IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.91 of 2005

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Ram Bahadur Sahani, Son of Late Bindeshwar Sahni, Resident of Village – Izara, Police Station – Rahika, District – Madhubani.

... ... Appellant/s

Versus

STATE OF BIHAR

... ... Respondent/s

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with

CRIMINAL APPEAL (SJ) No. 95 of 2005

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Maheshi Sah @ Mahesh Sah , Son of Chunchun Sah, Resident of Village – Radhepura -Tola Yaddu Patty, Police Station – Bisfi (Patauna), District – Madhubani.

... ... Appellant/s

Versus

STATE OF BIHAR

... ... Respondent/s

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Appearance :
(In CRIMINAL APPEAL (SJ) No. 91 of 2005)
For the Appellant/s : Mr.Ajay Kumar Thakur, Adv.
Mr. Shivam, Adv.
Ms. Sushmita Mishra, Adv.
For the Respondent/s : Ms. Anita Kumari Singh.
(In CRIMINAL APPEAL (SJ) No. 95 of 2005)
For the Appellant/s : Mr.Ajay Kumar Thakur, Adv.
Mr. Shivam, Adv.
Ms. Sushmita Mishra, Adv.
For the Respondent/s : Ms. Anita Kumari Singh, APP

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CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY
ORAL JUDGMENT
Date : 20-04-2026

1. Since both the appeals arise out of the same judgment of trial Court, they have been heard together and are being disposed of by this common judgment.

2. Both the appeals are arising out of the judgment

of conviction and order of sentence dated 12.01.2005 and 15.01.2005 respectively passed in Sessions Trial No. 19 of 1993 /224 of 2003 on the file of Additional Sessions Judge, Fast Track Court No. 1, Madhubani, whereby, the appellant/Ram Bahadur Sahani in Criminal Appeal (SJ) No.91 of 2005 and appellant /Mahesshi Sah @ Mahesh Sah in Criminal Appeal (SJ) No.95 of 2005 were convicted for the offence punishable under Section 395 IPC and were sentenced to undergo rigorous imprisonment for a period of 07 years.

3. The case of the prosecution as per the fardbeyan of P.W.6/Bindeshwar Sahani is that in the intervening night of 25/26.06.1992 at about 12.30. A.M., the brother of the informant, namely, Raja Chaudhary Sahani, nephews Jivneshwar Sahani and Mukteshwar Sahani and Bhagina (Sister's son) of Uday Kumar Sahani were sleeping at east facing dalan i.e. west to the house of the informant. The informant was sleeping with his wife inside the house. He heard the noise of some

persons assaulting Jivneshwar Sahani for opening the door of the house. On that, the informant saw in the torch light that about 6 to 7 persons armed with pistol were asking about the informant and threatening to kill Jivneshwar Sahani. In light of torch, the informant noticed that the dacoits were aged around 20 to 25 years. Some of them were tall, some were of medium height, while some were short. One person, who was thin and tall and had a towel tied around his face, worn a check shirt and a sheet wrapped around his body, was holding a three cell torch in one hand and a pistol in another hand, who seemed to be the leader of the dacoits. Other dacoits were wearing vests and underpants, most of them were speaking a local language like Maithili. In the meantime, the informant's brother Chandeshwar Sahani opened the door from inside. On that all the accused rushed pushing him, as a result Chandeshwar Sahani fell down and sustained injuries. About 8 to 10 dacoits entered the house and rest of the

dacoits remained outside. The informant in order to save his life escaped through back door of the house and raised alarm in the village. The dacoits, who entered the house of the informant looted the household articles from the house. On hearing the alarm of the informant, the co-villagers, namely; Badri Sharma, Suran Sharma, Ram Avtar Sharma, Ramchandra Sahani and others gathered nearby the house of Badri Sharma. At that particular point of time, the informant along with other villagers set on fire, two loads of straw. On which, one of the dacoits who was standing outside the house hurled a bomb, which exploded in the courtyard of house/Badri Sharma causing injuries to him. The second bomb exploded towards north of the road, causing injuries to the villagers. After looting the articles, the dacoits threatened the villagers not to inform the loot to anyone or else, bombs will be hurled in the village and thereafter, they all fled away towards the agricultural field. Later, the informant returned to his house and noticed that the

following articles were looted from the house:-

(i) Silver anklet, weighing around 10 bhar, price around Rs. 1,000/-.

(ii) Silver neck band, weighing around 20 bhar, price around Rs. 2,000/-

(iii) Gold nose ring, weighing around 600, 2 ana bhar.

(iv) Red coloured cotton saree – 2 pieces, price around Rs. 200/-

(v) Tericotton saree – 4 green coloured, price around Rs. 500/-

(vi) Tericotton saree - 4 sky coloured and black coloured 2, price around Rs. 500/-

(vii) Checkered blanket black and white , price around Rs. 250/-

(viii) Old Citizen watch, price around Rs. 400/-

(ix) HMT Deputy watch and price around Rs. 150/-

(x) HMT Janta watch and price around Rs. 150/-

(xi) Ladies watch and price around Rs. 250/-.

(xii) Old Citizen ladies watch and price around Rs. 125/-

4. The dacotis, altogether looted the property worth Rs. 5,625/-

5. Basing on the said fardbeyan of the informant/P.W.6, an F.I.R. was registered vide Bisfi P.S. Case No. 0110/1992 at 6 P.M. on 26.06.1992, against unknown offenders for the offence punishable under Section 395 of IPC.

6. During the course of investigation the Police arrested the accused/person including the appellants, conducted Test Identification Parade and ultimately the chargesheet was filed against six of the accused persons, namely, Ram Bahadur Sahani (appellant in Criminal Appeal (SJ) No.91 of 2005), Chandeshwar Sahani (case split up), Maheshi Sah @ Mahesh Sah (appellant in Criminal Appeal (SJ) No.95 of 2005), Bhola Sahani (acquitted), Vishwanath Sahani and Rameshwar Sahani (records of these two accused got separated from the original), for the offence punishable under Section 395 IPC.

7. During the course of trial, the trial Court framed charges against the appellants,

for the offence punishable under Section 395 IPC, read over and explained to them in Hindi language, for which the appellants and other accused above-said, pleaded not guilty and claimed to be tried.

8. Further, the record reveals that subsequent to framing of charges, Accused/Chandeshwar Sahani was declared as an absconder and his case was separated vide order dated 27.02.2002. The case of accused Bishwanath Sahani and Ramsresta Sahani was also separate vide order dated 9/06/1994.

9. Altogether, the prosecution examined eight witnesses and marked two exhibits which are as follows:-

P.W.1	Badri Sharma	Co-villager of the informant
P.W.2	Asharfi Sahani	Tendered
P.W.3	Sumitra Devi	Wife of informant
P.W.4	Archana Devi	Tendered
P.W.5	Jivneshwar Sahani	Tendered
P.W.6	Bindeshwar Sahani	Informant
P.W.7	Shahid Khan	JMFC, Madhubani Civil Court
P.W.8	Ramchandra	co-villager

	Sahani	

Exhibit 1	fardbeyan
Exhibiti 2	Test Identification Parade

10. On completion of the prosecution evidence, both the appellants were examined under Section 342 Cr.P.C., for which, the appellants pleaded innocent.

11. Considering the entire (oral and documentary) evidence on record the trial Court convicted the appellants as aforesaid.

12. The point for determination in theses appeals are:-

(I) Whether the prosecution is able to prove the guilt of the accused, for the offence punishable under Section 395 IPC, beyond reasonable doubt?

(II) Whether the trial Court is right in convicting the appellants for the offence punishable under Section 395 IPC?

(III) Whether the court can tender the evidence of

witnesses i.e. P.W.s 2, 4 and 5 ?

(IV) Whether the Court can examine the accused under Section 342 of Cr.P.C.?

13 Heard Mr. Ajay Kumar Thakur, the Learned counsel for the appellants in both the appeals and Ms. Anita Kumari Singh, the Learned Additional Public Prosecutor for the State.

14. The Learned counsel for the appellants specifically contended that the testimony of P.W.6 shows a clear "improvement" and material contradiction from the initial fardbeyan (Ext.-1). The fardbeyan of informant/P.W.6, states that he fled through the back door of the house out of fear, but in his evidence, he admitted the fact that he himself opened the door. It is further contended that the informant suppressed details regarding his enmity with Bhola Sahani in the F.I.R. as well as in the fardbeyan, thereby suggesting that the appellants were implicated due to prior animosity. Finally, the Learned counsel argued that the Test Identification

Parade (T.I.P.) was conducted at a very belated stage; therefore, it cannot be relied upon to convict the appellants solely on the uncorroborated evidence of P.W.6, and prayed to the set aside the Judgment of conviction and the order of sentence passed by the trial Court.

15. On the other hand, the Learned APP submitted that as per Ext. 2/the Test Identification Parade dated 10.08.1992, there was no delay in conducting the Test Indentification Parade and that the date '10.08.1995' mentioned by the Judicial Magistrate (P.W.7) in court was an inadvertent mistake. Considering the said fact, judgment passed by the trial Court is legally sustainable and, therefore, prayed for dismissal of the appeal and affirmation of the judgment of conviction and order of sentence under Section 395 IPC.

16. In order to decide the appeal, it is necessary to re-appreciate the evidence of witnesses.

19. The evidence of P.W.1/Badri Sharma disclose that the

incident occurred two years prior to the date of his deposition. He specifically testified that at the midnight while he was sitting in the courtyard, heard the noise of dacoity. When he reached from veranda to courtyard, a bomb got exploded, in which he sustained injuries to his left ear and thigh. He specifically testified that he could not identify anyone of the accused, as that of the dacoits.

17. In the cross-examination by one of the counsel of the appellants/Maheshi Sah, it was admitted by P.W.1 that he was not the resident of that village.

18. The evidence of P.W.2/ Ashraf Sahani, P.W.4/Archana Devi and P.W.5/ Jivneshwar Sahani disclose that their examination in chief was tendered by the trial Court.

19. In the cross-examination, P.W.2 testified that it was a dark night when the occurrence took place and that he could not identify anyone of the dacoits. Likewise, P.W.4 also testified in her cross-examination that she cannot identify the dacoits. Similarly, the evidence of

P.W. 5 also disclose that although a lantern was hanging at the door on the night of dacoity there was no other sufficient source of light.

20. At this juncture, it is necessary to refer to the judgment of the Hon'ble Apex Court in **Sukhwant Singh vs. State of Punjab** reported in **(1995) 3 SCC 367**, wherein their lordships have interpreted Section 138 of Indian Evidence Act and held as follows:-

> *"9. - It would, thus be seen that Section 138 (supra) envisages that a witness would first be examined-in chief and then subjected to cross examination and for seeking any clarification, the witness may be reexamined by the prosecution. There is, in our opinion, no meaning in tendering a witness for cross examination only. Tendering of a witness for cross-examination, as a matter of fact, amounts to giving up of the witness by the prosecution as it does not choose to examine him in chief. However, the practice of tendering witnesses for cross examination in session trials had been frequently resorted to since the enactment of the Code of Criminal Procedure, 1898. The reason behind taking recourse to such a practice, which undoubtedly is inconsistent with Section 138 (supra), is not far to seek. Under that Code as it stood prior to its amendment by Act 26 of 1955 a full fledged magisterial enquiry was to be held, in a case which was triable exclusively by the court of session or the High Court, in accordance*

with the procedure laid down in Chapter XVIII thereof and in that enquiry prosecution was required to examine all its witnesses. Under Section 288 of that Code the evidence of the witnesses so recorded by the Committing Magistrate could be treated, at the discretion of the Sessions Judge, as substantive evidence at the trial. More often than not, the prosecution taking advantage of the above provision, used to ask for and obtain leave of the Sessions Court to treat the depositions of those witnesses whom they did not intend to examine afresh, recorded in the committal enquiry as its evidence in the trial and then tender them for cross-examination. In other words, the prosecution brought on record of the trial court and relied upon the testimonies of some of the witnesses recorded at its instance before the Committing Magistrate as its evidence during trial and then tendered them for cross-examination by the defence. It will be pertinent to mention here that Act 26 of 1955 which amended the Code of 1898 restricted the examination of prosecution witnesses in the committal enquiry in respect of cases instituted on police report only to those who were to give an ocular version of the incident only.

10.- The question as to whether such a practice was legal and valid in view of Section 138 (supra) and, if so, to what extent and in what manner it could be adopted came up for consideration by different High Courts.

11. In Veera Koravan v. Emperor [AIR 1929 Mad 906 : ILR 53 Mad 69] a Division Bench of the Madras High Court opined that merely tendering of a prosecution witness for cross-examination is not a practice which should be encouraged specially in a murder case as the procedure would be unfair to

an accused

12. In Sadeppa Gireppa Mutgi v. Emperor [AIR 1942 Bom 37 : ILR 1942 Bom 115] Beaumount, C.J. speaking for the Division Bench of the Bombay High Court opined:

> *"The other Kakeri witness is Shambu, (Ex. 34) and a very irregular course was adopted with regard to him. He was tendered for cross-examination. The practice of tendering witnesses for cross examination, which is no doubt often adopted, is inconsistent with Section 138, Evidence Act, which says that witnesses shall be first examined-in-chief, and then, if the adverse party so desires, cross-examined, and, if the party calling him so desires, re-examined. It is obvious that if a witness is examined by the defence without having given any evidence-in-chief, he is not being cross-examined, by whatever name the process may be described. The practice of tendering for cross-examination should only be adopted in cases of witnesses of secondary importance. Where the prosecution have already got sufficient evidence on a particular point, and do not want to waste time by examining a witness who was examined in the lower court, but at the same time do not want to deprive the accused of the right of cross-examining such witness, they tender him for cross-examination. But, I think, strictly speaking, the witness ought to be asked by the prosecution, with the consent, of course, of the pleader for the accused, and the leave of the Judge, whether his evidence in the lower court is true. If he gives a general answer as*

to the truth of his evidence in the lower court, he can be cross examined on that. But he must in some way be examined-in chief before he can be cross examined. However, the practice of tendering a witness for cross-examination certainly should not be employed in the case of an important eyewitness."

13. A Full Bench of the Bombay High Court in Emperor v. Kasamalli Mirzalli [AIR 1942 Bom 71 : ILR 1942 Bom 384] approved the opinion of Beaumount, C.J. (supra) and 'condemned' the practice of tendering a witness for cross examination in no uncertain terms.

14. A Division Bench of the Punjab High Court in Kesar Singh v. State [AIR 1954 Punj 286 : 56 Cri LJ 86] after analysing the provisions of Sections 137 and 138 of the Evidence Act, followed the law laid down by the Full Bench of the Bombay High Court in Kasamalli case [AIR 1942 Bom 71 : ILR 1942 Bom 384] and observed:

"The other witness of this fact is Jai Ram PW 21 who was tendered for cross examination, but he was not cross-examined. That again in my opinion is no evidence. The law in regard to examination of witnesses is contained in Sections 137 and 138, Evidence Act. There is no provision in that Act for permitting a witness to be tendered for cross examination without his being examined-in-chief and this practice is opposed to Section 138 of the Act."

15. In Dhirendra Nath v. State [AIR 1952 Cal 621 : 53 Cri LJ 1427] a Division Bench of the Calcutta High Court held:

"There is a type of case where witnesses of a

secondary importance who have been examined before the Committing Magistrate are not called before the Sessions Court, because the prosecution considers that it has already had a sufficient body of evidence on the point concerned and then in fairness to the defence, it tenders those witnesses for cross-examination. But the fact that the witness is tendered for cross examination means and implies that there has been some examination-in-chief. As far as I can see, the only practical way in which a witness can be tendered for cross-examination is by asking him generally, may be by a single question, in the Sessions Court as to whether the statements made by him before the Committing Magistrate were true and on his answering in the affirmative, tendering the evidence given in the Committing Magistrate's court which would then serve as the examination-in-chief. Unless the examination-in chief is brought on the record in that fashion, I cannot understand on what the defence will cross-examine the witness tendered for cross examination. It does not appear from the record in this case that the evidence of the witness before the Committing Magistrate was brought on the record at all. In those circumstances, tendering for cross-examination seems to me to have been almost meaningless."

16. In Chhota Singh Hira Singh v. State [AIR 1964 Punj 120 : (1964) 1 Cri LJ 350] the Punjab High Court held:

"Tendering a witness for cross-examination is almost tantamount to giving up a witness.

There is nothing in law that justifies such a course. The trial courts adopt this manner of examining witnesses simply to lighten their burden, but it is not realised that in a serious case like the present murder case when the learned trial Judge failed to examine Wazira PW 5, he was very seriously remiss in his duty."

17. A Division Bench of the Kerala High Court in Thazhathethil Hamsa v. State of Kerala [AIR 1967 Ker 16 : 1967 Cri LJ 73] observed:

"In this connection we wish to clarify the mistaken impression which the learned Judge seems to have entertained about the propriety of the procedure adopted by the prosecution in tendering eyewitnesses for cross-examination. PW 10 who had given evidence in the Committing Court as an eyewitness was tendered for cross-examination in the Sessions Court after he made a bald statement that he has correctly stated all he knew about the incident in the enquiry court. The learned Judge has evidently relied on an observation made by the Patna High Court in Manzurul Haque v. State of Bihar [AIR 1958 Pat 422 : 1958 Cri LJ 931] , to find that such a procedure is proper. But it is really not. The very decision relied on by the learned Judge started by enunciating the principle thus:

'The practice of tendering witnesses leads to considerable confusion and is to be deprecated. A material witness should not be merely tendered but should be sworn and asked to give evidence by the prosecution. Tendering

if at all should be confined to witnesses of secondary importance.' "

18. Thus, it is seen that the Bombay, Kerala, Calcutta, Madras and Punjab High Courts have notwithstanding the provisions of Section 288 of the Code of 1898 consistently taken the view that there is no procedure whereby the prosecution is permitted to tender a witness for cross-examination only, without there being any examination-in-chief in relation to which, such a witness can be cross-examined. The practice of tendering a witness for cross examination has been consistently discouraged and even condemned by these High Courts and in our opinion rightly. Our attention has not been drawn to any judgment of any other High Court which may have taken the contrary view.

19. In State of U.P. v. Jaggo [(1971) 2 SCC 42 : 1971 SCC (Cri) 401 : AIR 1971 SC 1586] which has been referred to and relied upon by the prosecution and the trial court for adopting the procedure of tendering PW 4 and PW 5 for cross-examination only in our opinion, has not been properly appreciated and has been misapplied. That judgment cannot be read to lay down, as a matter of legal proposition, that a witness can be 'tendered' for cross-examination even without there being any examination in-chief. If there is some earlier statement of the witness recorded by a competent court or an affidavit filed in the trial court and the witness testifies to the correctness of that earlier statement at the trial, it may (in certain cases of witnesses of a formal nature) as noticed earlier be permissible to tender him for cross-examination after he is sworn to the correctness of the earlier statement, because in that event that earlier statement is treated as the examination-in-

chief of the witness but that is not the same thing as tendering a witness for cross-examination only, without there being any examination in-chief on the record. In Jaggo case [(1971) 2 SCC 42 : 1971 SCC (Cri) 401 : AIR 1971 SC 1586] a Bench of this Court was considering the question whether the mere presentation of an application by the prosecution to the effect that a certain witness had been "won over" was conclusive of the allegation that he had been so "won over" and the prosecution was therefore relieved of its obligation to examine him at the trial. The proposition was negatived and it was in that context, that this Court observed:

> *"On behalf of the appellant it was said that Ramesh Chand was won over and therefore the prosecution could not call Ramesh. The High Court rightly said that the mere presentation of an application to the effect that a witness had been won over was not conclusive of the question that the witness has been won over. In such a case Ramesh could have been produced for cross examination by the accused. That would have elicited the correct facts. If Ramesh were an eyewitness the accused were entitled to test his evidence particularly when Lalu was alleged to be talking with Ramesh at the time of the occurrence."*
>
> *20. The Division Bench, therefore, was considering a peculiar fact situation in that case and even in that context it was observed that the witness "could have been produced for cross-examination by the accused" and that "the accused were entitled to test his evidence". The observations of the*

Division Bench in Jaggo case [(1971) 2 SCC 42 : 1971 SCC (Cri) 401 : AIR 1971 SC 1586] , therefore, do not support the view that a material witness can be 'tendered' for cross examination only. The observations from a judgment of this Court cannot be read in isolation and divorced from the context in which the same were made and it is improper for any court to take out a sentence from the judgment of this Court, divorced from the context in which it was given, and treat such an isolated sentence as the complete enunciation of law by this Court. The judgment in Jaggo case [(1971) 2 SCC 42 : 1971 SCC (Cri) 401 : AIR 1971 SC 1586] has in our opinion been misappreciated and that judgment cannot be interpreted as a sanction from the Supreme Court to the prosecution to adopt the practice of tendering a witness for cross examination only, without there being any examination-in-chief, in relation to which the witness has to be cross examined. All that the judgment in Jaggo case [(1971) 2 SCC 42 : 1971 SCC (Cri) 401 : AIR 1971 SC 1586] emphasise is that the mere ipse dixit of the prosecutor that a particular witness has been won over is not conclusive of that allegation and the Court should not accept the same mechanically and relieve the prosecutor of his obligation to examine such a witness. It was for this reason suggested by the Bench that where the prosecution makes such an allegation, it must keep the witness in attendance and produce him to enable the defence to cross-examine such a

witness to test his evidence as well as the allegations of the prosecution and bring out the truth on the record. After the coming into force of the

Criminal Procedure Code, 1973, which replaced the Code of 1898, recording of evidence in commitment proceedings has been totally dispensed with and Section 288 of that Code has been omitted. Consequently, the course suggested by some of the High Courts in the earlier quoted judgments regarding tendering of a witness for cross-examination who had been examined in the committal court, is also no more relevant or available. The Jaggo case [(1971) 2 SCC 42 : 1971 SCC (Cri) 401 : AIR 1971 SC 1586] , which was decided when the Code of 1898 was operating in the field could not, therefore, be pressed into service by the trial court while dealing with the instant case tried according to the Code of 1973. Thus considered, it is obvious that the trial court, wrongly permitted the prosecution to tender PW 4 and PW 5 for cross-examination only. Both PW 4 and PW 5 were, according to the prosecution case itself, eyewitnesses of the occurrence and had removed the deceased to the hospital. Their evidence was, of a material nature which was necessary for the unfolding of the prosecution story. The effect of their being tendered only for cross examination amounts to the failure of the prosecution to examine them at the trial. Their non-examination, in our opinion, seriously affects the credibility of the prosecution case and detracts materially

from its reliability."

21. On perusal of the contents of the aforesaid judgment, tendering of witness is not at all permissible by the trial Courts after the amendment of Criminal Procedure Code, 1973. The trial Court ought not to have permitted the prosecution to tender the evidence of P.W.s 2, 4 and 5 and permitted the defence for their cross-examination.

22. Admittedly, P.W.s 2, 4, and 5 are alleged to be the eyewitnesses, to the dacoity that occurred on the intervening night of 25th/26th of June, 1992. However, despite being projected as eyewitnesses to the incident, none of them participated in the Test Identification Parade (TIP). Furthermore, the prosecution has failed to bring on record any statements allegedly recorded by the Judicial Magistrate 1st Class under Section 164 of the Cr.P.C. Likewise no statements recorded under Section 161 of the Cr.P.C., were brought on record during trial either for the purpose of corroboration or for contradiction

23. The evidence of these witnesses clearly disclose that they could not identify the dacoits, as it was dark in the night.

24. The evidence of P.W. 3/Sumitra Devi disclose that the incident occurred at 12:30 A.M. while she was in the company of her husband. This witness is the wife of the Informant/Bindeshwar Sahani (P.W. 6). She deposed that they woke up upon hearing a commotion and, on peeping through the window, observed about eight to ten people standing in the *dalan,* who were verbally abusing her brother-in-law, father-in-law, and nephew. She further testified that Jivneshwar Sahani opened the house door, and Chandeshwar Sahani subsequently opened the gate at instance of Jivneshwar Sahani. Approximately, about five to six dacoits entered the house and looted various household articles, including clothing, ornaments, and watches.

25. During her cross-examination, she specifically admitted that although she saw the dacoits, she could not

identify any of them.

26. The evidence of P.W. 6 (the Informant) disclose that on the intervening night of 25th/26th of June, 1992, he was sleeping in his room along with his wife. His father, son, nephews, aunt, and sister-in-law were also present, and were sleeping in the *dalan*. At about 12:30 A.M., he woke up upon hearing a commotion and through the window observed about six to seven dacoits armed with three torches. According to him, the dacoits were assaulting his nephew and demanding that the door be opened. He further testified that, out of fear, he opened the door and fled toward the village, to raise an alarm, as a result of which co-villagers to assembled there. He stated that the dacoits looted his house, took away jewelry, clothes, and watches valued at approximately Rs.6,000/-. Further, P.W. 6 claimed he identified three of the dacoits in torchlight, who were subsequently identified by him in the Test Identification Parade (TIP) as Chandeshwar Sahani, Ram Bahadur

Sahani, and Maheshi Sah. He further identified Chandeshwar Sahani in open court, and his initial statement (fardbeyan) was marked as Exhibit 1.

27. Upon a careful perusal of the evidence provided by P.W. 3 and P.W. 6 who are husband and wife and comparing it with the fardbeyan, it becomes evident that the informant made material improvements in his evidence. The fardbeyan, do not disclose the names of the dacoits. Subsequently he improved his version during his testimony by naming Chandeshwar Sahani as well as both the appellants, namely, Ram Bahadur Sahani and Maheshi Sah. It is relevant to mention that the F.I.R was registered against unknown offenders.

28. The testimony of P.W. 3 is materially inconsistent with that of P.W. 6. P.W. 3 deposed that Jivneshwar Sahani opened the door but, P.W. 6 claims that he himself opened the door. Further it contradicts with the contents of his own *fardbeyan*, which states that Bisheshwar Sahani was the one who opened the door. A

significant disparity also exists regarding the identification of the accused. P.W. 3, an alleged eyewitness remained at the scene throughout the incident stated that she saw the dacoits but could not identify them. Conversely, P.W. 6, who fled away through the back door out of fear, claimed to have identified three dacoits, including the appellants. The prosecution has failed to explain as to why P.W. 6 did not disclose the names of the said three persons in his *fardbeyan,* if he had in fact recognized them at the time of the incident. Finally, the claim of identifying the appellant in the source of torchlight appears to be logically unsustainable.

29. P.W. 6 admitted during his cross-examination that the night was dark and cloudy. Since the torches were carried by the dacoits themselves the light would naturally have been in the direction of the witnesses and the interior of the house, thereby casting shadow on the dacoits' faces. Consequently, the source of light would have blinded the witnesses, rather than illuminating the

facial features of the assailants thereby rendering a reliable identification doubtful.

30. It is also admitted by P.W.6 that he identified three of the dacoits in Test Identification Parade and all the people who were standing in the line, were wearing clothes of different colour, and different height, which clearly disclose that the Magistrate, who conducted the Test Identification Parade had not adhered to requirments prescribed under Rule 34 of Criminal Rules of Practice and Circular Orders, 1990. Rule 34 of Criminal Rules of Practice and Circular Orders, 1990 reads as follows:-

> 34 **Identification parades:**
>
> - *In conducting identification parades of suspects, the Magistrate shall observe the following Rules.*
>
> > *(I) [(a) The Police should sent a requisition for holding identification parade by the Magistrate as nominated by the Sessions Judge. On such requisition, the Magistrate shall conduct the identification parade as expeditiously as possible.*
> >
> > *(b)Where bail application is pending for the release of the accused and on being informed so by the Police Officer, the Magistrate shall as far as possible fix a date earlier to the date of arguments on the bail application and hold the identification*

parade.]

(ii)As far as possible, non-suspects selected for the parade shall be of the same age, height, general appearance and position in life as that of the accused. Where a suspect wears any conspicuous garment, the Magistrate conducting the parade shall if possible, either arrange for similar wear to other or induce the suspected person to remove such garment.

(b)The accused shall be allowed to select his own position and should be expressly asked if he has any objection to the persons present with him or the arrangements made. It is desirable to change the order. in which the suspects have been placed at the parade during the interval between the departure of one witness and the arrival of another.

(iii) The witnesses who have been summoned for the parade shall be kept out of the view of the parade and shall be prevented from seeing the prisoner before he is paraded with others.

(b)Before a witness is called upon to identify the suspect, he should be asked whether he admits prior acquaintance with any suspect whom he proposes to identify. He shall also be asked to state the marks of identification by which he can identify the suspects.

(c)Each witness shall be fetched by a peon separately. The witness shall be introduced one by one and on leaving shall not be allowed to communicate with witness still waiting to see the persons paraded.

(iv)Every circumstances connected with the identification including the act if any attributed to

the person who is identified shall be carefully recorded by the officer conducting it, whether the accused or any other person is identified or not. Particularly any objection by any suspect to any point in the proceeding shall be recorded".

31. As per the above provision, the non-suspects selected for the Test Identification parade, are required to be of the same age, height, general appearance and position in line as that of the accused. The Magistrate while conducting the parade, as far as possible, shall arrange for similar clothing for all participants.

32. In the present case, Exhibit -2, the Test Identification Parade proceedings do not disclose that the Magistrate had complied with Rule 34 while selecting the non-suspects as to the age and height or general appearance particularly mentioned by P.W.6 in fardbeyan as to the appearance of the dacoits.

33. The evidence of P.W.7/Judicial Magistrate-1st Class clearly disclose that he had conducted the Test Identification Parade on 10.08.1995 whereas the alleged occurrence took place on the intervening night of 25th and

26th June, 1992. Thus, the Court finds that there was an inordinate delay of three years in conducting the Test Identification Parade.

34. In this context, the Learned counsel for the appellants relied on the judgment of the Hon'ble Apex Court in the case of **Rajesh Govind Jagesha vs State Of Maharashtra vs. State of Maharashtra** reported in **(1999) 8 SCC 428**, wherein, ther Lordships have held as under:-

> *"Admittedly, in the FIR lodged, the name of Accused 2 has not been mentioned. Accused 2 was arrested on 20-1-1993 but the identification parade was held on 13 -2-1993. There is no explanation as to why the test identification parade was held after an unexplained delay. Moreover, at the time of identification parade, the appellant was not having a beard and long hair as mentioned at the time of lodging of FIR but no person with a beard and long hair was included in the parade. The witnesses are alleged to have identified Accused 2 at first sight despite the fact that he had removed the long hair and beard. What prevented the Magistrate from associating one or two persons having resemblance with the persons named in the FIR is a mystery shrouded with doubts and has not been cleared by the prosecution. The possibility of the witnesses having seen the said accused*

between the date of arrest and the test identification parade cannot be ruled out.

35. The Learned counsel for the appellant also relied upon the Judgment of the Hon'ble Apex Court in the case of **State of Andhra Pradesh vs Dr. M.V. Ramana Reddy and Ors** reported in **(1991) 4 SCC 536**, wherein their lordships have held in para 16 and 23, which reads as under-

" 16 The motive for the commission of the crime was the indus- trial unrest occasioned on account of the strike by the workers of the International Packaging 'Company and later by the transport workers. Indisputably accused No.1 commanded considerable clout over the employees of various industrial units such as the International Packaging Company, Andhra Cotton Mills and the transport industry in Proddatur.. Accused No. 1 was championing the cause of the workmen during the. prolonged agitation and strike by the workers of the Inter-national Packaging Company and also spearheaded the agitation by the transport workers. The deceased was the lawyer for the managements and was considered the main obstacle, in the realisation of the workers demands. There was, there- fore, animosity between the deceased and accused No. 1. This is more than clear from the oral evidence of PWs 2.3.4, 10. 11.21 to 23 and from the documentary evidence tendered as Exhs. P-2 to P-5. P-30 to P-37 and P-40 to P-55. In view of this overwhelming

documentary evidence which corroborates the ocular evidence of the aforesaid prosecution witnesses, it is established beyond any manner of doubt that the rival- ry between the trade unions headed by accused No. 1 and the managements. advised by the deceased had assumed ugly. proportions. The starting of the INTUC branch at Proddatur with the active participation of the deceased was perhaps the last straw on the camel's back which worsened the relations between accused No. 1 and the deceased. This is the motive according to the prosecution for the crime in question. But as has often been commented bitter animosity can be a double edged Weapon which may be instrumental for deliberate false involvement or for the witnesses wrongly inferring and strongly believing (without having actually witnessed it) that the crime must have been committed by the rival group. This possibility has to be kept in mind while evaluating the prosecution evidence regarding the involvement of accused No. 1 and his companions in the commission of the crime.

23. That takes us to the question of the involvement of accused Nos. 3 and 5. The evidence of PW 1 is that when she heard the cries of her father she woke up and saw accused No. 1 and six or seven others belabouring him. This means that she did not know and could not identify the companions of accused No. 1. However, when she tried to raise an alarm three of the assailants approached her and pinned her down to the bed, and one of them threatened to stab her. He did carry out his threat as is evident from the injuries sustained by her. She Was able to identify two of them 'at the identification parade held on May 23,

1975. This is proved through the evidence of PW 14 who conducted the test identification parades. Now accused 3 and 5 had surrendered before the court on May 13, 1975. PW 14 received the requisition for arranging a test identification parade on May 17, 1975. The identification parade was actually held on May 23, 1975. There is no valid explanation tendered by the prosecution for the delay in holding the. identification parades. The defence has suggested in the cross-examination of PW 1 and PW 25 that in the meantime the accused who were in custody were shown to the witnesses and the police had secured a group photograph in which accused Nos. 3 and 5 figured to facilitate their identification. The High Court was, however, reluctant to place absolute reliance On the evidence of PW 1 regarding the identity of accused Nos. 3 and 5. In the absence of a valid explanation for the delay we do not think that this approach of the High Court can be said to be manifestly wrong to call for our intervention.

36. In the case of **Wakil Singh and Others vs. the State of Bihar** reported in **1981 Supp Supreme Court Cases 28** the Hon'ble Apex Court has held in paragraph no. 2, which reads as follows:-

"2. In the instant case we may mention that none of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits whom they have alleged to have identified in the dacoity, nor did the witnesses give any identification marks viz., stature of the accused or whether they were fat or thin or of a fair colour or

of black colour. In absence of any such description, it will be impossible for us to convict any accused on the basis of a single identification, in which case the reasonable possibility of mistake in identification cannot be excluded. For these reasons, therefore, the trial court was right in not relying on the evidence of witnesses and not convicting the accused who are identified by only one witness, apart from the reasons that were given by the trial court. The High Court, however has chosen to rely on the evidence of a single witness, completely over-looking the facts and circumstances mentioned above. The High Court also ignored the fact that the identification was made at the T.I. parade about 3| months after the dacoity and in view of such a long lapse of time it is not possible for any human being to remember, the features of the accused and he is, therefore, very likely to commit mistakes. In these circumstances unless the evidence is absolutely clear, it would be unsafe to convict an accused for such a serious offence on the testimony of a single witness".

37. All the above citations squarely applies to the facts and circumstances of the present case.

38. The trial court had erred in acquitting Bhola Sahani contending that the informant and other witnesses failed to identify the said Bhola Sahani. The record reveals that P.W.6 had identified Ram Bahadur Sahani, Bhola Sahani as well as Mahesh Sahani, all the three

accused. Therefore, if benefit of doubt was extended to Bhola Sahani, the same benefit ought also to have been extended to the appellants. Moreover, the other alleged witnesses have not identified any of the accused. The fardbeyan is the first piece of evidence, which kept the Criminal law into motion and it do not disclose the name of any of the accused.

39. Admittedly, there was animosity between Ram Bahadur Sahani and the informant, which has come on record in the cross-examination of P.W.6, If at all these appellants were well known to the informant, then as to why, P.W 6 did not name them in his fardbeyan, is also found to be doubtful. Therefore, the judgment of the trial court warrants interference by this Court. Furthermore, the accused/appellants were examined under Section 342 Cr.P.C., which reads as follows:-

342. Power to order costs.

"Any Court dealing with an application made to it for filing a complaint under Section 340 or an appeal under Section 341, shall have power to

make such order as to costs as may be just".

40. Admittedly, the accused are to be examined under Section 313 Cr.P.C. for the incriminating evidence of the prosecution found against them. The trial Court erred in examining the appellants under Section 342 Cr.P.C.

41. In **Prem Chand Vs. State of Maharashtra** reported in **(2023) 5 SCC 522** their Lordships also evolved the guidelines for examination of the accused under Section 313 of Cr.P.C. which held as follows:-

> *"15. What follows from these authorities may briefly be summarized thus:*
>
> *15.1. Section 313CrPC [clause (b) of sub-section (1)] is a valuable safeguard in the trial process for the accused to establish his innocence.*
>
> 15.2. Section 313, which is intended to ensure a direct dialogue between the court and the accused, casts a mandatory duty on the court to question the accused generally on the case for the purpose of enabling him to personally explain *any circumstances appearing in the evidence against him.*

15.3. When questioned, the accused may not admit his involvement at all and choose to flatly deny or outrightly repudiate whatever is put to him by the court.

15.4. The accused may even admit or own incriminating circumstances adduced against him to adopt legally recognized defences.

15.5. An accused can make a statement without fear of being cross-examined by the prosecution or the latter having any right to cross-examine him.

15.6. The explanations that an accused may furnish cannot be considered in isolation but have to be considered in conjunction with the evidence adduced by the prosecution and, therefore, no conviction can be premised solely on the basis of the Section 313 statement(s).

15.7. Statements of the accused in course of examination under Section 313, since not on oath, do not constitute evidence under Section 3 of the Evidence Act, yet, the answers given are relevant for finding the truth and examining the veracity of the prosecution case.

15.8. Statement(s) of the accused cannot be dissected to rely on the inculpatory part and ignore the exculpatory part and has/have to be read in the whole, inter alia, to test the authenticity of the exculpatory nature of

admission.

15.9. If the accused takes a defense and proffers any alternative version of events or interpretation, the court has to carefully analyse and consider his statements.

15.10. Any failure takes a defense the accused's explanation of incriminating circumstances, in a case, may vitiate the trial and/or endanger the conviction.

38. Bearing the well-settled principles in mind, every criminal court proceedings under Clause (b) of Sub-section (1) of Section 313 of Cr.P.C. has to shoulder the onerous responsibility of scanning the evidence after the prosecution closes its case, to trace the incriminating circumstances in the evidence against the accused and to prepare relevant questions to extend opportunity to the accused to explain any such circumstances in the evidence that could be used against him.

39. The Criminal Justice System ensures a fair and speedy trial and the facts within the domain of the court are to be explained to the accused and opportunity has to be given to them to explain about the incriminating evidence.

42. In view of the above said discussions, this Court

is of the opinion that the prosecution has miserably failed to prove the guilt of the appellants beyond reasonable doubt and the trial Court ought not have convicted the appellants for the offence punishable under Section 395 of IPC. Further, tendering of witnesses is not at all permissible in view of the Criminal Procedure Amendment, and accused are to be examined under Section 313 Cr.P.C.

43. Accordingly, the judgment of conviction dated 12.01.2025 and order of sentence dated 15.01.2005 passed by the Additional Sessions Judge, Fast Track Court No. 1, Madhubani in Sessions Trial No. 19/1993 / 224/2003 is hereby set aside.

44. The appellants are acquitted of the charges levelled against him.

45. Both the appeals stand allowed.

46. Since the appellants were released on bail vide order dated 17.11.2005, they are discharged from the

liabilities of their bail bonds.

47. Let the records of this case be returned to the concerned court below forthwith.

(G. Anupama Chakravarthy, J)

sunilkumar/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	15.05.2026
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