Satya Narain and Others Vs The State

Court: Allahabad High Court

Date of Decision: April 17, 1952

Acts Referred: Evidence Act, 1872 â€" Section 114, 9

Citation: AIR 1953 All 385

Hon'ble Judges: Sankar Saran, J; Mushtaq Ahmad, J; Desai, J

Bench: Full Bench

Advocate: S.N. Misra, for No. 1, Baqar Usmani, S.N. Mulla and R.K. Shagloo, for the Appellant; Deputy Govt. Advocate, for the Respondent

Final Decision: Allowed

Judgement

Mushtaq Ahmad, J.
Satya Narain, Shakur, Shyam Behari, Earn Abhilakh Sami Ullah, Earn Behari, Mohammad Eaza, Sant Ram, and Mt.

Naozadi (on bail) appeal against their conviction and sentences passed by the learned Sessions Judge of Jaunpur. The first eight of the appellants

were convicted under s, 396 and sentenced each to transportation for life, Earn Abhilakh, appellant 4, being also convicted u/s 19 (f), Arms Act,

and sentenced to one year''s rigorous imprisonment, and the last appellant, who is the mother of Ram Abhilakh, appellant 4, was con. victed under

9. 412, I. P. C., and sentenced to four years'' rigorous imprisonment. There were ten other persons also charged under either on both of these

sections, but they were all acquitted.

2. The occurrence which became the subject of the charge had taken place on the night between 1st and 2nd of March 1949, at village Bhilampur,

seven miles from the police station Sujanganj, district Jaunpur. As a result of what happened one Jageshar Pasi died, having received as many as

ten injuries according to the post mortem report.

3. A report of the incident was lodged by Dwarka Frasad, in whose house the alleged dacoity had been committed at 8-20 the next morning, in

which only Sant Ram appellant was mentioned by name and 25 or 26 others without names as dacoits by the informant. It may be noted that Sant

Ram''s name is really stated in the report as Satya Narain, but that was only an alias for Sant Bam, it being necessary to mention this as appellant 1

in this appeal is also named Satya Narain. It may further be noted that this Sant Bam whose name is mentioned in the report is alleged to have been

arrested on the spot and was not, therefore, put up for identification by the. witnesses either at Jaunpur or at Partapgarh where different batches of

the accused were identi-fied by different batches of the. witnesses.

4. Mr. S. N. Mulla argued this appeal oil behalf of Satya Narain and Sami Ullah, appellants l and 5 respectively, while the other appellants were

represented before us by Mr. Baqar Usmani. Naturally, in the course of the arguments on behalf of Satya Narain and Sami Ullah those portions of

the record were also brought to our notice which were germane only to the cases of the other appellants, there being no doubt, a; number of

common features between the case of the appellants 1 and 5 and that of the other appellants.

5. The conviction in this case, as in every case of dacoity, was based either on identification evi-dence or on evidence of recovery of articles and in

the case of some of the appellants on both. Dealing. with the case first of Satya Narain and Sami Ullah represented by Mr. S. N. Mulla, the

conviction of the one was based entirely on identification evidence and of the other both on such evidence and also on evidence of recovery of

property alleged to have been taken away at the time of the dacoity. We have while examining the case of these two ap-pellants to examine both

these classes of evidence.

6. It has not been contended before us that the identification evidence was so deficient in volume as "not to form a satisfactory basis of conviction

of the appellants, nor was the evidence of recovery of the articles alleged to have been stolen criticised in any great detail except with reference to

one particular appellant, Samiullah. All the game a general criticism was advanced by learned counsel against the identification evidence on a

ground which, according to the learned counsel was essentially fatal to the credibility of the same.

As already remarked above, there were identification proceedings both at Partabgarh and at Jaunpur. So far as the appellants are concerned, all of

them except one, Mohammad Baza, wero, put up for identification at Partapgarh. Out of: the whole lot of the accused only four of them, Mohd.

Eaza, appellant 7, Jahangir, Jamil and Bam Naresh, all acquitted, were lodged at the Jaunpur jail, whereas eleven accused were put in the jail at

Partapgarh. Of the witnesses taken to identify the accused in jail, only seven were taken to the jail at Jaunpur and thirty one to the jail at

Partapgarh.

Of the seven taken to the Jaunpur jail only six were among the thirty-one taken to the Partapgarh jail. The position, therefore, was that whereas six

out of the seven witnesses at the Jaunpur jail went to Partapgarh jail to identify the accused, the majority of the witnesses at the Partapgarh jail, that

is twenty-five out of thirty-one, did not go to the Jaunpur jail to identify the accused there.

7. On these facts learned counsel for the appellants 1 and 5 has strenuously contended that a serious prejudice was caused to them, and that it

affected the quality of the trial.

8. I would first indicate the precise position with regard to the identification of these appellants and then see how far the point raised by their

counsel carries any force. There were in all ten witnesses who had identified these appellants in jail, either at the one or at the other place. Of these,

three had no doubt been taken both to the Jaunpur and the Partapgarh jails to identify particular sets of the accused. They were Inder Bahadur

Singh, Jagarnath Misir and Jag-damba Singh. The other seven had been taken only to the Parfcapgarh jail and not to the jail at Jaunpur. These

were Ganga Prasad, Bansi Lal, Munnoo Earn, Bindeshwari Singh, Kudra Pratap Singh, Bishwanath and Bechu Singh, the last being examined only

in the Court of the Com. mitting Magistrate and his statement brought on the record at the trial u/s 33, Evidence Act.

Besides the three witnesses out of these ten, who had been taken to the Jaunpur jail to identify some of the accused, there were also Dwarka

Prasad and Satya Narain at whose joint house the daeoity had been committed. Neither of these two men having identified either of the appellants

1 and 5, Satya Narain and Samiullah, their evidence calls for no consideration in the present connection. Of the three witnesses, Inder Bahadur,

Jagarnath and Jagdamba, who had been taken both to the Jaunpur and Partapgarh Jails, Inder Bahadur had identified at Partapgarh six right

persons and one wrong, Jagarnath four right and two wrong and Jagdamba five right and two wrong. Inder Bahadur at Jaunpur identified one right

person and made no mistake, Jagarnath no right and two wrong persons and Jagdamba one right and one wrong person.

Taking the identifications by these men at both the places, the position was that Inder Bahadur had identified seven right persons and one wrong,

Jagamath four right persons and four wrong and Jagdamba six right persons and three wrong. The identification by Jagarnath, the second of these

men taking into account the proceedings at both the Jails, therefore, stood in the ratio of fifty right and fifty wrong, although the identification by the

other two men, Inder Bahadur and Jag. damba, on the same calculation heavily weighed on the side of correct identification as compared to the

mistakes they made.

9. On these facts learned counsel has strenu-oualy argued that the identification of these appellants by seven out of the ten witnesses enu-merated

above at Partapgarh only, they having never been taken to Jaunpur for the purpose, carries no weight at all. He amplified his point by contending

that the Court is now compelled to base its appreciation of the evidence of these men only on their behaviour at one of the identification centres,

knowing nothing at all as to how they might have behaved if they had been taken to the Other centre also for the same purpose.

He has illustrated his point by referring to the identification by Jagarnath witness who had identified four right persons and two wrong at Partap.

garh and subsequently at Jaunpur no right and two wrong persons. Therefore, if one were to go by the identification made by the witness at

Partapgarh alone, the identification might be taken as of a fairly good quality, but if one were to set off against the same the unsatisfactory

identification made by the witness at Jaunpur, the scale was bound to turn in favour of the defence, inasmuch as in that event it would be a case of

fifty right and fifty wrong.

Similarly, he argued that, if the other seven witnesses had been taken to the jail at Jaunpur to identify the accused who had been lodged there and if

they had not behaved so well as at Partapgarh on an earlier date, the value of their identi. fication at Partapgarh would have had to be judged in the

light of the nature of their identification at Jaunpur and the Court would have then judged the quality of their evidence on the result of the

identification made by them at both the places and not only at one of them to the exclusion of the other. In this contention, I think, the learned

counsel was right.

10. It was contended by the learned counsel for the State that, while it was a fact that these seven out of the ten witnesses against the appellants 1

and 5 had not been fcakon to the Jaunpur jail, no question was put to the Investigating Officer on behalf of the defence as to why this had not been

done. This argument simply meant that, although there was an inherent deficiency in the identification proceedings relied upon by the prosecution,

no one on behalf of the accused had cared to enquire how that deficiency had originated, that is to say, no one had asked anybody on the side of

the prosecution to explain the cause of the deficiency.

To my mind, it only means that, because the accused had not tried to ascertain the cause of an obvious flaw in the identification proceedings, they

were not entitled to take advantage of the same. I am unable to subscribe to such a reasoning. There are certain things more or less of an

indifferent type which would not be allowed to operate against a particular party unless it has been given an opportunity of explaining it and has

then failed to explain it. On the other hand, there are certain facts which from the nature of them are so patent that only an extraordinary cause

might furnish some explanation about them, and, where such a cause is not disclosed, there seems to be no reason why the other party should be

prevented from taking advantage of the situation.

It should have siarecf into the face of the prosecution agency in this case that the witnesses taken to the Partapgarh Jail alone for identification were

open to ba criticised and open even to be wholly rejected in the general evaluation of the evidence of the prosecution against the accused if they

had not been taken also to the jail at Jaunpur to identify the accused there. In the present case fortunately it does not seem necessary to exercise

one"s mind too much to realise the significance of this point. We have the identification made by Jagarnath witness in this case at both the places,

Partapgarh and Jaunpur.

I have already shown that, whereas his identification at the former place taken by itself might fully satisfy the Court, his identification at Jaunpur,

bearing value only in an inverse ratio, the total effect of the two identifications made by him brought the position virtually to a cipher, with the result

that the Court would be perfectly justified in putting this witness out of account altogether. Why could not possibly the same may have happened in

the case of the other seven witnesses also? I do not say that it must have so happened, but no one can say that it could not so happen. And if it

could have so happened, surely the accused were deprived of an important test in the light of which they could have legitimately criticised the

identification evidence against them as a whole.

11. It may appear a little curious to say that for no fault intrinsically appearing in the evidence of a body of seven witnesses they should be put out

of account only by reason of this particular flaw. The reason to my mind is clear. If the evidence of a single identifying witness can be reasonably

criticised on the ground that he had been asked to identify only some of the accused at only one of the places of identification and not the others at

the other place 1 see no reason why the same objection cannot lead to the same result where a number of witnesses come under such a category.

The position of every one of such witnesses would be open to the same objection, and the mere fact that he finds himself in company with many

others would be no ground for believing him or the others of his class. I, therefore, think that, seven out of the ten witnesses examined against the

appellants 1 and 5 not having gone to the jail at Jaunpur to identify the accused there, these appellants were deprived of a valuable material to

scrutinise the evidence of those witnesses, a position clearly illustrated by the case of Jagarnath P. W.

In the case of Abdul Jalil Khan and Others Vs. Emperor, , a certain witness had been taken to identify some of the accused at Bareilly and also to

identify the remaining accused at Pilibhit. His failure, to identify any of the suspected persons at Pilibhit was held to affect the quality of the

identification at Bareilly. The same precisely is the position here. Not knowing how these seven witnesses, if they had been sent for the purpose to

the Jaunpur Jail, would have behaved there, these appellants are wholly unable, and for this the prosecution alone is responsible, to attack their

evidence on a ground which is now completely denied to them. The evidence of these seven witnesses, therefore, being open to a fatal objection,

cannot, in my view, be accepted to make out the charge.

12. There remains the question as to why the identification evidence oil Inder Bahadur and Jagdamba, both of whom had been taken to Partapgarh

and Jaunpur to identify the accused, should not be accepted. In the context of the facts of this case, I have come to the conclusion that it should not

be. If it had stood by itself it might have formed a good basis of conviction of these appellants. These witnesses stand, however, in company with

eight others whose evidence, as I have already pointed out, is open to a severe objection. One of the reasons suggested by the learned counsel for

the appellants 1 and 5 was that the witnesses who had been taken to the Partapgarh jail were not taken to the Jaunpur jail because they had been

shown, only those of the accused who had been lodged at the former jail. I cannot say whether this is a correct or a purely imaginary assumption.

Nonetheless, the circum-stance of the Partapgarh witnesses not having been taken to the Jaunpur jail is by itself so vital that it should have struck

the prosecution that some explanation was necessary in that behalf, for otherwise it was open to the accused to take up the position they took in

their arguments in this Court. No such explanation was made by the prosecution and in the absence of any explanation it would certainly be open

to the accused to suggest what at least may not be taken as an irrational figment of the mind, namely that the accused in the Partapgarh jail had in

fact been shown to the witnesses taken there to identify them.

If the seven witnesses had been taken to the Jaunpur jail also and had misbehaved there in the sense that the number of wrong identifications made

by them outweighed the number of correct identifications, surely that circumstance would have affected the value and credibility of the evidence of

the two witnesses Jagdamba and Inder Bahadur also. I think that this omission created a fundamental deficiency in the evidence of the prosecution

as a whole, and it would be wholly unsafe to rely even on the evidence of these two particular witnesses. I am, therefore, inclined to hold that the

charge against them u/s 396, I. P. C., was not at all brought out.

13. There was some argument with regard to there being a presumption of the guilt of the accused even under this seefion in view of the provisions

of illustration (a) of Section 114, Evidence Act. This illustration has the words :

That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless

he can account for his possession.

14. The learned counsel for the State, relying on this illustration, argued that, as at least five articles proved to have belonged to Dwarka Prasad

and his family were recovered from the house of Samiullah appellant only three days after the night of the dacoity, that is, on 4-3-1949, he could

be assumed to have been among the dacoits Himself and therefore to have committed the crime of dacoity. It is noticeable that the important

words in this illustration are ''stolen goods'', ''theft'' and ''thief. There is no reference to ''goods obtained by dacoity'', ''dacoity'' or ''dacoit''. Now

Section 410, I. P. C, defines the expression ''stolen property'' as ""property, the possession whereof has been transferred by theft, or by extortion,

or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is

designated as ''stolen property''.

While the words ''theft'', ''extortion'' and ''robbery'' occur in this section, there is no such word as dacoity, which means that property obtained by

dacoity was not covered by the expression ''stolen property''. It cannot be denied that, while a dacoity is a robbery, the reverse is not true in every

case. Robbery becomes a dacoity only where the number of persons concerned exceeds four. There seems to be no reason why, while referring

to three distinct offences theft, extortion and robbery the Legislature should not have also mentioned the offence of dacoity, if property obtained by

dacoity was also included in the words ''stolen property''.

One possible reason that suggests itself to my mind is that, while in the case of theffc, extortion and robbery a presumption of liability for the

substantive offence might be raised under cl. (a), Section 114, Evidence Act, the same should not be done in the case of a more serious offence,

namely of dacoity. On a careful consideration of the matter I have come to the conclusion that no case u/s 396, I. P. C., was made out against the

appellants 1 and 5, Satya, Narain and Sami Ullah, and that they should be acquitted of the charge under that section.

(His Lordship considered the question whether Samiullah could be convicted of any other offence and after considering the evidence observed that

he would hold him liable for an offence u/s 411, I. P. C. His Lordship then proceeded.)

15-16. So far as the other appellants are concerned, the position of Sbakur appellant 2, is precisely the same as that of Satya Narain, no property

having been recovered from his house either. He should, therefore be dealt with similarly as Satya Narain.

17. With regard to the other accused, there was the evidence not only of those who bad identified them at Partapgarh Jail but also of some of

those who had identified the accused at Jaunpur jail, and from the house of every one of them some or other property found to belong to Dwarka

Prasad was recovered. Among them is also Ram Abbilakh appellant who was found by the learned Sessions Judge to have been armed with a

pistol, it being further found that the injuries caused on Jogeshar Pasi could have been caused with that weapon. The appeal of these appellants,

that is the appellants other than Satya Narain, Sami Ullah and Shakur, is, therefore, liable to be dismissed, except in regard to Mt. Naozadi who

must have acted under the influence of her son Earn Abhilakh appellant the sentence passed appears to me as rather excessive.

18. In the result I would allow the appeal of Satya Narain and Shakur and acquit them, and, further allow the appeal of Sami Ullah in respect of his

conviction u/s 396, I. P. C. which I would set aside and instead convict him u/s 411, I. P. C. and sentence him to two years" rigorous

imprisonment. I would also reduce the sentence in the case of Mt. Naozadi from four to two years" rigorous imprisonment.

Sankar Saran, J.

19. I am in agreement with my brother Mushtaq Ahmad in the order proposed by him against the appellants Shy am Behari, Ram Abhilakh, Ram

Behari, Mohammad Raza, Sant Ram alias Satya Narain and the woman Nauzadi. I do not, however, find myself in agreement with him with regard

to the three appellants Satya Narain son of Ram Newaz, Shakur and Samiullah for the reasons I shall presently indicate.

20. This was a serious dacoity in which considerable amount of property was lost and one man, Jageshwar Pasi, was killed. A large number of

men were prosecuted and 19 men stood their trial before the learned Additional Sessions Judge. They were charged, some of them u/s 396, Penal

Code, alone, others u/s 412, Penal Code, only and the rest under both the sections. One man, Ram Abhilakh, was also charged u/s 19 (f) of the

Arms Act. Of these men only nine were convicted. Of them eight were convicted under 8. 396, Penal Code, and only Nauzadi was convicted u/s

412, Penal Code. They have all made an appeal to this Court.

21. The evidence against the appellants in this case consists of identifications and recovery of property from the possession of some of them. The

question which really needs to be considered is whether the evidence of the witnesses who identified the various appellants as having participated

in the dacoity is to be rejected because of certain inherent defects in it. If there is no serious defect in their evidence, as I hold there is none, then

upon their testimony the appellants'' conviction should be maintained.

22. It appears that after their arrest the appellants and certain suspected persons were confined into two District Jails, one at Pratapgarh and the

other at Jaunpur, where identification parades were held. The identification parade at Pratapgarh was held on 27-3-1949, and at Jaunpur it was

held nearly three months later on 22-6-1949. At Pratapgarh there were a large number of suspects in the parade, but at Jaunpur there were only

four. The majority of witnesses, numbering roughly over 30, were sent to Pratapgarh Jail for identifications and about half a dozen of them were

sent to Jaunpur for the same purpose.

All those witnesses who were sent to Jaunpur for identification had also participated in the identiiieation proceedings at Pratapgarh, but quite a

number of those who took part in the identification proceedings at Pratapgarh were not sent to Jaunpur. Learned counsel for the appellants argued

that this was a serious flaw in the prosecution case. According to them if all the Pratapgarh witnesses had been sent to Jaunpur Jail, they might have

made mistakes and thus weakened the general effect of their evidence which did not happen because their identifications were confined to only one

jail. I do not see force in this argument.

It has to be remembered that in convicting an. accused person the Courts are guided by the sworn testimony that is given in Court. The reliance

upon identification proceedings is only by way of corroboration or contradiction of the evidence in Court and no more. As was laid down in

Nagina and Others Vs. Emperor, identification proceedings held in jail ""amount to this, namely that certain persons are brought to the jail or other

place and make statements, either express or implied, that certain individuals whom they point out are persons whom they recognise as having

been concerned in a particular crime.

These statements are of course not made on oath and again, they are made in the course of extra judicial proceedings. The law does not allow

statements of this kind to be made available as evidence at the trial unless and until the persons who made those statements are called as witnesses.

When these persons are called as witnesses then these previous statements become admissible, not as substantive evidence in the case, but merely

as evidence to corroborate or contradict the statements made by these witnesses in Court (Sections 155 and 157, Evidence Act). If when a

witness to identify is called in the Sessions Court and states there that he can identify no one, there is obviously nothing to corroborate and so the

evidence of the previous statement, express or implied, made in the course of the identification proceedings in the jail is not admissible.

23. Thus if a witness was not produced at a particular identification parade, there is no material upon which to corroborate or contradict him.

Suppose in a case of this nature no identification proceedings are held. It cannot be said that because of this defect the entire sworn testimony of

prosecution witnesses should be discarded. Naturally enough the Courts would judge the identifications held before them in such circumstances

with the greatest care and caution but would not altogether discard the testimony of witnesses because there were no previous identification

parades held.

It must be noted that there is no provision in law that identification proceedings should be held in dacoity cases or for that matter in any type of

cases. These parades are held in the nature of a precautionary measure that is taken so that the earliest impressions of the witnesses are kept on

record.

24. In this case we have the record of the identification proceedings that were conducted against all the appellants at least in the Pratapgarh Jail by

some of the witnesses and by some of them in both the jails. Because all the witnesses were not sent to bath the jails it cannot be said that the

statements of those witnesses who went only to one jail for identification are falsified or lack oorroboration. In the case of those who were able to

identify accused persons in both the jails there may be stronger corroboration, but the fact that some of the witnesses attended only one

identification parade does not mean that there is no corroboration of their evidence at all.

During the course of arguments learned counsel for the appellants were asked whether they objected at any stage of the proceedings either in jail

or in Court to the fact that they had been prejudiced because all the witnesses were not sent for identification in both the jails, and their answer was

in the negative. Nowhere in the course of the fairly lengthy cross-examination of witnesses has any suggestion been made that the absence at

Jaunpur of all the witnesses who participated in the Pratapgarh identification parade was on account of any mala, fides on the part of the

prosecution.

25. In these circumatanceg it would be throwing a very heavy burden on the prosecution to ask them not only to arrange for identification

proceedings but to see to it that no witness who is sent up for identification in one jail is left out in another. It often happens that identification

parades are held on different dates and different witnesses attend those parades and unless the defence make any definite allegations or suggestions

no doubt is cast upon the absence of some of the witnesses from the identification parades. I am wholly satisfied that upon the evidence on the

record nothing has been brought out to cast any doubt upon the genuineness of the identification parades and that no witness has been withheld for

any ulterior reason. Thus there is absolutely no question of prejudice of any sort to the appellants in this case.

(His Lordship then dealt with individual cases and in each case observed that he would dismiss the appeal, but that he would reduce the sentence

in the case of Nauzadi to two years.)

26-39. By the Court.--The members of this Bench having differed in regard to Satya Narain (appellant 1), son of Bam Newaa, Shakur and Sami

Ullah (appellants 2 and 5 respectively), the papers be laid before the Hon''ble the Chief Justice to obtain the opinion of a third Judge in the case of

these appellants. The appeals of the other appellants are dismissed, except that in the case of the appellant Naozadi her sentence is reduced from

four to two years'' rigorous imprisonment.

She is on bail, and must surrender to serve out the rest of the sentence.

Desai, J.

40. The case of three appellants, Satya Narain, Shakur and Samiullah, has been laid before me for my opinion. They along with several others

have been convicted u/s 396, Penal Code, etc. On appeal, the appeal of others has been dismissed by my brethren Sankar Saran and Mushtaq

Ahmad, but they differed as regards these three appellants. While Sankar Saran J. was of the opinion that all the three appellants are guilty u/s 396,

Penal Code, and their appeal should be dismissed, Mushtaq Ahmad J. was of the opinion that Satya Narain and Shakur should be acquitted and

that Samiullah should be convicted u/s 411, Penal Code.

41. There is no dispute about the facts relating to the dacoity. There is overwhelming evidence to prove, and both my learned brethren have been

satisfied, that a dacoity resulting in the death of one man was committed in the night of 1 and 2 March 1949, in the house of Dwarka and his cousin

Satya Narain in village Bhillampur, police station Sujanganj, Jaunpur district. It is also abundantly proved that some property carried away by the

dacoits has been recovered from the house of Samiullah appellant; there is no difference of opinion between my learned brethren on this point.

Samiullah himself admitted the recovery of the property but claimed that it belongs to him and that claim, though supported by the evidence of his

father, cannot be accepted. The property has been identified by the victims of the dacoity as belonging to them and no adequate reason exists for

disbelieving their evidence. On the other hand, the appellant''s father could very well have given false evidence in an attempt to shield him. The

question, that caused difference of opinion, is. whether he should be convicted u/s 397, Penal Code or u/s 411, Penal Code.

42. Satya Narain belongs to village Bikra, Samiullah to village Mahasingh Sarai and Shakur to Mohammadpur, all of police station Baghra, district

Partabgarh. Their villages are said to be near one another and about forty miles from village Bhillampur where the dacoity was committed. During

the investigation of the dacoity the police carried out a raid in the villages where the appellants reside on 3-3-1949 and arrested several persons

suspected to have committed the dacoity. They include Satya Narain and Sami-ullah appellants.

Shakur appellant was arrested on 4-3-1949. All were arrested at their houses in the morning and then taken, with their faces covered up, to police

station Jaitwara and on the following day to Partabgarh jail. They along with eight other suspects were put up for identification before a First Class

Magistrate in the jail on 27-3-1949. they wore mixed with seventy other undertrials.

Thirty-one witnesses were sent up by the police to identify the dacoits.

Seven of them did not pick out any of the suspects and the rest picked out one or more of them. All the suspects had alleged before the Magistrate

holding the proceedings that they had been detained in police station Jaitwara for two days and shown to a large number of witnesses and that they

were again shown to many of them at Partabgarh. After the identification proceed. ings, Satya Narain stated that there was none in the jail of his

size and weight.

43. Some other suspects who were arrested for their alleged participation in the same dacoity were placed before another Magistrate in Jaunpur

jail for identification on 22-6-1949. There were four suspects arrested on 19th May or so and were mixed with twenty undertrials. Twelve

witnesses were sent by the police to identify them. I find that the details given by my brother Muslitaq Ahmad in his judgment about the

identification proceedings are not correct. Nine of these witnesses are those who had identified one or more of the appellants in Partabgarh. In all

nineteen witnesses had identified one or more of the appellants in Partabgarh and out of these ten had not been sent to Jaunpur to identify the other

suspects.

44. Differences arose between Sankar Saran J. and Mushtaq Ahmad J., as regards the guilt of Satya Narain and Shakur appellants on one point

alone. The evidence against these two appellants consisted wholly of direct evidence given by witnesses, corroborated by the fact of their having

identified them in jail. There was no other evidence, Satya Narain was identified by a large number of witnesses, namely, Ganga Prasad, Inder

Bahadur, Jagannath (p. w. 13), Jagdamba, Bansi Lal, Manu Earn, Bindeshwari, Rudra Pra-tap Singh, Bishwanath Singh, Becchu Singh,, Amarpal

Singh, Earn Bahadur Singh and another Jagannath (P. w. 7).

Shakur was identified by Jagdamba, Bansi Lal, Eudra Pratap Singh, Bishwanath Singh, Becchu Singh, Dwarka and Amarpal Singh, Manu Earn,

Bindeshwari, Eudra Pratap Singh and Becchu Singh did not pick out any wrong man in the Partabgarh jail. Inder Bahadur, Bishwanath Singh and

Bansi Lal identified eight, seven and seven suspects respectively and picked out one wrong man each. Jagannath P. w. 13 identified four suspects,

Jagdamba six suspects arid Earn Bahadur Singh four suspects and picked out one wrong man each. Dwarka identified four suspects and picked

out three wrong men. Jagannath p. w. 7 identified three suspects and picked out four wrong men. Amarpal Singh identified seven suspects and

picked out nine wrong men.

In the Jaunpur jail Inder Bahadur, Jagannath p. w. 13 and Bansi Lal identified one suspect and picked out no wrong man, Becchu Singh identified

two suspects and picked out no wrong man, Jagdamba identified two suspects and picked out one wrong man, Dwarka and Amarpal Singh

identified one suspect each and picked out two and three wrong men respectively and Bam Bahadur Singh and Jagannath P. W. 7 identi. fied no

suspect and picked out two wrong men each. The contention that appealed to Mushtaq Ahmad, J. and has been repeated before me is, that the

evidence of the witnesses who were not sent to Jaunpur for identification purposes should be disbelieved because it is not known how they would

have fared there if they had been sent.

Mr. Mulla went to the length of pleading that the case of the appellants was prejudiced by all the witnesses who were sent to Partabgarh jail not

being sent to Jaunpur jail also. An example was given by my learned brother and that is of Jagannath who is said to have identified four suspects

and picked out two wrong men in the Partabgarh jail and identified no suspect and picked out two wrong men in the Jaunpur jail. If the credibility

of Jagannath is to be assessed on the results of the identification at Partabgarh alone, he would be classed as a fair witness, but if the results of the

identifications at both the jails are considered, he would be classed as a bad or unreliable witness.

Mushtaq Ahmad, J. was greatly impressed by these figures quoted before him by the appellants'' counsel. But the figures are not correct and the

counsel have confused between two Jagarnaths. It was Jagarnath p. w. 13 who identified four suspects and picked out two wrong men in the

Partabgarh jail; but in the Jaunpur jail he identified one suspect and picked out no wrong man. Thus whether the results of the identification in

Partabgarh only were considered or the results of identification at both the places, would make no difference to the credibility of the witness. It was

the other Jagarnath who identified no suspect and picked out two wrong men in the Jaunpur jail. The counsel erroneously added the result of the

identification in Partabgarh by one Jagarnath to the result at Jaunpur of the other Jagarnath.

Thus the example given before my learned brethren and which was made the basis of his judgment by Muahtaq Ahmad, J. was itself wrong. But

taking it to be correct, Muahtaq Ahmad, J. accepted the principle that the credibility of the witnesses should depend upon the results of

identifications at both the places and that the witnesses who were sent only to Partabgarh should be disbelieved for want of certainty as to how

they would have behaved if sent to Jaunpur. No question was put to the investigating officer why all the witnesses were not sent to Jaunpur also,

but Mushtaq Ahmad, J. was of the opinion that this made no difference because there was ""an inherent deficiency"" or ""an obvious flaw"" in the

identification proceedings and that the deficiency or flaw was :

So patent that only an extraordinary cause might furnish some explanation and that when no explanation was furnished, the appellants were

entitled to take advantage of it.

He observed :

It should have stared into the face of the prosecution agency that the witnesses taken to the Partabgarh jail alone were open to be criticised and

open even to be wholly rejected in the general evaluation of the evidence of the prosecution against the accused if they had not been taken also to

the jail at Jaunpur.

He considered that the appellants were deprived by the prosecution of :

an important test in the light of which they could have legitimately criticised the identification evidence

or

a valuable material to scrutinise the evidence of those witnesses"".

He, therefore, rejected the evidence of Cranga Prasad, Manu Ram, Bindeshwari, Eudra Pratap Singh, Bishwanath Singh, Becchu Singh and Bansi

Lal. Out of this the evidence of Becchu and Bansi Lal was wrongly rejected because they had gone to Jaunpur jail for identification. After rejecting

their evidence, he rejected the evidence of the other witnesses who had gone to Jaunpur on the ground that they stood :

In company with eight others whose evidence is open to a severe objection.

Sankar Saran, J., on the other hand, relied upon the evidence of the witnesses. He did not think that there was any fatal defect in the investigation

or that the evidence of the witnesses who were not sent to Jaunpur suffered on account of that fact or that the police were bound to send all the

witnesses to both the places. I am wholly unable to subscribe to the view taken by my brother Mushtaq Ahmad. It has been correctly pointed out

by my brother Sankar Saran that the-evidence against an accused is the direct statement made in Court that he was one of the offenders. His

earlier identification of him is simply a corroboration of the evidence given by him in Court. See In Re: Sangiah, and Kanai Lal Dwary Vs. The

State, . The identification has by itself no independent value. As stated by Viscount Haldans L. C. in Bex v. Christie (1914) A. c. 545 (55l) (E):

its relevancy is to shew that the witness ""was able to identify at the time and to exclude the idea that the identification of the prisoner in the dock

was an afterthought or a mistake.

Lord Moulton (with whom Viscount Haldane L. J. agreed) said at page 558 :

Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be

obtained.

During the investigation of a crime committed by persons unknown to the witnesses, the persons arrested on suspicion of their complicity in the

crime have got to be confronted by the investigating authority with the witnesses so that they can find out whether they are the persons who

committed the crime or not. Before the investigating authorities send up a case to Court, they must be satisfied that the persons arrested by them

are the persons accused of having committed the crime.

If they were known to the witnesses, the witnesses would have given their names and that would have established their identity, but when they

were not known, their identity could be established only if the witnesses on seeing them say that they are the offenders. Since it would be very easy

for a witness who has little regard for truth, to say that the person arrested on suspicion was the offender, he is confronted with the suspect mixed

with innocent men. If he picks him out, that would add to the credibility of his statement that he was the offender. This is the primary object of

identification proceeding.

When the proceedings are held, the statements made by the witnesses before the Magistrate conducting them, that the persons pointed out by him

had committed the crime, are admissible as previous statements to corroborate their evidence in Court against those men. But simply because

these statements are admissible in evidence (as corroborative evidence), it cannot be said that if such evidence is lacking the evidence given in

Court is no evidence. The Evidence Act does not require any particular number of witnesses to prove any fact; nor does it require that the

evidence of any witness should be corroborated. As far as the statutory law is concerned it is legal for a Court to believe the evidence of a witness

without any corroboration.

It is not a rule of law that the evidence of an accomplice must be corroborated in order to render a conviction on his evidence valid"";

per Lord Atkinson in (1914) A. C. 545 (E).

Similarly, in a case of daeoity, the Court does not act illegally by relying upon the evidence of a witness even though he has not named or identified

the accused during the investigation. The question at all times is of believing or not believing the witness; Dhaja Rai and Another Vs. Emperor, . But

in practice, it is not safe to accept the statement of a witness about the complicity of an accused in the crime if he did not describe him by name or

other particulars during the investigation and still was not made to identify him out of a group. In (1914) A. c. 545 (B), Lord Reading said on p.

564:

There are exceptions to the law regulating the admis-sibility of evidence which apply only to criminal trials, and which have acquired their force by

the constant and invariable practice of judges when presiding at criminal trials. They are rules of prudence and discretion, and have become so

integral a part of the administration of the criminal law as almost to have acquired the full force of law.

Phipson writes in his Law of Evidence, Edn. 8, p. 392:

In criminal cases it is improper to identify the aceused only when in the dock; the police should place him, beforehand, with others, and ask the

witness to pick him out.

The English Court of Criminal Appeal has set aside convictions if the proof of identity depended on the belief of a few witnesses whose recognition

of the accused had taken place when he had been shown to them singly as a suspect. It treats it

as indisputable that a witness, if shown to the person to be identified singly and as the person whom the police have reason to suspect, will be

much more likely, however fair and careful he may be, to assent to the view that the man he is shown corresponds to his recollection:

Davis v. The King 57 C. L. R. 170 at p. 181 (G).

The evidence of a witness that he recognises the accused, whom he had not seen before the occurrence, as the offender is inherently weak. Lord

Guthrie, presiding at the Slater Trial charged the jury thus:

It would not be safe to convict the prisoner merely on the evidence of personal impression of his identity with the man seen flying from the house,

on the part of strangers to him, without teferenceto any marked personality or personal peculiarities, and without corroboration derived from other

kinds of evidence. My proposition involves a distinction between the identification, by personal impression, of a strange person, and the

identification, by personal impression, of a familiar person.

Suppose that a father told you that his son, who was resident in his house, had been seen by him in Princes Street yesterday, That would be

admirable evidence. But if a person who had only seen the son once in his life told you that ho had seen him in Princes Street yesterday, that would

be evidence of slender value, unless the son had a marked personality, or unless he had some peculiarity about him, such as a very peculiar walk,

or unless there were corroboration, such as that the man, when spoken to, answered to the name of the particular individual.

Quoted by Evatt and Mctiernan JJ. in Graig v. The King 49 c. L. Rule 429 at p. 450 (h). In Davis v. The King 57 C. l. r. 170 at p. 182 (a) the

High Court of Australia adopted the English view that :

if a witness whose previous knowledge of the accused man has not made him familiar with his appearance has been shown the accused alone as a

suspect and has on that occasion first identified him, the liability to mistake is so increased as to make it unsafe to convict the accused unless his

identity is further proved by other evidence direct or circumstantial.

Therefore the observation of my brother Sankar Saran that it cannot be said that on account of absence of identification proceedings the entire

sworn testimony of witnesses should be discarded should be taken as modified by the rule of caution or prudence that there must be

corroboration. At the same time I must utter a warning against thinking that identification proceedings are required in order to supply material to the

accused for challenging the evidence of the witnesses. In AIR 1948 Mad. 113 (c), Rajamannar J. (now C. J.) said :

Identification parades are held not for the purpose of giving defence advocates material to work on but in order to satisfy investigating officers of

the bona fides of the prosecution witnesses.

45. The view of my brother Mushtaq Ahmad that the evidence of the witnesses who did not go to Jaunpur should be discarded on that ground

alone cannot be supported. The only effect of their not going to Jaunpur is that there is no corroboration of evidence, if any, given by them against

any of the persons lined up for identification at Jaunpur. It is quite erroneous to say that the witnesses who identified the appellants should have

been sent to Jaunpur also so that the defence might have some material for challenging their evidence against the appellants.

To say that had they been sent to Jaunpur, they might have committed mistakes and that consequently their evidence against the appellants might

have been seriously impaired and that no reliable evidence would be left for maintaining their conviction, would be to ignore the fundamental

principle that cases should be decided on the basis of evidence and not on surmises and speculations. McReynolds J. in Aldridge v. United States

(1931) 75 Law. Ed 1054 : 283 U. S. 308 (i)), said :

Courts ought not to increase the difficulties by magnifying theoretical possibilities. It is their province to deal with matters actual and material; to

promote order, and not to hinder it by excessive theorising of or by magnifying, what in practice is not really important.

A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not

played according to rule"";

Stone J. at p. 558, in McGuire v. United States (1027) 71 Law. Ed. 556 : 273 U. S. 95 (j). There can be no justification for treating the witnesses

who were not eent to Jaunpur as if they had been sent there and had committed numerous mistakes in identifying the other suspects. And there

cannot possibly be any justification for ruling out the evidence of the other witnesses who had gone to both the places on the ground that they stand

in their company. Finally, as I would show presently, the results of identification at Jaunpur would be quite irrelevant in judging the results of

identification at Partabgarh.

46. Though so many dacoities are committed and though the evidence against the alleged dacoits is in most cases the evidence of identification, it is

to be regretted that enough attention has not been paid by anybody to the question of proper identification proceedings. Controversies have raged

about the method of valuing the identification results, but how the identification proceedings should be carried out has not been discussed in any

authority. Nor has adequate attention been paid to the factors to be considered in judging the evidence of witnesses of identification,

47. The whole object behind an identification proceeding is to find out whether the suspect is the real offender or not. One may confront the

witness with the suspect and find out whether he was the offender. But there would be no guarantee of the truth of the witness"s saying that he was

the offender. In order to have some guarantee of the truth, the witness is confronted with the offender not standing alone but mixed with a number

of men of similar sizes and features. If a suspect is mixed with nine innocent men and the witness picks him out as the offender, one would be

inclined to believe that he was the real offender. If a blind man were to go round the ten men arranged in a circle, his chance of picking out the

suspect would be 1/10th or 1 to 9.

Similarly if ten blind men were to go round, according to the law of chance, one of them would point out the suspect. Thus there would be a

chance of l to 9 of anyone being picked out as the offender. If a suspect is picked out by only one witness in identification proceedings, one cannot

be certain that he did not pick him out by accident. If a suspect is mixed with 99 innocent men, then the chance of his being picked out by accident

by any witness is 1 to 99; this is a much remoter chance than l to 9 as in the case when he was mixed with nine innocent men, and one would be

ready to believe that he was identified really because he was the offender and not on account of chance.

Ordinarily, it is not practicable to have 99 innocent men to be mixed with a suspect. In practice one may not expect more than 10 or 20 men to be

mixed. Taking the case of a suspect mixed with nine innocent men, the chance of his being picked out by two blind men is 1/100, which is again a

very remote chance. While one may not be quite certain that an accused identified by only one witness was the real offender, when he is identified

by two witnesses the certainty becomes strong and one can believe that he was the real offender.

There is also the clear possibility of a bona fide mistake when only one witness identifies an accused. If he is identified by two, both making a bona

fide mistake is a remote possibility and such a possibility may not be made a ground for acquittal. This is why Courts hesitate to accept the

identification of one witness only. They are not prepared to act upon a solitary witness''s bare testimony based on identification and do not

consider only his identification of the accused as sufficient corroboration. If three witnesses identify the suspect, nobody can have any doubt about

his complicity in the crime.

48. I have assumed so far that only one suspect is lined up for identification. Even though in a dacoity case there are two or more accused, the

question as regards each individual accused is whether he committed the dacoity and it is obvious that the answer should not depend upon whether

the other accused committed the daeoity or not. A correct answer to the question can be given only when he alone is put up for identification out of

a group of say ten or twenty men.

The proper way to hold identification proceedings is to put up each suspect separately for identification mixed with as large a number of innocent

men as possible, in any case not less than nine Or ten. As each witness comes up for identification, it will be seen whether he identifies the suspect

or not. He will either identify him, in which case there will arise no question of mistake (because there will be no mistake), or he will not identify him

in which case even if he makes a mistake in picking out an innocent man it will be immaterial, because he will not have identified the suspect and

even if he gave evidence against him in Court, it would not be believed.

When several suspects are put up for identification in connection with the same dacoity, care must be taken to see that the same innocent men are

not mixed with each of them, otherwise the benefit of holding separate identification proceedings would go away. In this way, the proceedings will

be as simple as possible without any complications arising out of innocent men being picked out. The problem how the identification of suspects is

affected by some innocent men also being pick-ed out, will be eliminated completely. If a suspect is identified by only one witness, he will be

acquitted. If he is identified by three or more, he will be convicted ; the only condition being that the proceedings are genuine and not a farce or

sham, i. e. the identifications are based only on impressions formed during the commission of the crime.

49. What actually happens in most dacoity cases, however, is that several suspects are lined up for identification together. This practice is

fundamentally wrong and is the root of all the trouble that arises in the matter of judging the identification results. In a line-up in which only one

suspect is put up for identification there will arise no question of mistakes as explained above. But in a line-up in which two or more suspects -are

put up, a witness may identify one suspect and pick out an innocent man and there will arise the problem of judging how the identification of the

suspect is affected, if at all, by the picking out of the innocent man. Though Courts have laid down certain rules such as that if a witness identifies

three suspects and picks out one innocent man, he is not a satisfactory witness and that if he identifies four suspects he is a satisfactory witness

even if he picks out one innocent man (see Emperor v. Debi Charan AIR 1942 ALL. 339 (k),) or that if a witness identifies one or more suspects

and does not pick out any innocent man he is a good witness ; but these rules are not based on reason or any principle of mathematics.

It is evident that how a witness''s failure to identify the other suspects or mistake in picking out some innocent man affects the value of his

identifying one or more suspects depends upon the reason for the witness''s failure or mistake. Several causes contribute to a witness''s failure to

identify the other suspects or picking out innocent men. No clear-cut rule can be laid down for judging how the identification is affected by a

witness''s failure or mistake. As in almost every case the causes which brought about a witness failure or mistake would not be known to the

Court, it would be practically impossible for it to apply any particular rule.

50. The weight to be attached to the identification of a suspect by a witness should ordinarily not depend upon his failure to identify other suspects.

He might not have had the same oppor-tunity of noting and retaining in mind the features of all the offenders committing the crime. He might not

have even seen all the offenders. He might not have been attracted to the same extent by the features of all the offenders, even if he saw them.

Features of some might have made a stronger impression upon his mind than those of others.

Further if a suspect, who has not been identified by him, has not been proved to be guilty of the crime, it cannot be said that he was one of the

offenders and ought to have been identified by the witness. After all he has been arrested only on suspicion and merely because he is a sus-pect he

does not become one of the offenders. He might not have been involved in the crime at all and the witness would act rightly in not identifying him.

On the other hand, I do not see any reason why a witness''s identifying or picking out only suspects should always be taken to be a case of ""no

mistake."" If all the suspects identified by him are proved to be guilty, it would certainly be a case of ""no mistake"", but if some of them have not

been proved to be guilty there is no reason for saying that his identifying them is not a mistake. Thus, neither a witness''s failure to identify other

suspects nor his identifying them is an infallible test for judging his reliability.

If the weight to be attached to the identification of a suspect should not depend upon the failure of the witness to identify the other suspects, it

follows that it should not depend upon the mistakes committed by him i.e., upon the number of innocent men picked out by him as other offenders.

In logic there is no difference between his failing to pick out other suspects as other offenders and his picking out some of the innocent men as

other offenders. There is no reason to think that a witness who identifies a suspect and also picks out an innocent man is necessarily worse or less

reliable than another witness who identifies the suspect and picks out no innocent men.

When he picks out an innocent man, he picks him out as another offender ; his act amounts to saying that the suspect and the innocent man were

two of the offenders. There is no such connection between his saying that the suspect was one of the offenders and his saying that the innocent man

was another of the offenders which would make the former statement unreliable simply because the latter statement turns out to be wrong.

If a witness deliberately tells a lie in one respect something may be said for his being disbelieved in other respects, but it cannot be said that a

witness tells a deliberate lie when he picks out an innocent man as one of the offenders. He might have honestly thought that he had seen the

innocent man while committing the crime. His face may resemble that of one of the dacoits. So long as his picking out a suspect and an innocent

man does not amount to his saying that either one or the other only took part in the crime, it cannot be said that his identifying the suspect should be

disregarded just because he erroneously thought that along with him the innocent man alao had taken part in the crime.

While thus the picking out of an innocent man should have no effect at all on his identifying a suspect, the law of chance comes in again and it

becomes impossible to disregard the mistake. If five suspects are put up for identification mixed with twenty innocent men and if a witness identifies

one suspect and picks out four innocent men, it can be argued that the identification of the suspect could be as much due to chance as to design.

Any blind man picking out five men at random would pick out one of the suspect because that is the law of chance. If the witness identifies two or

more suspects and four innocent men, it can still be argued that anyone of them might have been identified by chance, arid that since it cannot be

ascertained which, both or all are as good as identified by chance.

This anomalous position arises on account of the inherent defect in the identification proceedings, viz., that of including more than one suspect. I

have already hinted at another anomaly. When some of the suspects identified by a witness are not proved to be guilty, there exist no means to

ascertain whether his identifying them was a mistake or not. Just as there is no reason for treating it as a mistake, there is no reason for not treating

it as a mistake also. When it is not known whether the witness made a mistake or not obviously the weight to be attached to the identification of

other suspects cannot be assessed.

51. In this country most of the witnesses who go for identification are illiterate and cannot be expected either to understand the question, or to state

what the percentage of their certainty about the complicity in the crime of every person picked out by them is. When a witness picks out two or

more men as having taken part in the crime he does not necessarily mean that he has got the same certainty about their complicity. He may be cent,

per cent, certain about the complicity of one and may be only 50 per cent, certain about the complicity of the others. He has to pick out a man or

not pick him out. If he picks him out, he becomes a cent, per cent, offender as far as he is concerned though if his certainty were to be taken into

consideration it might be anything even less than 50 per cent.

If a person of whose complicity he is only 40 per cent, or 50 per cent, certain is picked out and he happens to be ah innocent man, it would be

illogical to ignore his identification of a suspect on the ground of his having picked out the innocent man. The Court would be in a better position to

assess the weight of his identifying the suspect if while identifying the two men he said that he was cent, per cent, sure of the complicity of one man

(the suspect) and only 40 or 50 per cent, sure of the complicity of the other (the innocent man). But as I said, it is impossible to expect witnesses in

this country to state intelligently what the percentage of their certainty is.

52. When a number of suspects are lined up for identification, there is possibility of a witness, identifying two men on the basis of one impression.

He may identify one man, because of his resemblance to a certain impression in his memory, later he may identify the other man because of his

resemblance to the same impression. He may do this without realising that he is identifying two men to answer for one offender, or he may identify

both as alternatives. If one of them is a suapect, it is evident that little weight should be given to his identification.

There are no means of knowing how his mind was working when he identified the two men, and in this state of uncertainty it becomes unsafe to act

upon any identification. If he identifies in addition two suspects in respect of whom he is absolutely certain i.e., he identifies three suspects and one

innocent man, in the absence of information as to about which two suspects, he is certain, and which suspect he identifies as an alternative to the

innocent man the Court cannot act upon any identification.

53. In the instant case all the three appellants were put up for identification only at Partabgarh and how the witnesses who identified them fared

subsequently in Jaunpur jail while trying to identify other dacoits is absolutely irrelevant. To mix up the results of the two identifications proceedings

has no support either from the law or from reason or logic. And the necessary corollary is that a witness who is sent to identify one suspect is not

required to be sent to identify another suspect in another proceeding.

Normally all witnesses who claim to be in a position to identify the offenders would be sent to identify all of them. The investigating authorities

would themselves do this. But if for certain reasons they do not do this, they contravene no law at all, and are under no obligation to offer any

explanation for their conduct and no Court can refuse to accept the testimony of a witness on the ground of his not having been sent to identify all

the suspects.

54. Another serious flaw in the identification proceedings, as they are conducted everywhere, is that they are conducted in circumstances which are

quite different from those in which the offenders are said to have been seen committing the crime by the witnesses. Take the usual case of a

professional dacoity which is generally committed at night and in which the dacoits are seen by the witnesses in the light of torches or lanterns and

from distances of 20, 40 or 80 paces. An ideal identification proceeding is that which is held in the same conditions in which the offenders were

seen by the witnesses.

If a witness claims to identify an offender on account of a certain impression formed and retained in his mind on the basis of seeing him or his face

in a certain artificial light from a certain distance, he must be able to identify him from that distance and in that light. There is no reason why he

should claim better light and shorter distance to identify him. As a matter of fact, the impression formed of the face when seen in the light and shade

of artificial light and from a distance of say forty paces must naturally be quite different from an impression formed by seeing him in broad daylight

and from a distance of 3-4 paces.

I think it may oven be said that if a witness who saw a dacoit only in the light of a lantern and from a distance of 40 paces identifies a suspect in

broad daylight from a distance of 3 paces, he does so not on account of the impression formed in his mind while witnessing the dacoity but on

account of having seen him elsewhere in broad daylight and from close quarters. It may not be always possible to have identification proceedings

held in the same circumstances in which the crime was committed, but that is no reason for never making an attempt to hold them in like

circumstances.

In order to inspire confidence not only in the Court but also in the public, I consider it necessary that every attempt should be made to hold them in

circumstances similar to those in which the crime was committed. If the dacoits were seen in torch light, the identification proceedings should be

held with the help of torches : If a witness claimed to have seen the dacoits from a distance of 30 paces, he should be asked to identify them from

only that distance.

If he saw the dacoits only while running away, he must be able to identify the suspect while he is running. There can be no justification for his

demanding better facilities for identifying the dacoits than he had of seeing their features, if he claims to identify them only on the basis of the

impression of the features formed in his mind at the time of the dacoity and retained since then. Evatt and Mctiernan JJ. said in Craig v. The King,

at p. 446 (h) :

An honest witness who says "The prisoner is the man who drove the car," whilst appearing to affirm, a simple, clear and impressive proposition, is

really asserting :

(1) that he observed the driver, (2) that the observation became impressed upon his mind, (3) that he still retains the original impression (4) that

such impression has not been affected, altered or replaced, by published portraits of the prisoner, and (5) that the resemblance between the

original impression and the prisoner is sufficient to base a judgment, not of resemblance, but of identity.

It therefore became necessary, in the present case, to pay attention to the following circumstances: (1) Whether the witness was a stranger to the

driver of the car,

(2) whether the driver had any special peculiarities which, at the time, impressed themselves upon the witness,

(3) the length of time which elapsed between 14th December and (a) the time when the witness first described the driver or (b) the time when the

witness saw the accused person, (d) the description of the driver given by the witness before seeing the prisoner, and (5) the circumstances under

which the prisoner was first seen and identified by the witness as the driver.

Many judges are justly sceptical of the genuineness of many identification results. Having regard to the general level of intelligence among villagers

they find it difficult to believe that dacoits seen only in the light of a torch or a lantern from a distance of several yards should be recognised by the

witnesses after some months. It is high time that the identification proceedings were conducted genuinely and properly.

55. The identification proceedings in the present case were not conducted properly. They were not conducted separately for each suspect. Nor

was any attempt made to reproduce the circumstances in which the dacoits were seen by the witnesses. None of the inmates of the house in which

the dacoity was committed identified any of the three appellants. Dwarka did identify two of them, but his evidence has been ignored by everybody

because he picked out many innocent men and there was no reasonable certainty that he picked out the appellants on account of his having seen

them and not by accident.

All the witnesses who have identified them had seen them from the house of Ganesh which is at a distance of 25 yards according to one witness, 1

bigha according to another and 30-35 paces according to a third, from the house of Satya Narain and Dwarka, or from the house of Din Dayal

which is 15-20 paces or from the house of Ram Prasad, which is at a distance of 50-60 paces, or from the house of Ram Kishan 2-3 bis-was off

or from the house of Sitaram the distance of which is not known. The night was dark and the dacoits'' faces were seen by these witnesses only in

the light of torches and lanterns.

Torches were with the dacoits and some of the witnesses. Lanterns were burning inside and outside the house of Satya Narain. Dwarka and some

of the witnesses also carried lanterns. The dacoits were armed and were firing in all directions to keep off the people. They had also wounded

some persons. They kept on going inside the house and coming out. When after committing the dacoity the dacoits left, they were pursued by a

large number of witnesses. During the pursuit there was an encounter with lathis between the pursuers and some 4-5 dacoits who were left behind.

The encounter resulted in one dacoit being knocked down and captured. Inder Bahadur and Bindeshwari are two of the three witnesses who had

fought with lathis with the dacoitg. But none of the appellants was seen by any of the witnesses in the lathi fight. As a matter of fact, no witness has

assigned any specific part to any of the appellants; only Beohu and Ram Bahadur Singh stated that Samiullah appellant was armed with a gun.

None of the appellants is said to possess any marked personal peculiarities.

It is true that the identification of the appellants took place in the Partabgarh Jail on the 26th day. Still I am unable to say that I am satisfied that the

appellants were identified by the witnesses merely on the basis of their having seen them committing the dacoity. There may be some truth in their

statements that they were shown to the witnesses at Jaitwara and Partab-garh. Some of them might have taken part in the police raid. Had the

identification proceed-ings been hold in circumstances similar to those in which the dacoity was committed and had the witnesses still identified the

appellants, I would have relied upon their identification.

If the identification appears to have been induced by any suggestion or other means, the Court should not hesitate to quash any conviction which

follows, particularly when justice depended upon the identification of the accused. I would refer to E. v. Dickman (1910) 26 T. L. b. 640 (l) in

which Lord Alverstone, C. J. deprecated in the strongest manner any attempt to point out be-forehand to a person, coming for the purpose of

seeing if he could identify another, the person to be identified. Ho observed at page 642 :

The Police ought not, either directly or indirectly, to do anything which might prevent the identification from being absolutely independent, and they

should be most scrupulous in seeing that it was so"".

56. Samiullah''s case is different. Not only has he been identified by the witnesses as one of the dacoits, but also property proved to have been

carried away by the dacoits was recovered from his house on the very third day of the dacoity. There is no truth in Samiullah''s evidence that the

property belongs to him. He has offered no explanation for his being in possession of the property carried away by the dacoits from the house of

Satya Narain Dwarka.

As the property was recovered so soon after the dacoity, it can be presumed that he was one of the daooits. Illustration (a) to Section 114,

Evidence Act, is simply an illustration as it purports to be; it does not lay down the entire law on the subject and it is needless to emphasise that it

uses the words, ""stolen goods"", "" theft"" and "" thief"". There is no force in the argument that because the words ""dacoity"" and ""dacoit"" are not

used in it, a person who is in possession of goods carried away by dacoits soon after the daaoity cannot be presumed to be either the dacoit or to

have received them knowing them to be so carried away.

Theft"" is a general term and dacoity is theft committed in certain circumstances. The principle involved in the illustration is clearly applicable to all

thefts, including those amounting to dacoity. Mushtaq. Ahmad J., was of opinion that property obtained by dacoity is not stolen property as

defined in Section 410, Penal Code. With great respect to the learned Judge I do not agree. Section 412, Penal Code, refers to property carried

away by dacoits as stolen property. Even otherwise the words used in the illustration are not ""stolen pro. perty"", but ""stolen goods"". ""Stolen

property"" may have a particular meaning as given in Section 410, Penal Code., but there is nothing to suggest that the words ""stolen goods"" should

be given the same meaning.

In Sumer Vs. Rex, , this Court definitely laid down that the illustration does not limit the scope of Section 114 and that a person found in

possession of property carried away by dacoits can be presumed either to have been present and concerned in the dacoity or to have received it

knowing it to be dacoity property. The general presumption is that a person found to be in recent possession of the fruits of a crime, is the criminal

unless he can account for his possession. Recent possession of property proved to have been in the possession of a murdered person at the time of

the murder leads to the presumption that the possessor was the murderer; see; AIR 1949 277 (Nagpur) , In Re: Guli Venkataswami, and

Sadashiva Daulat v. State A. I. R. 1950 M p. 104 (p). In Wilson v. United States (1896) 40 Law Ed. 1090 (Q).

Fuller C. J., laid down that if property that was in the house at the time of its being burnt down is in possession of the accused after the arson, it

raises the presumption that he was present and concerned in the arson. It is legitimate to presume that Samiullah was present and concerned in the

dacoity. Though the direct evidence is not such as would have sustained his conviction standing alone, his conviction u/s 396, Penal Code, must be

maintained.

57. In my opinion the appeal of Satya Narain and Shahur should be allowed, their conviction be set aside and they be acquitted and the appeal of

Samiullah be dismissed and his conviction and sentence be maintained.

By the Court.

58. The opinion of the third Judge having been received, in accordance with ib the appeal of Satya Narain and Shakur appellants is allowed and

that of Sami Ullah appellant dismissed. Satya Narain and Shakur shall be released forthwith unless they are wanted in any other connection.