ram Singh and the house of Kalyan, of which memos were separately prepared and exhibited as Exhibit Ka-8 and Ka-12, respectively. He collected two empty cartridges from near the shop of Ram Singh of which a memo was prepared and exhibited as Exhibit Ka-9. He also collected sample of burnt ash from near the house of the

informant of which a memo was prepared and exhibited as Exhibit Ka-10. He also prepared a custody memo of lantern, alleged to have been lit in the shop of Ram Singh, which was exhibited as Exhibit Ka-11. He prepared a custody memo of a kerosene lamp (Dibby) lit in the house of Kalyan at the time of the incident, which was exhibited as Exhibit Ka-13. He prepared a memo of lifting empty cartridge and pellets from the house of Kalyan, which was exhibited as Exhibit Ka-14. He also prepared a memo of collection of blood stained Dhoti of injured Kalyan, which was exhibited as Exhibit Ka-15. Inquest with regard to the deceased - Ram Singh, was held at the mortuary of Civil Hospital, Bareilly on 08.06.1980. The genuineness of the inquest report was admitted and it was exhibited as Exhibit Ka-20. After investigation, charge-sheet (Exb. Ka-16) was submitted on 18.07.1980 by PW-6 (the second investigating officer) against 7 persons (i.e. only the named accused-the appellants), with a remark that the other named accused Gajram had died. On the charge-sheet, after taking cognisance, on 09.08.1982 charges relating to offences punishable under Sections 396 and 307 I.P.C. were framed.

7. During the course of trial, six prosecution witnesses were examined, namely, PW-1 Ganga Sahai - informant, PW-2 - Dhan Singh (the brother of the informant); PW-3 - Kallu (one of the victims of dacoity, who was declared hostile); PW-4 -Ranbir Singh (the son of the deceased and nephew of the informant - the person injured); PW-5 - Hari Ram (one of the victims of dacoity); and PW-6 - P.P. Mishra (the investigating officer who submitted charge-sheet).

8. The incriminating circumstances appearing in the prosecution evidence were put to the accused for recording their statement under Section 313 Cr.P.C. The surviving

appellant Mohar Singh claimed that he has been falsely implicated; that in the murder of Happu and Bhure, Ganga Sahai was an accused, wherein he was a witness, therefore, he has been falsely implicated. Appellant-Bhagwan Singh stated that in the murder of his father (Happu), Ganga Sahai (the informant), Ram Singh (the deceased), Ranbir Singh (PW-4), Dhan Singh (PW-2), and Hari Ram (PW-5) were all accused therefore, he has been falsely implicated. Appellant-Rajendra gave identical statement as given by Mohar Singh, which is, that he is a witness in the murder of Happu and Bhure. Whereas, appellant-Rajpal claimed that he is an associate of Rajendra and Bhagwan Singh therefore, he has been falsely implicated.

9. The trial court held that the factum of armed dacoity is proved; the death of one of the victims of dacoity, after 21 days of hospitalisation, on account of septicaemia as a result of injuries received at the time of dacoity, is proved; the injuries of PW-4 are also proved; the first information report was lodged promptly; that PW-4, the injured witness, and other persons in whose house dacoity was committed, have disclosed the presence of the accused-appellants, therefore, there is no reason to doubt their version, hence, they were all liable to be convicted under Section 396 I.P.C. As the charge of an offence punishable under section 307 IPC was found covered by the charge of dacoity, no separate conviction on that charge was recorded.

10. We have heard Sri Ajay Kumar Pandey along with Sri Bharat Singh for the surviving appellants - Mohar Singh, Bhagwan Singh, Rajendra and Rajpal; Sri Pankaj Saxena along with Sri Amit Sinha, learned A.G.A., for the State; and have perused the record.

**SUBMISSIONS ON BEHALF OF THE SURVIVING**  
**APPELLANTS**

11. Learned counsel for the appellants submitted that this is an interesting case where all the named accused except Rajpal (appellant no.7) are residents of the same village where the dacoity is alleged to have been committed. Twelve persons are said to have participated in the dacoity including 8 named accused. It is an admitted fact that in the murder of Happu and his brother Bhure, Ganga Sahai (the informant), Dhan Singh (PW-2); Hari Ram (PW-5); Ram Singh (the deceased); and Ranbir Singh (PW-4) were accused. Interestingly, amongst all the witnesses of fact, PW-3, who is not an accused in the murder of Happu, has not disclosed the name of any of the dacoits and has stated that he could not recognise them. It cannot be a mere coincidence that only those victims of dacoity have named the accused who held enmity with the named accused; whereas those who held no enmity have not named the accused-appellants. The prosecution has not led any evidence to show that the accused-appellants were men of criminal antecedents or were dreaded dacoits against whom reports were there from before, or were proclaimed offender who cared a damn about law and order, under these circumstances, it is unbelievable that the accused-appellants, if were to commit dacoity in their own village, would not cover their faces to hide their identity. The prosecution story to the extent of participation of the accused appellants in the dacoity, without masking their identity, defies logic, and is a circumstance which suggests that the informant has taken the factum of dacoity as an opportunity to falsely implicate the accused- appellants.

12. It has been urged that in the prosecution evidence it has come that, out of 12 dacoits, four had sported police dress (*Khakhibana*). Thus, part of the gang of dacoits were hiding their identity, under these circumstances, it is unacceptable that those who were residents of the same village would not hide their identity. This clearly indicates that it is a case of false implication.

13. As regards prompt lodging of the first information report, the learned counsel for the appellants submitted that the first investigation officer of the case and the clerk/constable who registered the report have not been produced as a witness therefore, the accused-appellants were deprived of the opportunity to elicit from them that the FIR was ante-timed. In this regard it was pointed out that various memorandums prepared on 17.05.1980, during the course of investigation, namely, Exhibit Ka-2, Exhibit Ka-3, Exhibit Ka-8, Exhibit Ka-9, and Exhibit Ka-11, which all appear to be in one handwriting, do not bear the case crime number and other details of the case in connection with which those memorandums were prepared whereas, Ex-Ka-10 which is in same writing carries the case crime number in English language, which appears interpolated. But, interestingly, Exhibit Ka-12, Exhibit Ka-13, Exhibit Ka-14, Exhibit Ka-15, which were also prepared on 17.05.1980, appear in a different handwriting though, they carry the case crime number. Most importantly, the *majroobi chitthi* (letter for examination of the injured) of PW-4 and Champa Devi (not examined), marked Exb Ka-5 and Exb Ka-6, do not bear the case details which is suggestive of the fact that when they were sent for medical examination, no first information report had come into existence. It has also been urged that as per the Chik FIR (Exb. Ka-1), the FIR was lodged at 22.00 hours (10 pm) on



16.05.1980, whereas, if the incident occurred at 9 pm on 16.05.1980, as is the case, and the distance between the place of the incident and the police station is 3 kms, the same appears too prompt. Further, the FIR has been made orally yet, it is a detailed report which, keeping in mind that there were several victims of dacoity who had also sustained injuries and required immediate attention, would suggest that it was made with composure and after deliberation. This circumstance, by itself, evokes suspicion with regard to the report being ante-timed.

14. It was urged that as all the witnesses were highly inimical and interested, there was a need for corroboration from independent evidence such as recovery of the weapons of assault or the articles looted or by deposition of those victims of dacoity who were not inimical to the accused-appellants. But, interestingly, this is a case where there is no recovery, either of the weapon of assault or of the looted articles, either from the accused-appellants or from anybody else. It was also urged that the first investigating officer of the case has not been examined and no reason for his non-examination has come in the testimony of the police officer who proved the police papers by proving the signature of the first investigating officer. Under the circumstances, the testimony of highly interested witnesses have got no corroboration from other material.

15. Lastly, learned counsel for the appellants submitted that the trial court overlooked an important feature, which is, that in the testimony of all the prosecution witnesses, except for naming the accused-appellants as being part of the Gang, there is no disclosure about the role played by the accused-appellants during the course of dacoity. Further, there is nothing in the testimony to show as to with what weapon the

accused-appellants were armed and who inflicted which injury and to whom. Absence of disclosure in this regard, according to the counsel for the appellant, is a clinching circumstance suggestive of the fact that the informant took advantage of the occurrence of dacoity to implicate persons with whom he held enmity. It is thus a case where the prosecution story as regards the involvement of the accused-appellants in the dacoity is shrouded in suspicion and that suspicion has not been dispelled by the prosecution, therefore, the appellants are entitled to the benefit of doubt. It has been prayed that the judgment and order of the trial court be set aside.

#### **SUBMISSIONS ON BEHALF OF THE STATE**

16. Per contra, the learned A.G.A. submitted that as the factum of dacoity is duly substantiated and not seriously disputed and the first information report has been lodged promptly; there being an injured witness to disclose the presence of the accused-appellants as part of the Gang, it stood proved that the appellants were part of armed dacoits that committed murder in the act of looting, which, by itself, is sufficient to convict the appellants under Sections 396 I.P.C. therefore, the judgment and order of the trial court calls for no interference.

17. As regards the possibility of false implication and the argument that the accused being residents of the same village would not have participated in dacoity without masking their faces, the learned A.G.A. submitted that there is no hard and fast rule that a person committing dacoity in his own village would always mask his identity. It is the psychology of the criminal that lets him take such a decision and that psychology is not for the court to guess. Often, criminals to show their devil may care attitude do not care to mask their face. In this context,

the learned counsel for the appellants placed reliance on certain observations in the impugned judgment as also on a decision of the apex court in the case of *Siyaram v. State of Bihar*, 1973 (3) SCC 241.

18. On the issue of the FIR being ante-timed, the learned A.G.A. submitted that no suggestion has been given to PW-1 (the informant) that the FIR was ante-timed therefore, the appellants cannot take advantage of non-examination of the investigating officer or the police clerk, who made entries on the oral report.

19. In respect of absence of evidence with regard to recovery of incriminating material from any of the accused-appellants, the learned A.G.A. submitted that this may be a lapse on the part of the investigating officer of which the benefit should not go to the accused, because here, there is a credible ocular account of the incident. It has been urged that once the factum of dacoity is proved beyond doubt and the presence of the appellants as part of that gang of dacoits has been proved by an injured witness, the trial court stood justified in recording conviction therefore, the appeal deserves to be dismissed.

### **PROSECUTION EVIDENCE**

20. Before we proceed to weigh the rival submissions, it would be apposite to have a glimpse at the prosecution evidence in some detail. The prosecution examined six witnesses. Their testimony, in brief, is as follows:-

**20 (i) PW-1- Ganga Sahai.** He is the informant, brother of deceased (Ram Singh) and uncle of injured Ranbir Singh. He states that at the time of dacoity, Ram Singh and Ranbir Singh (PW-4) were at their general merchandise shop in the village. PW-1 heard their shrieks. On hearing their shrieks, PW-1,

Roopram (not examined), Dhan Singh (PW-2), Munsii (not examined), Babu Ram (not examined), Saudan Singh (not examined), Sukhram (not examined) and others went to the spot with lathi and torches, there they saw 10-12 men armed with Guns, Pistols, *Ballam* and *Gandasa* assaulting PW-1's brother and nephew. When PW-1 and his men arrived and intervened, the dacoits assaulted PW-4 with *Ballam* and Gajram and Bhagwan Singh fired from their guns at the interveners, who took shelter of the wall of their house and started pelting stones/bricks at the dacoits. Thereafter, the dacoits looted articles from the house of PW-1, including his brothers, as also from the house of Dhan Singh, Ram Singh and Munsii. At that time, to lit the area, PW-1's wife set straw leaves on fire. The dacoits thereafter entered the house of Nem Chand and also fired a shot at Kallu (PW-3) i.e. brother of Nem Chand. The pellets of that shot, hit Champa Devi i.e. wife of PW-3. Thereafter, the dacoits committed dacoity in the house of Babu, Saudan, Hari Ram (PW-5) and Naresh Pal (not examined) and they took away the mare of Hari Ram. After committing dacoity, the dacoits escaped towards the west. PW-1 stated that on account of the injuries received in the incident, PW-1's brother-Ram Singh died twenty four days later. After narrating the incident as above, PW-1 stated that at the spot he had spotted Gajaram, Bhagwan Singh (appellant no.5), Rajendra (appellant no.6), Prem (appellant no.1), Ramesh (appellant no.3), Mohar Singh (appellant no.2), Rajpal (appellant no.7) and Banwari (appellant no.4). He stated that except for Rajpal, all the other accused are residents of the village of PW-1. In respect of Rajpal, he stated that he used to visit the village often with Gayaram. PW-1 also stated that prior to this incident, Happu (father of Bhagwan Singh - appellant

no.5) was murdered in which Bhagwan Singh had implicated PW-1 and his brothers along with 14 others, which case is pending. He also stated that because of that case there is enmity. PW-1 stated that after the incident got over, he took the injured to the police station. There, on his oral report, the first information report was written which was thumbmarked by him. The said report was exhibited as Exb. Ka-1. Thereafter, the police station incharge recorded his statement and sent the injured to the hospital. He stated that when the investigating officer had come to the village he had seized the Dibby (kerosene lamp) and it was handed over to his custody. He also produced the custody memo of the torch/batteries.

**20(ia) In his cross-examination**, he stated that along with Happu (the father of Bhagwan Singh), Happu's brother Bhure was also killed in the incident which had taken place a year before the present dacoity. He admitted that in that case, PW-1 and his brothers were implicated along with Hari Ram, Mahesh, Bhawan Lal, Bhan Singh, Munsu, Saudan. He stated that in that case including him and his family members i.e. brothers and nephews, there were about 10 accused. He admitted that in that case, Prem (appellant no.1) and Mohar Singh (appellant no.2) were witnesses. He also admitted that Ramesh (appellant no.3) and Banwari (appellant no.4) are real brothers of appellant no.2 (Mohar Singh) whereas, Rajendra (appellant no.6) and Bhagwan Singh (appellant no.5) are sons of Happu and brother of Bhure. Rajpal (appellant no.7) is nephew of Bhagwan Singh (appellant no.5) and Rajendra (appellant no.6).

**20(ib)** On further cross-examination, he stated that his brother Saudan Singh was abducted by criminals in respect of which a case was lodged against Bhagwan Singh (appellant

no.5), Rajendra (appellant no.6) and Gajram but they were all acquitted. He also stated that about 8-10 years back, there was another incident in connection with which there was a case against Ram Singh (the deceased) in connection with which Gajram and Malkhan were tried but acquitted. He added that after this incident, Gajram absconded and is no longer residing in the village.

**20 (ic)** In respect of the distance between PW-1's house and deceased's shop, he stated that the distance between the two would be about 100 paces and in between, there are many other houses. He stated that at the time of the incident, he was sitting in his house on a cot where Roopram, Dhan Singh, Munsu and Saudan were also sitting. He stated that by the time he reached the spot, he heard a gunshot and cries; responding to that noise, they all took lathi to go to the spot. When PW-1 arrived at the spot, he saw his brother (the deceased) and his nephew (PW-4) being assaulted. PW-1 stated that when he reached the spot, the accused pushed him and fired at him but he escaped by taking shelter of the wall of that shop. He stated that by the time the dacoits reached PW-1's house, PW-1 had already retreated to his house; other witnesses were also trying to hide themselves in PW-1's house. He stated that the dacoits looted his house for about half an hour and, thereafter, they went to the settlement of Jatavs to loot and thereafter, the dacoits vanished.

**20 (id)** In paragraph 15 of his statement, during the course of cross-examination, he stated that in the night itself *Daroga* (Station House Officer of the police station concerned) had come to the village and had taken the injured persons with him and along with him he had also gone to the police station. He stated that *Daroga* had enquired from the villagers about the

incident in the village and had also queried them at the police station. Next day, again, *Daroga* had come to visit the shop and the house and had prepared site plan. In paragraph 16 of his statement, PW-2 stated that the accused had not covered their faces with *Dhata* (cloth). He stated that he had mentioned in his report that accused Bhagwan Singh (appellant no.5) had also fired but if that was not written he does not know the reason for the same. He denied the suggestion that the accused have been implicated on account of enmity. He also denied the suggestion that he could not recognise the real accused and that the dacoity was committed post midnight.

**20 (ii) PW-2- Dhan Singh.** He also stated about the occurrence of dacoity by 10-12 persons. He stated that amongst the dacoits, he could recognise Bhagwan Singh, Rajendra, Prem, Mohar Singh, Ramesh, Banwari, Rajpal and Gajram. He reiterated that Ram Singh was shot by Gajram and someone, from amongst the dacoits, struck Ranbir (PW-4) with a Ballam. He stated that dacoits looted not only the house of the informant and his brothers but also of other fellow villagers, namely, Baburam, Ram Prasad, Kallu and Hari Ram and, in that process, they took away the mare of Hari Ram. He stated that in the incident, Ranbir, Kallu and his wife Champa had received injuries whereas, as a result of the injury which Ram Singh sustained, Ram Singh died 24 days later. In paragraph 4 of his statement, he stated “मेरी भाभी ने सरकटे के पूलों में आग लगा दी इसकी काफी रोशनी हुयी। यह डकैती भगवान सिंह ने पुरानी रंजिश की वजह से डलवाई।”

**20 (iia) In his cross-examination,** he stated that by the time they could reach the shop, Ram Singh had already been shot and, thereafter, when the accused had aimed at the informant party, they hid behind the wall and ran to the safety of

their homes. He stated that when the accused tried to enter their houses, stones were pelted at them. He reiterated that the accused were armed with Tamancha, Ballam, Pistol, Gun. In paragraph 8, he stated that after the dacoits had left, the villagers collected to lodge a report of dacoity. Then, at the police station, his brother lodged the report, whereas, PW-2 took his other relative to the hospital. He stated that from the village they went to the police station on a bullock-cart. His brother Saudan had reached the police station before him and he had brought the *Daroga* with him, whereafter, the *Daroga* took them to the hospital. He denied the suggestion that on the date of the incident, he was not in the village and that he has made a false statement on account of enmity. He claimed that he has no knowledge whether Kalyan and others had lodged a separate report of the incident.

**20 (iii) PW-3-Kallu.** He confirmed the occurrence of dacoity and stated that the dacoits, after committing dacoity at the house of PW-1, came to his house as well, and they looted for about half an hour. He stated that there was no fire lit at that time though light of torches was there. He stated that he cannot give a count of the dacoits; and that he did not see face of any dacoit. He stated that he was asked to open the door and when he opened the door, four shots were fired, out of which two hit him, as a result of which he fell unconscious. At this stage, he was declared hostile by the prosecution and was cross-examined by the prosecution. On a suggestion made by the prosecution, he denied that his statement was recorded by the Tehsildar.

**20 (iv) PW-4-Ranbir Singh.** He is the person who received injuries in the incident. He stated that the incident occurred at about 9 pm; there were 12 dacoits; at the time of



the incident, he was sitting near the shop of his father (the deceased) where a lantern was lit; the dacoits had arrived there through a Gali; and Gajram fired a shot at his father. Because of that shot, his father died at Sadar Hospital, Bareilly. Dacoits also beat him with lathi and *Ballam*. Dacoits had looted a mare of Hari Ram and they looted the house of Babu as well as Ganga Sahai. He stated that his aunt (बड़ी माँ) had lit haystack, in the light of which he could notice Bhagwan Singh, Rajendra, Prem, Mohar Singh, Banwari, Rajpal and Ramesh. The rest of the dacoits, he could not recognise. He stated that all the named accused except Rajpal are residents of his village whereas Rajpal is the *Behnoi* (sister's husband) of Bhagwan Singh.

**20 (iva) In his cross-examination,** he stated that he arrived at the shop an hour before the incident and except him and his father there was nobody in the shop. His father was sitting on a cot whereas he was inside the shop. The dacoits on arrival, first, shot his father and when PW-4 came out, he was assaulted with *Ballam* and lathi. On being assaulted, he fell, but was conscious. His father, on being hit by gun shot, fell on the cot. The dacoits after leaving him and his father, went to loot other houses and when all the dacoits left, his family and villagers arrived and collected at the spot. In paragraph 4 of his statement, he stated that in the night, the police had arrived and they took him and his father to the police station. He stated that he is not aware as to who had called the police. He stated that the investigating officer had interrogated him on the third day. He stated that he is not aware as to how many shots had hit his father. He admitted that the dacoits also looted other houses. He denied the suggestion that he could not recognise the dacoits and because of enmity, he had named the accused-

appellants.

**20 (v) PW-5 - Hari Ram.** He reiterated the incident of dacoity and stated that his mare was looted by the dacoits. He stated that amongst the dacoits, he could recognise Bhagwan Singh, Rajendra, Ramesh, Banwari, Prem, Mohar Singh, Rajpal and Gajram in the light of torches and there were four others, whom he could not recognise. He stated that the dacoity lasted for about 1 and ½ to 2 hours. He stated that the dacoits were armed and were in Khakhi dress: “(डाकूओं पर हथियार थे और खाकी बाने में थे)”

**20 (va) In his cross-examination,** he stated that his house is about 50-60 paces from the shop of the deceased (Ram Singh). He stated that his mare was taken by breaking open the door of his house. In paragraph 3, he stated that when the incident occurred, he understood that dacoits have come to the village and, therefore, his wife ran to another house and he went to the roof-top of his house. The dacoits pushed and broke open the door of his house and when the dacoits went away, he came out. He stated that the investigating officer interrogated him, next day morning. He stated that along with mare, dacoits also took utensils, clothes, etc. He admitted that in the murder of Happu and Bhure, he and his sons were accused but denied the suggestion that because of old enmity, he is making a false statement. He denied the suggestion that he could not recognise any of the dacoits.

**20 (vi) P.W.-6 - P. P. Mishra.** The investigating officer, who submitted charge-sheet. PW-6 stated that he was posted at the police station concerned in the month of June-July, 1980. He took over investigation of the case from R.D. Yadav. He proved the signature of Head Constable Dinesh Singh on the Chik FIR (Exb. Ka-1) as well as the GD entry thereof (Exb. Ka-

7). He proved the signatures of R.D. Yadav on Exb. Ka-2, Exb. Ka-3 and Exb.Ka-8 to Exb. Ka-15. He stated that he read the case diary of the case and from a perusal of the case diary, he could gather that R.D. Yadav had inspected the spot on 17.05.1980 but the site plan was missing. He stated that all the named accused have been charge-sheeted by him. He proved the charge-sheet which was marked as Exb. Ka-16. He stated that all the accused had surrendered. He also stated that the accused Gajram was absconding and has been killed in a police encounter.

### **ANALYSIS**

21. Having noticed the rival submissions and the entire prosecution evidence led during the course of trial, the key features that stand out in the prosecution evidence are as follows:-

(a) The factum of dacoity is not challenged as would be clear from the suggestions put to the prosecution witnesses. Though, its time has been challenged by putting a suggestion to one of the witnesses;

(b) There are three sets of accused. One (i.e. Gajram) is named but not related to any of the other named accused including the present set of appellants; the other set, comprising seven persons including the appellants, are related to each other and all of them, except Rajpal, reside in the same village where dacoity was committed; and, the third set of accused are unknown persons. In respect of Gajram, in paragraph 10 of the statement of PW-1, during the course of cross-examination, it has come that Gajram had been absconding since after another incident and that though

he (Gajram) was earlier a resident of the village but was no longer residing in the village. PW-1, however, denied the suggestion that Gajram was of PW-1's party. PW-1, in paragraph 8 of his statement, during the course of cross-examination, admitted that 8-10 years ago, in a case of burglary in the house of Happu (the father of Bhagwan Singh and Rajendra), a case was instituted against PW-1's brother-Ram Singh (the deceased), Gajram (co-accused of this case), Malkhan and others in which they were acquitted;

(c) The role of causing gun shot injury to the deceased is attributed to Gajram. No specific role of causing any specific injury is attributed to any of the other accused. Further, as to what article was looted by whom and as to who (excepting Gajram) caused which injury is not disclosed in the prosecution evidence;

(d) The prosecution led no evidence of recovery of any incriminating material from any of the accused persons even though, according to the allegations, the dacoit lifted clothes, utensils and other articles which could have been identified and correlated with dacoity, if there had been a recovery; and

(e) The enmity between the named accused (the appellants of this case) and the informant as well as three of the four witnesses of fact is proved as follows:- Father of Bhagwan Singh and Rajendra, namely, Happu, and his brother - Bhure were killed about a year before the incident in which Ganga Sahai (informant-PW-1), Ganga Sahai's brothers, namely, Dhan Singh (PW-2), Ram Singh (the deceased), Ganga Sahai's nephew (i.e. Ranbir - the injured - PW-4), Hari Ram

(PW-5) were accused;

(f) The dacoits, according to the prosecution story and the evidence led during the course of trial, looted not only those with whom they had enmity but other residents of the village also. One of the villagers whose house was looted by the dacoits, namely, Kallu (PW-3), though supported the allegation of dacoity but resiled from the prosecution case on two important counts:-

(a) That he did not count the number of dacoits and could not recognise/notice their faces;

(b) That though there were light of torches but there was no fire lit;

(g) The other victims, except Kallu (PW-3), who did not bear enmity with the named set of accused, have not been examined during the course of trial;

(h) The investigating officer of the case, who prepared the seizure memos as well as the police personnel who were posted at the police station at the time of lodging the FIR and who may have prepared *Chitthi Majroobi* have not been examined and the investigating officer, who did not conduct the earlier stages of investigation, though submitted charge-sheet on the basis of previous record, was examined only to prove the signature on various documents prepared during the course of investigation by the earlier I.O.

22. After examining the key features in the prosecution evidence, we find that the defence has not seriously challenged the occurrence of dacoity in the village on that fateful night though there appears a dispute with regard to its time. In view whereof, the trial court was justified in recording a finding that

the commission of dacoity in the village on that fateful night has been duly proved. Thus, the only question that falls for our consideration is whether or not the accused- appellants were part of that gang of dacoits that committed dacoity in the village, or the informant and his relatives, who are highly inimical to the accused, have taken the incident of dacoity as an opportunity to falsely implicate his enemies i.e. the appellants, as being part of the gang of dacoits.

23. To demonstrate that it is a case of false implication of the appellants, the learned counsel for the appellants has highlighted the following circumstances:-

(i) That there were three sets of accused, one, known (i.e Gajram) but not related to the second set; second, known, seven in number including the appellants, who were related to each other but not related to Gajram; and the third, four unknown persons, who have not been sent to trial. Notably, the second set of accused, which includes the appellant, had strong enmity with the informant and his family including the prosecution witnesses of fact except PW-3, who did not support the prosecution case against the appellants.

(ii) The dacoity was committed not only at the house /shop of the informant party but also at other places in the village with whom the named accused-appellants had no enmity. In the circumstances, the accused-appellants who were residents of the same village would have had tried to mask their faces. The circumstance that they did not cover their faces while committing dacoity is relevant because it does not fit in the scheme of the prosecution case.

(iii) There is no corroboration to the prosecution case either by recovery of any incriminating material from the accused – appellants or by independent/ non-inimical witnesses.

24. The trial court has discarded the plea of false implication on the following grounds:-

(a) That the FIR has been promptly lodged therefore the possibility of the prosecution case being coloured with enmity is ruled out;

(b) There is an injured witness, who has supported the prosecution case; and

(c) Whether the accused would commit dacoity in his own village, without covering their faces, is not an acid test for the prosecution to pass, as it depends on the psychology of the accused, as has been observed by this Court in **Chandrabhan v. State :1981 CrLJ 196** as also by the Apex Court in **Siyaram Rai v. State of Bihar; 1973 (3) SCC 241**.

25. Before we proceed to analyse the submissions, it would be useful to notice a decision of the Supreme Court in somewhat similar situation where the accused had allegedly participated in the commission of dacoity at his neighbour's house and the factum of dacoity was duly proved and the eye-witnesses, apparently, were congruous and consistent in their deposition yet, upon finding the possibility of false implication very high, the apex court allowed the appeal of the convicted accused and acquitted him of the charge upon finding that intrinsic circumstances of the prosecution case raised considerable amount of suspicion regarding the complicity of the appellant in the dacoity. The relevant observations of the

Supreme Court in that case i.e. **Lakshman Prasad v. State of Bihar : 1981 (Supp) SCC 22**, contained in paragraph 3 of the judgment, are extracted below:-

*“3. The central evidence against the appellant consisted of the testimony of PWs 1 and 2 who were the servants of complainant PW 4 Baijnath Prasad. It appears from the evidence that Baijnath Prasad was a rich business man of the locality and the accused-appellant Lakshman Prasad was his next door neighbour having a double storey house. Both the courts below have accepted the prosecution case that a dacoity took place in the house of Baijnath Prasad in the course of which cash and other articles were stolen away. In the instant case, counsel for the appellant has not challenged this finding of the courts below. We are also satisfied that a dacoity undoubtedly took place in the house of Baijnath Prasad. The only question that falls for consideration is whether or not the appellant participated in the crime. PWs 1, 2 and 4 have supported the prosecution case that the appellant clearly participated in the dacoity and was, in fact, the leader of the dacoits. After going through their evidence, we do find that there is some amount of consistency in their evidence but mere congruity or consistency are not the sole test of truth. Sometimes even falsehood is given an adroit appearance of truth, so that truth disappears and falsehood comes on the surface. This*



*appears to be one of these cases. There are many inherent improbabilities in the prosecution case so far as the participation of appellant is concerned. In the first place, admittedly the appellant was a respectable man in the sense that he was possessed of sufficient means and was a well-known homeopath doctor and also the neighbour of the complainant. In this view of the matter, it is difficult to believe that he would commit dacoity in the house of his own neighbour and that too in the early hours of the evening, so that he may be caught any moment and take the risk of a conviction under Section 395 Indian Penal Code. Secondly, the evidence of the complainant PW 4 clearly shows that the dacoits had no doubt concealed their identify but they did it in such a way that their faces were visible. Indeed, if the appellant had participated in the dacoity and took the precaution of concealing his identity, then he would have seen to it that his face was fully covered so that identification by the complainant or the witnesses would become impossible. If he was a dare-devil, then he would not have concealed his identity at all. Thirdly, FIR having been lodged the same evening the police visited the house of the appellant next morning and found him there. If the appellant had really participated in the dacoity, he would have at least made himself scarce. The house of the accused was also searched and nothing*

incriminating was at all found. Finally, there was the important circumstance that in view of a dispute between complainant Baijnath Prasad and the appellant, there was a clear possibility of the appellant having been falsely implicated due to enmity. The complainant himself admits that there is a boundary wall around the house of the appellant and there is a road which runs to the east of his house and the mill of the complainant is situated to the west of the house. There is evidence of DW 2 that there has been some dispute between Baijnath Prasad and accused Lakshman Prasad two or three years before the occurrence of dacoity in respect of a passage near the house of accused Lakshman Prasad through which he used to go to his mill. The evidence of DW 2 does support what the complainant has himself admitted. The gravest provocation which the complainant must have felt was the fact that Lakshman Prasad bought a piece of land near his house from Kishori Lall, the nephew of Baijnath Prasad. This is proved by Ex. Kha and the evidence of DW 4. The High Court also observed that the sale-deed executed by the nephew of the complainant in favour of the appellant was executed only a month before this occurrence. This therefore furnishes an immediate motive for the false implication of the appellant. Another important circumstance which seems to have been overlooked by the courts below is that PW 4 has

clearly admitted in his evidence at page 44 of the paper-book that immediately after the occurrence, a number of people near the mosque assembled, of whom he recognized Suba Raut and Moti Raut, but they never came to his help. The witness also says that when he came from the west, he saw 40 to 50 persons at a little distance, including Ganesh Raut, Achhelal, Mathura Ram and Rameshwar. Obviously, if an occurrence of dacoity had taken place in the early hours of the evening, the near neighbours must have assembled and yet none of these neighbour have been examined to support the complainant's version that the appellant has participated in the occurrence. It seems to us that the reason why these persons did not choose to support the complainant was that perhaps the appellant had been falsely implicated and hence the persons who had assembled may not have relished the idea of supporting the complainant if he had gone to the extent of falsely implicating the appellant in the dacoity. These intrinsic circumstances speak volumes against the prosecution case and raise considerable amount of suspicion in our minds regarding the complicity of the appellant in the dacoity. It is well settled that while witnesses may lie, circumstances do not.

*(Emphasis supplied)*”

26. From the observations of the apex court, extracted above, what becomes clear is that mere consistency or congruity in

the testimony of the prosecution witnesses is not the sole test of truth as even falsehood can be given an adroit appearance of truth, so that truth disappears and falsehood comes on the surface. Therefore, what the court has to look at, and assess, is whether the prosecution evidence coupled with the surrounding circumstances has a ring of truth about it or there arises a strong suspicion and high probability of false implication of the accused put on trial. Bearing this in mind, when we embark upon the exercise to assess the prosecution evidence, we find that, no doubt, on record, the prosecution case is instituted on a prompt first information report and is supported by testimony of a person injured but, interestingly, no one disputes the factum of dacoity in the village on that fateful night. What is disputed is the accused-appellants being part of the gang of dacoits. When we see the evidence in this light, we find that the prosecution evidence is completely silent as to what the accused-appellants did at the time of dacoity. Except in the statement of one witness (i.e. PW-1) that Bhagwan Singh was carrying a gun and he fired a shot, there is no disclosure about the role of any of the accused appellants save that, that they were noticed. In fact, PW-1 who deposed about that, in the FIR, which was lodged by him and with which he was confronted, made no such disclosure. Even in respect of gunshot alleged to have been fired by Bhagwan Singh, it is not disclosed as to whom it was aimed at and who sustained what injury from it. Importantly, two persons were reported to have been examined for their injuries, one is PW-4 and the other is Champa Devi. Champa Devi has not been examined as a witness and PW-4 has sustained incised wounds, the author of which has not been disclosed by him. Interestingly, the only witness (i.e. PW-3) with whom the accused-appellants had no enmity and whose

house was also looted, does not support the prosecution case either with respect to the number of dacoits who participated in the dacoity or in respect of their identity. Further, we find that there is no recovery of any incriminating material from any of the accused-appellants to lend credence to the accusation against them. Another important feature that we notice from the testimony of the prosecution witnesses is that various houses in the village were looted and after the dacoits had left, the villagers had collected at one place. This suggests that there were independent witnesses also who were affected by the dacoity but the prosecution deliberately chose not to examine them. When we see all of this, coupled with the fact that the accused-appellants are residents of the same village where the dacoity had been committed yet, they chose not to cover their faces and nothing incriminating has been recovered from them, as also that all the accused do not appear to be of the same family or of the same village, it gives us a feeling that the dacoity in the village has been taken as an opportunity to falsely implicate the accused with whom the informant and the prosecution witnesses of fact except PW-3, who was declared hostile, had strong enmity.

27. At this stage, we may observe that the trial court has laid great emphasis on the first information report being promptly lodged. In this case we have noticed from the original record of the trial court that various recovery/ custody memos, namely, Exb. Ka-2, Exb. Ka-3, Exb. Ka-8, Exb. Ka-9, and Exb. Ka-11, all dated 17.05.1980, bear no details of the case i.e. crime number, in respect of which those memos were prepared. No doubt, there are other memos also, namely, Exb. Ka-12, Exb. Ka-13, Exb. Ka-14 and Exb. Ka-15 that bear the details of the case but those appear to be in a different handwriting than the

other exhibits, noticed above. Importantly, the *Chitthi Majroobi* (Exb. Ka-5 and Exb. Ka-6), under which the injured got themselves examined at the PHC, bear no case details. We may also notice that though the genuineness of the *Chitthi Majroobi* (Exb. Ka-5 and Exb. Ka-6) has been admitted by the defence but admission of its genuineness would not amount to accepting it as having been prepared after registration of the case. Interestingly, the medical examination of Champa Devi is of 2 pm on 17.5.1980 against a *Chitthi Majroobi* dated 16.05.1980 which bears no details of the case. Importantly, the first investigating officer of the case and the constable clerk, who prepared the Chik FIR, allegedly on oral dictation of the informant, have not been examined therefore, in our view, merely because the defence did not question the police witness (PW-6) on the issue whether the first information report was ante-timed or not, it would not absolve the prosecution of its responsibility to prove its case beyond reasonable doubt.

28. On the analysis above, though we agree with the finding of the trial court in respect of commission of dacoity in the village on that fateful night but we are of the considered view that the prosecution has failed to establish beyond reasonable doubt that the accused - appellants were part of the gang of dacoits that committed dacoity in the village. Rather, we have a strong suspicion, based on the facts of the case, the informant has taken the commission of dacoity in the village as an opportunity to falsely implicate persons with whom he had enmity i.e. the appellants along with other unknown dacoits including one Gajram who has been ascribed causing of gunshot injury to the deceased. The above suspicion could have been dispelled if the prosecution had produced independent witnesses i.e. non-inimical victims of the dacoity to

disclose the involvement of the applicants or had proved their involvement by recovery of looted articles or other incriminating material connecting the appellants with the crime. Admittedly, there is no recovery of any incriminating material from the accused- appellants and the only independent witness of fact, namely, PW-3, did not depose with regard to the involvement of the accused-appellants. Even the other prosecution witnesses of fact have not been able to demonstrate beyond reasonable doubt that as part of the gang of dacoits, the accused-appellants participated in the dacoity, either, by lifting or looting articles or, by causing injury to any of the victims. No doubt, we are conscious of the legal position that being part of a gang of dacoits, while the act of dacoity is on, is sufficient to make a member of that bunch of dacoits, present there, liable for conviction, but, here, the issue is whether, the appellants were a part of that bunch of dacoits or not, therefore, to test whether they were a part or not, we have taken notice of the aspects discussed above. Further, the investigating officer of the case has not been examined to explain non mentioning of the case details in the Chhitthi Majroobi as well as various memos prepared during investigation so as to enable us to be completely satisfied in respect of prompt lodging of the FIR. Further, the police clerk who registered the FIR was not produced as a witness.

29. For all the reasons above, we are of the considered view that the appellants are entitled to the benefit of doubt. Consequently, the appeal deserves to be allowed and is consequently **allowed qua the surviving appellants i.e. appellant no.2 (Mohar Singh son of Nathu); appellant no.5 (Bhagwan Singh son of Happu); appellant no.6 (Rajendra son of Happu); and appellant no.7 (Rajpal son of Khannu).**

The judgment and order of the trial court qua the surviving appellants (supra) is hereby set aside. All the surviving appellants (supra) are acquitted of the charges for which they have been tried. They are reported to be on bail, they need not surrender and their bail bonds are discharged, subject to compliance of the provisions of Section 437A Cr.P.C. to the satisfaction of the court below.

30. Let a copy of this order be sent to the trial court for information and compliance.

**Order Date :- 08.04.2022**  
Sunil Kr Tiwari