

**(1999) 09 CAL CK 0014****Calcutta High Court****Case No:** Criminal Appeal No's. 192 and 194 of 1992

Rakib S.K.

APPELLANT

Vs

The State

RESPONDENT

**Date of Decision:** Sept. 13, 1999**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 396

**Citation:** 104 CWN 125**Hon'ble Judges:** Malay Kumar Basu, J; Gitesh Ranjan Bhattacharjee, J**Bench:** Division Bench**Advocate:** Balai Ch. Roy, Asim Roy, Anirban Roy, Dipak Sengupta and Druba Jyoti Ghosh, for the Appellant; Kazi Safiullah, Public Prosecutor and Ranjit Kr. Ghosal, for the Respondent**Final Decision:** Allowed**Judgement**

Malay Kumar Basu, J.

These two criminal appeals are directed against the judgments and orders of conviction and sentence dated 29.5.92 passed by Shri A. K. Basu, the Additional Sessions Judge, Suri in Sessions Case No. 136 of 1987 (Sessions Trial No. 2 of 1992). Both the appeals arising out of the same judgment and order (Appeal No. 192/92) having been preferred by the convict, Rakib Sheikh and the appeal No. 194/92 being filed by the convict, (Hidayatullah Sheikh) and both involving the same question of law and facts are taken up together. Charge was framed against both the accused persons u/s 396 Indian Penal Code for committing dacoity in the house of Kishorilal Mondal and for committing murder of Smt. Mamata Mandal, aninmate of that house, during the commission of such decoity. The learned Trial Judge after considering the materials on record found both the accused guilty of the said offence, convicted them accordingly and sentenced each of them to suffer imprisonment for life. Being aggrieved by that order of conviction and sentence the accused-appellants have preferred the present appeal. The prosecuting case is as

follows. An FIR was lodged on 30.4.88 at about 8.05 p.m. by one Kishorilal Mandal stating that on the previous night, i.e., night of 29.4.88 while he and other inmates of his house were asleep, a gang of six/seven dacoits raided their two storied house in order to commit dacoity. His "Boro Boudi" (wife of his eldest brother) who was sleeping in the upper floor of the house first saw the dacoits and raised alarm and hearing her cries Kishorilal woke up and rushed to the varandah, of the first floor of their house and found two dacoits to break the lock of the door of their front-side boundary wall. He cried and hearing his cries his three elder brothers, his mother and his second sister, Mamata, woke up and came out. The four brothers had a tussle with the dacoits. One of his elder brothers hit one of the dacoits with a Tangi and as a result that dacoit sustained injury on his body. The dacoits then were going away, but Kishorilal somehow arrested one of them and he and his brothers started beating that dacoit. At this time the dacoits who were standing outside the house hurled two bombs towards them (the inmates of the house). One of the bombs hit the boundary wall and burst and the other bomb hit the chest of Mamata who was standing behind her brothers and as a result she sustained serious injuries on her person. At this they released that detained dacoit. Meanwhile, on hearing the alarm raised by the inmates of the house the villagers began to come to their house and seeing this the dacoits fled away without being able to take anything from the house.

2. The dacoits had Torchlights, Lathis and Shovels in their hands. In the focus of their torchlights the informants saw the dacoits and they would be able to recognise them if the dacoits were seen again. After the dacoits left, Kishorilal along with his elder brothers and some villagers took his injured sister, Mamata, to Ahmedpur P.H.C. in a cart and therefrom to Suri Hospital where she succumbed to her injuries the next morning. In the FIR it is also stated that some drops of blood of the dacoit who received a blow from the Tangi of the informant's elder brother could be found on the wall of their house.

3. On the basis of this FIR police started investigation. During investigation, the Investigating Officer visited the place of occurrence, prepared a sketch map of the place of occurrence, seized several articles therefrom under seizure lists, namely, blood stained mud, one Tangi, one Shovel, one torchlight, a pair of Chappal etc. The Investigating Officer also recorded statements of the witnesses u/s 161 Criminal Procedure Code. Further, police conducted raids in search of the suspects in the nearby villages and receiving some source information that a man named. Hidayatullah having received injuries on various parts of his body was staying at village Makra, the Investigating Officer had been there and arrested that person and on interrogation the man stated before him (I.O.) that he had received injuries while committing dacoity at the disputed village, Kanaipur, and then he forwarded that accused person, named, Hidayatullah, to Suri Hospital for treatment. He also made a prayer before the S.D.J.M., Suri for recording confessional statement of that accused person. However, when he was produced before the Magistrate for this

purpose, he declined to confess. The I.O. also made a prayer before the S.D.J.M. for placing this accused in the T.I. parade was held on 23.5.84. He was identified by the four T.I. parade witnesses, viz., the informant Kishorilal (P.W.1) and his three brothers. The other accused Rakib Sk. surrendered before the court of S.D.J.M. on 31.10.84. He was also placed in the T.I. parade which was held on 21.1.85 of the four witnesses, only two identified him and the other two failed to identify.

4. After the investigation was over, police submitted chargesheet against four accused persons including the present two accused u/s 396 Indian Penal Code. As regards two accused, namely, Glas Mohammad and Nasiruddin Mallick, the case was filed after W/P & A were served and the other two accused, Hidayatullah and Rakib Sk, were committed by Id. S.D.J.M. to the Court of Sessions for their trial. Considering the materials on record the Id. Addl. Sessions Judge framed charge against both these accused u/s 396 Indian Penal Code when both of them pleaded not guilty.

5. From the trend of cross-examination the defence case appears to be that on that night no dacoit entered inside the compound of the house of the de facto-complainant as alleged and the inmates of that house including Mamata chased some dacoits after hearing the cries of the villagers and Mamata was hit outside their house by a bomb thrown by the villagers while chasing the dacoits. So far as the identification of these two accused in the T.I. Parade is concerned, their suggestion is that they had been shown to the witnesses by the police beforehand.

6. In order to prove the charge prosecution has to show that five or more persons conjointly committed dacoity in their house and, secondly, in so committing the dacoity someone of them committed the murder of the deceased. However, Mr. Balai Roy, the learned Counsel for the appellant, has urged that as per the definition given in Section 390 Indian Penal Code, in every robbery there must be theft or extortion and if theft is not complete there cannot be robbery and since in this case admittedly the dacoits did not take away any property the ingredients of the offence of robbery or, for that matter, dacoity were not fulfilled and this cuts at the root of the charge of the offence of dacoity with murder u/s 396 Indian Penal Code. But this contention is without any merit. The offence of dacoity has been defined u/s 391 Indian Penal Code which provides that when five or more persons conjointly commit or attempt to commit a robbery, every person so committing or attempting or aiding is said to commit dacoity. Thus it has been made abundantly clear and express that an unsuccessful attempt at the commission of the offence of robbery by five or more persons will constitute the offence of dacoity. In a Full Bench decision reported in AIR 1957 SC 320 the Hon'ble Apex Court has also taken this view.

7. Death of the deceased, Mamata is admitted. It is also admitted that on the night of occurrence she received bomb injuries. According to the doctor (P.W.6) who held the post mortem on the dead body of the deceased the death was due to the effects

of the injuries caused by bomb being antemortem and homicidal in nature.

8. The prosecution in order to establish the guilt of the accused appellants examined 13 witnesses in all. Of them the P.Ws 1, 3, 6 and 8, the four brothers, are the eye-witnesses to the factum of dacoity. P.W. 1. Kishorilal Mandal, the informant himself, stated that on the fateful night on the 16th Baisakh while all the inmates of their house were asleep, his "Boro Boudi" (the wife of his eldest brother) woke up first on hearing the sound of breaking of lock of the main entrance door of their three storied house and she raised alarm and at that this P.W. 1 woke up and rushed to the verandah of the first floor of the house and there he found two men one of whom caught hold of his throat and throttled him. He then pushed that man to the ground and raised alarm when all other inmates of the house woke up. He then noticed 2/4 persons trying to come to the first floor. Seeing this he jumped on the ground from that verandah and closed the west facing door of their house when he saw 3 persons going away. He then caught one man on the spot. He also saw that his 3 brothers were jostling with 3 dacoits, but they finally fled away. Thereafter, he assaulted the dacoit, whom he had caught, with a Lathi and his eldest brother assaulted him with the blunt side of a Tangi. At this time his mother and sister Mamata, came to the ground floor. The dacoits who had been outside the house hurled bombs at the instance of the arrested dacoit and one bomb struck Mamata on her chest and as a result she fell down injured. Another bomb exploded within the house. The P.W. 1 has further stated that the dacoits were 6/7 in number and they were carrying Torchlights, Lathis and Shovel and he saw the dacoits in the light of the Torchlight carried by them. After the decoits left, the P.W. 1 and others took the injured, Mamata, to Suri Hospital where she was admitted. But she succumbed to her injuries the next morning i.e., on 17th Baisakh. At about 8/10 P.M. on that date he went to the Sainthia P.S. and lodged the FIR. The explanation of the delay of several hours in lodging the FIR was that they had to remain busy with their injured sister.

9. P.W. 3, Nandadulal Mondal the eldest brother of Kishorilal (P.W. 1) is another eye-witness to the occurrence. He has stated that on the night of the incident, he was sleeping in the south-facing room of the 1st floor of the house. On hearing shouts of his wife, he woke up and came outside his room and he heard alarms raised by his youngest brother and he also heard that the dacoits were threatening to kill their children. Then he jumped from the verandah with a Tangi in his hand and his wife remained inside the room along with the children. He saw his younger brother to jostle with the dacoits. Thereafter his two other brothers, Gopal and Joydeb, joined them. Then they, the four brothers, were jostling with four dacoits of whom three managed to escape and one was detained by them. He (P.W. 3) gave 3/4 strikes on the person of the detained dacoit with his Tangi. The detained dacoit was short in physique with bald head. When this detained dacoit raised alarm saying about his assault bombs were hurled from outside and one of such bombs hit P.W. 3's sister, Mamata, who had already come along with their mother. As a result

Mamata fell down with injuries. While they became busy with their injured sister the detained dacoit managed to escape by crossing the wall. They saw four dacoits within the compound of their house and there were some more outside. There was no electric light in their house and they saw the dacoits in the light of torchlights carried by the dacoits themselves. P.W. 3 further says they with their injured sister they came to Suri Sadar Hospital where she expired. He also says that he came to Suri jail for identification of the suspects in the T.I. Parade and identified the accused. Hidayatullah, as the dacoit who was assaulted by him during commission of the offence on the night of occurrence.

10. P.W. 4 Gopal, another brother of the P.W. 1 and an eye-witness says that on the night of occurrence he slept in a room of the ground floor and woke up on hearing the noise raised by the dacoits. He found his brothers jostling with the dacoits. He saw all these in the torchlights focussed by the dacoits themselves. He caught hold of a man who had been already detained by his other brothers and at that time somebody struck him on his left hand causing bleeding injury. About 5/7 dacoits came inside the house compound and all of them except the who had been caught and detained by them escaped by scaling the wall. P.W. 4 further says that the detained dacoit raised alarm saying that he was being assaulted by the inmates of the house and at his request the dacoits standing outside the house threw bombs and one such bomb hit his (P.W. 4's) sister, Mamata who had already come there along with their mother. Mamata receiving bomb injuries fell down and at this time the arrested dacoit managed to escape by jumping the compound wall. This was revealed from the marks of blood with which that wall was stained. Thereafter they took their injured sister to the Suri Hospital where she died the next day at about 9 A.M. P.W. 4 also says that an inquest was conducted on the dead body by police at Suri Sadar Hospital and they brought the deadbody after the post mortem examination was held on it. The further evidence of the P.W. 4 is that he came to Suri jail for identification of the dacoits in the Test Identification Parade and he identified the accused, Hidayatullah, as the man whom he and his brothers detained in their house on the night of occurrence during commission of dacoity. P.W. 4 identifies both the accused on dock but says that he identified the accused Rakib Sk. in Suri Jail not fully.

11. P.W. 8, Jaydeb Mondal, is one more eye-witness being another brother of the P.W. 1. He says that on the night of occurrence he slept in a room of the first floor of their house and woke up on hearing noise. He found 3/4 persons jostling with his younger brother, Kishorilal (P.W. 1). At once he and his two other brothers (P.Ws. 3 and 4) rushed to that spot and 3 dacoits managed to escape while one was detained by them. That detained dacoit being assaulted with a Tangi raised alarm for rescue and at this bombs were hurled towards the premises from outside of the wall and one such bomb struck his sister. Mamata, on her chest and she fell down. At this time the detained dacoit took the opportunity to run away by crossing the wall. Then they took the injured. Mamata, to the Sadar Hospital at Suri where she succumbed to her

injuries at about 9 A.M. On the next day, P.W. 8 further says that about 5/6 dacoits took part in the commission of dacoity on that night and they noticed four of them within their premises in the focus of torchlights carried by the dacoits themselves. P.W. 8, they says that he attended Suri jail twice in connection with identification parade of the suspects and he identified Hidayatullah as the man who had been assaulted by them on that night and Rakib Sk. as one of the dacoits who entered into their house on that night.

12. P.W. 5, the wife of P.W. 3. Nandadul Mondal. has not stated anything about the incident. She was tendered by the prosecution for cross-examination, but the defence declined to cross-examine her.

13. P.W. 9, Smt. Santirani Mondal. the mother of the P.Ws. 1. 3, 4 and 8 and also of the deceased, who claimed to have eye-witnessed the occurrence narrates the incident by saying that on the night of occurrence her daughter, Mamata, was sleeping by her side. When the dacoits raided her house, she woke up, but did not and Mamata. She then come outside and found her sons jostling with the dacoits. She further says that suddenly a bomb came and hit Mamata who fell down. She then raised her from the ground and the injured Mamata was taken to Suri Hospital where she died subsequently.

14. P.W. 11, Netai Chandra Mondal, is a neighbour of the P.W. 1. He says that on the 16th Baisakh, 1391 B.S. at night he woke up from sleep hearing sounds of bomb explosion and also shouts. He came to the house of P.W. 1 and found Mamata lying on the courtyard of the house injuries. On enquiry he came to learn that the dacoits raided the house, but could not take away any articles. He was also told by the inmates that four dacoits had entered into their house and they saw those dacoits. P.W. 11 also says that thereafter they took the injured to Suri Hospital where she died the next morning at 9 A.M. He was at the Suri Hospital till post mortem was held on the dead body.

15. P.W. 12, Adhir Mondal. is another neighbour of P.W. 1 and gives similar evidence. He, however, adds that he along with others chased the dacoits, but in vain.

16. P.W. 2, Shri S. K. Dam, who was the Judicial Magistrate, Suri, at the relevant time and held the Test Identification Parade in respect of the two appellants in the District Jail, Suri has stated about the same and proved the Test Identification Memo.

17. P.W. 6, Dr. S. Nath, performed the post mortem examination on the dead body of the deceased, Mamata, on 30.4.84. He has stated the details of the injuries which he found on the body of the deceased and he has given his opinion as to the cause of the death. He has opined that the death was due to the effects of the injuries caused by bomb, antimortem and homicidal in nature.

18. P.W. 7, Shri S. Mukherji. Retd. S.I. of Police, who was posted as S.I. of Police. Sainthia P.S. on 26.6.86 took up charge of this case from the O.C., Sainthia P.S. and submitted C.S. against the accused persons u/s 396 Indian Penal Code without performing anything relating to the investigation of the case.

19. P.W. 10, Shri Ajit Shaw. S.I. of Police, was attached to the Sainthia P.S. as the second officer and was holding charge of the P.S. in the absence of the regular O.C. He states that on 30.4.84 at about 8 P.M. one Kishorilal Mondal came to the P.S. and narrated the incident when he (P.W. 10) reduced the same in writing and got it signed by the informant. He further says that on 6.10.84 he took up investigation of the case, made attempts at arresting the accused persons from time to time and on 27.1.86 handed over the case docket to the O.C. on his transfer.

20. P.W. 13, Shri Ajoy Chakraborty, S.I. of Police was the Investigating Police Officer. He gives the details of investigation done by him. He says that he visited the P.O. and seized some blood stained mud and also plain mud from the top of the compound wall of the house of the informants as well as from outside that wall, seized one Tangi, one Torchlight, one Shovel, one pair of Hawai Chappal and one Gamchaall reported to the left by the dacoits. He also seized from the P.O. some half burnt paper with smell of gun powder and some half burnt strings. He further says that he received a written report from some persons at village Makra that a man named Hidayatullah had been found to have received injuries on various parts of his body and on his interrogation that man stated before them (members of the public of that village) that he had been assaulted while attempting to commit dacoity in village Kanaipur. P.W. 12 then says that he thereafter took that person, named. Hidayatullah in custody from his residence and he noticed injuries on his head and forwarded him to Suri Hospital for treatment. He also made a prayer before the S.D.J.M., Suri for recording confessional statement of that accused, Hidayatullah.

21. The accused persons did not examine any defence witness. After perusal of the entire evidence and circumstances on record the learned Trial Court came to the conclusion that the prosecution case had been totally proved and accordingly he convicted the accused appellants and sentenced them as noted above. The main point for determination in this appeal is whether the findings of the Trial Court are correct and whether the charge levelled against the appellants can be said to have been proved beyond all reasonable doubt.

22. As we have seen above, the five eye-witnesses to the occurrence, viz., the four brothers and the mother (P.Ws. 1, 3, 4, 8 and 9) have quite consistently testified to the factum of dacoity and they have been well corroborated by two independent co-villagers who came to the P.O. just after the occurrence (P.Ws. 11 and 12) and one of whom also participated in chasing the dacoits. We do not find absolutely any reason to disbelieve their testimonies as regards the allegation that a dacoity was attempted to be committed in their house and during commission of such dacoity Mamata was killed. The death of the deceased Mamata in the manner as alleged by

the prosecution has been established from the evidence of the above witnesses and, more particularly, by the medical evidence which remains practically unassailed.

23. But the crucial question to be determined is whether it has been proved beyond all reasonable doubt that the appellants took part in the commission of the dacoity on the night of occurrence as alleged. It has been vehemently argued for the appellants that the evidence of identification of the accused which is the mainstay of the prosecution and which was the bare minimum required for conviction was miserably unworthy of reliance and the learned Trial Court wrongly upon the same for arriving at the finding of guilt.

Learned Counsel for the appellants has urged that the identification suffers from a number of infirmities and shortcomings so that it is most unsafe to rely upon the same. According to him, in the first place, admittedly it was a dark night and as per the evidence, the inmates of the house saw the faces of the dacoits in the light of the torchlight which was being focussed by the dacoits themselves, but curiously enough, the version of the inmates-eyewitnesses to the occurrence on this point are not consistent or harmonious. While P.W. 1, P.W. 3 and P.W. 4 have stated that they saw the dacoits in the focus of the torchlights carried by the dacoits themselves, the that the dacoits were seen by them in the light of the torchlights of dacoits as well as of themselves. He says in his cross-examination that v (the inmates of the house) had two torch lights with them and the dacoits were carrying 4 torch lights and they could see. the faces of the dacoits with the help of the torch lights of both sides. He further says that they (the inmates of the house) did not handover their torch lights to the I.O. Learned Counsel for the appellants contended that in view of such inconsistent statements of the eye-witnesses the truth in their claim that the above mentioned eyewitnesses saw the faces of the dacoits during the commission of the offence at that dark night becomes subject to grave doubt.

24. Secondly, it is pointed out that the T.I. Parade was held in respect of the accused, Hidaytullah, on 25.5.84, whereas he was actually arrested by police on 2.5.1984. From the records, it transpires that this accused was bearing multiple injuries on his person at the time of his arrest and hence the Investigating Police Officer after arresting him got him admitted in the Suri Sadar Hospital for treatment and made a prayer before learned S.D.J.M.. Suri for an order showing him as arrested in connection with this case. Subsequently, on 10.5.1984 he was brought under arrest and produced before the court of S.D.J.M. wherefrom he was taken into judicial custody. It has been contended by the learned Counsel that the prosecution had not adduced any evidence whatsoever to prove that from the date on which he was arrested and during the period he was kept in the hospital for undergoing treatment and thereafter was brought to the court from the police lockup and thereafter again was taken to the jail, this accused was escorted Baparda (under the cover of a curtain) or was kept Baparda all along. The learned Counsel attracts our attention to the admission made by the P.W. 3 in his cross-examination to the effect

that the Investigating Officer showed the accused. Hidayatullah to him in the hospital and argues that this statement of one T.I. witness alone is enough to give a blow to the reliability of the entire identification, because it if in evidence [vide the deposition of the P.W. 3) that the accused. Hidayatullah was bald headed. Learned Counsel for the appellant contends that it has been admitted by the T.I.P.-Magistrate (P.W. 2) that he did not note in his T.I.P. Memo about any special feature of the appearance of this suspect and from the T.I. Parade Memo it is not shown that the Magistrate mixed up this bald headed accused, Hidayatullah, along with some other persons of similar bald heads during the identification parade and if that was not done, it was quite easy for all the 4 T.I. Parade witnesses to identify him on the basis of such a special mark in his appearance particularly when all the 4 T.I. Parade witnesses were full brothers and inmates of the same house and this suspect having been shown to one of them in the hospital it is quite likely that the other 3 brothers would get sufficient idea and hint from him (P.W. 3) about the special mark in the appearance of this accused for the purpose of identification of that accused. Learned Counsel submits that in view of such flaws it would be unsafe to rely upon such identification of the accused in the T.I.P. which is the lone evidence of the prosecution for connecting the accused with the crime.

25. So far as the other accused, Rakib Sk. is concerned, the learned Counsel argues, the identification suffers from similar shortcomings. This accused surrendered himself before the Court of S.D.J.M. on 31.10.84 and he was remanded to judicial custody on that date and he was placed in the T.I. Parade which was held on 21.2.85, that is, after 264 days from the date of the occurrence and 81 days from the date of surrender. It is urged on behalf of this appellant that in the first place it is humanly impossible to remember the face or the features of appearance of a dacoit and identify him after such a long period, particularly when the witnesses saw him in a dark night in the flash of torch lights of the dacoits themselves and that too for a short while. Secondly, this accused was detained in the jail custody for about 81 days and during this long period he was produced before the court of S.D.J.M. from the jail custody on a number of occasions by way of routine fortnightly production and there is absolutely no evidence from the side of the prosecution to show that during such production before the court all safeguards were taken to obviate the possibility of his being seen by or shown to any of the T.I. Parade witnesses while in transit during such production or in the court room or in the jail premises. Thirdly, it is the contention of the Id. Council that out of the four witnesses only two were actually able to identify him and of them again one witness, namely, Gopal Mondal (P.W. 4) had admitted in his cross-examination that he told the Magistrate during the T.I. Parade that he was not hundred per cent sure about the identity of this suspect and in such circumstances, the genuineness of the identification of the accused, Rakib, Sk., by this witness becomes highly doubtful and the successful identification by only one witness, vix., the P.W. 8 loses all its value or credibility in the backdrop of the above mentioned circumstances.

26. Giving our careful consideration we find that some of the above contentions are not wholly Without substance. There is no denying the fact that the evidence of identification on which alone the whole prosecution hinges in respect of both the appellants was full of lacunae and could not be safety relied upon.

27. The admission of one of the witnesses that the accused, Hidayatullah, was shown to him by the Officer-in-charge of the concerned P.S. at the hospital where he was receiving medical treatment gives a fatal blwo to the genuineness and reliability of the entire identification in so far as this accused is concerned. Moreover, admittedly this accused was boad headed and in the evidence there is nothing to show that during the T.I. Parade other similar bald headed persons were mixed up with this accused or that the heads of all persons placed in the T.I. Parade were covered by caps or cloths and under such circumstances if the witnesses all of whom belonged to the same family identify that accused, then the possibility cannot be eliminated that the witness to whom he was shown by the I.O. in the hospital would divulge to the others the special identification of this accused to enable them to identify the accused in the T.I. Parade. As regards the identification of the accused, Rakib Sk., we have seen that he was identified by two witnesses at a T.I. Parade held 264 days after the occurrence and one of the two witnesses himself stated that he was not hundred per cent sure about the identity of the suspect. The other witness of course does not say so, but having regard to the facts and circumstances including the circumstances in which the occurrence took place in a dark night we are of the opinion that it may not be safe to rely solely on the identification of the accused by that witness 264 days after the occurrence.

28. We are therefore of opinion that the evidence of identification against both the appellants cannot be regarded as sufficiently reliable for the purpose of arriving at a finding of guilt against them beyond reasonable doubt and they are entitled to get the benefit of doubt. In the result, the appeals are allowed. The conviction and sentence of the appellants are set aside and both the appellants are acquitted of the charges framed against them and they be set at liberty, if their detention is not lawfully required in connection with any other matter.

Gitesh Ranjan Bhattacharjee, J.

I agree