

(2001) 05 AHC CK 0200

Allahabad High Court

Case No: Criminal Appeal No. 2329 of 1984

Kallan

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: May 17, 2001**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 396

Citation: (2001) CriLJ 4403 : (2002) 1 RCR(Criminal) 496**Hon'ble Judges:** M.A. Khan, J; G.P. Mathur, J**Bench:** Division Bench**Advocate:** Vinay Saran, for the Appellant; A.G.A., for the Respondent**Final Decision:** Allowed

Judgement

G.P. Mathur, J.

Kalian has preferred this appeal from jail against his conviction u/s 396, IPC and sentence for imprisonment for life imposed by IInd Additional Sessions Judge, Basti, by his judgment and order dated 24-3-1979 in ST No. 194 of 1976.

2. The case of the prosecution as set forth in the FIR, in brief, is that the first informant PW 2, Rajendra Prasad Misra, was sleeping in the outer verandah of his house in village Plkora. P.S. Dhabarua, in the night of 7-8-1976. His lather Ram Lakhari, Surya Nath Pandey and Idris were also sleeping there and a lantern was burning nearby. At about mid-night, 6-7 dacoits armed with various weapons came there and started assaulting them. Three or four dacoits entered the house after scaling the wall and opened the door from inside. Thereafter, they started removing various articles like ornaments, clothes, watch, cash money etc. from there. The first informant and other family members started raising an alarm on which Bharosey and some others came there flashing their torches. The dacoits fired upon Bharosey who received gun-shot injuries and fell down. After committing dacoity in the house of Rajendra Prasad, they entered the house of Shanker Pradhan. However, as a

large number of villagers had collected there they could not take away any property and started fleeing from there. While leaving they shot at Munesar who dropped down dead after receiving gun-shot injuries. The dacoits were seen in the light of lantern and torch. A FIR of the incident was then lodged by Rajendra Prasad Misra at 2.30 a.m. on 8-1-1976 at P.S. Dhabarua, wherein details of the property looted was also given.

3. PW 12, Ram Pal Dubey, Head Constable, registered the case in the general diary on the basis of the FIR lodged by Rajendra Prasad Misra and prepared the chick FIR. He also prepared other documents in connection with the registration of the case. The police personnel of police station Dhabarua then came to the spot, held inquest on the bodies of Bharosey son of Mathura and Munesar son of Ram Nand Yadav. The bodies were sealed and were sent for postmortem examination. They also took other steps in connection with the investigation of the case. The appellant Kallant, was arrested near the railway line on 19-1-1976, and after making ba-pardah he was brought to the police station Dhabarua by Ganga Prasad Tewari. ASI and was kept in the lock up. An identification parade for the appellant was arranged in District Jail, Basti, on 13-2-1976, but as the witnesses failed to appear, the parade could not be held. Subsequently, the identification parade was held on 27-2-1976, wherein the appellant was correctly identified by 3 witnesses, namely, PW 2 Rajendra Prasad Misra. PW 3 Shankar and PW 4 Binda. After completing the investigation. PW 11 Ram Raman Bahadur Singh submitted charge-sheet against the appellant, and 3 other persons namely. Sultana, Amresh and Agnoo u/s 396, IPC.

4. The learned Magistrate took cognizance of the offence and committed the case to the Court of Session. The learned Sessions Judge framed charge u/s 396, IPC against all the four accused including the appellant, Kalian. The accused pleaded not guilty and claimed to be tried. The prosecution in support of its case examined 12 witnesses, including 5 eye-witnesses of the incident. The accused did not examine witness in their defence. The learned Sessions Judge convicted the appellant Kalian u/s 396 and sentenced him to imprisonment for life. The remaining three accused, namely, Sultana, Amresh and Angoo were acquitted.

5. We have heard Sri Vinay Saran who has been appointed as amicus curie for the appellant, learned AGA for the State and have perused the record.

6. PW 2, Rajendra Prasad Misra in his statement in Court gave details of the prosecution case. He stated that he was sleeping in the outer verandah of his house when the dacoits came at about 11.30 in the night. He had seen the faces of the dacoits in the light of torch and lantern which was kept burning in the verandah. He identified the appellant Kalian, as being one of the dacoits who had committed dacoity in his house. He further stated that he had seen the appellant during the course of dacoity and then at the time of identification parade. PW 1 Gauri Shanker was also examined as an eyewitness of the incident. He, however, stated that he had become blind subsequent to the commission of the dacoity, as such was not in a

position to identify any one in the dock. PW 3 Shanker stated that he was sleeping near his cattle shed when he heard alarm from the house of Rajendra Prasad Misra. He along with some other villagers went there flashing torches. He stated that he had seen the dacoits in the light of torch and lantern. The witness identified the appellant Kalian in the dock and stated that he was present amongst the dacoits at the time of incident. He further stated that after the dacoity, he had seen the appellant only at the time of identification parade. PW 4 Binda stated that he was resident of village Pikora and after hearing alarm from the house of Rajendra, he went there and saw the incident while standing on the road. He had seen the dacoits in the light of torch while they were running away. He identified the appellant in the dock and stated that he had seen the appellant at the time of incident and then during the identification parade held in jail. The prosecution also examined PW 5 Idris as an eye-witness of the incident. However, this witness only identified Amresh, accused, and did not identify the appellant.

7. PW 7 Sri Daya Shanker, SDO, Harraiya, stated that he conducted identification parade of Kalian, Sultana, Amresh and Agnoo, accused on 27-2-1976 in District Jail, Bash. He further stated that he observed all the precautions at the time of holding of identification proceedings and, therefore, prepared an identification memo on which he put his signature. He has proved his signature as Ext. Ka-3 on the identification memo. The identification memo is on the record of the case. It appears to be a carbon copy of a document and it is so dim and blurred that it is almost impossible to read or decipher anything from it. PW 7 Daya Shanker who conducted the identification parade admitted in his cross-examination that as the writing on the memo had become very dim he was not in a position to depose any thing regarding any special marks on the faces of the suspects or about the fact whether they had any beard or not. The document is so dim that it is not possible to read or decipher as to which witness had identified which particular suspect. It is just not possible to know whether any witness had identified any accused including the appellant Kalian at the time of identification parade. It is, therefore, not established at all that the appellant Kalian had been identified by PW 2 Rajendra. PW 3 Shanker and PW 4 Binda in the identification parade which is alleged to have been held on 27-2-1976.

8. In this case, the appellant is not named as an accused in the FIR. The case against the appellant rests entirely on identification evidence. There is no recovery of any stolen or looted property from his possession. Except for the identification evidence, there is no other evidence to fasten the guilt upon the appellant. No doubt, PW 2, Rajendra, PW 3 Shanker and PW 4 Binda identified the appellant as one of the dacoits when he was standing in the dock at the time when his trial was going on. However, in a case based upon identification evidence, it is obligatory for the prosecution to establish that soon after the commission of the crime and arrest of the accused, he was put for identification along with several others and in such identification parade the witness had correctly identified the accused. In absence of

such an evidence regarding identification by a witness in an earlier identification parade, the testimony of the witness which has been given for the first time in Court wherein he points to a particular person standing in the dock as one of the accused who had participated in the incident, cannot be accepted. In the present case, the prosecution has failed to establish that the appellant had been identified by PW 2, PW 3 and PW 4 at the time of identification parade which is alleged to have been held on 27-2-1976. In these circumstances, the evidence of these three witnesses in Court wherein they pointed towards the appellant as one of the miscreants who had participated in the dacoity, cannot be accepted. There being no other evidence to connect the appellant with the crime in question, it is not possible to sustain his conviction and he has to be acquitted.

9. In the result, the appeal succeeds and is hereby allowed. The conviction of the appellant u/s 396, IPC and the sentence of imprisonment for life imposed upon him by IInd Additional Sessions Judge, Basti, by his judgment and order dated 24-3-1979 in ST No. 194 of 1976 is set aside and he is acquitted of the charge levelled against him. The appellant is in jail. He shall be released forthwith unless wanted in some other case.