

(2002) 09 CAL CK 0044

Calcutta High Court

Case No: Criminal Appeal No's. 226 and Death Ref. No. 2, 227, 228, 254, 258, 261 and 267
etc. etc. of 1999

Shew Kr. Rai and Another

APPELLANT

Vs

State of W.B.

RESPONDENT

Date of Decision: Sept. 13, 2002

Acts Referred:

- Penal Code, 1860 (IPC) - Section 396

Citation: (2003) CriLJ 574

Hon'ble Judges: Nure Alam Chowdhury, J; Joytosh Banerjee, J

Bench: Division Bench

Advocate: Ram Prasad Bhattacharrya, Shekhar Basu, Tapas Kr. Ghosh, Naba Kumar Gosh, Manwat Ali, Dilip Dutta, R.K. Ghosal, Firoze Edulji, Arup C. Chatterjee, Anusua Dutta, Sahid Imam and Arup C. Chatterjee, for the Appellant; Kazi Safiullah and Swapan Kr. Mallick, for the Respondent

Final Decision: Allowed

Judgement

Joytosh Banerjee, J.

These eleven appeals has been directed against the judgment and order of conviction dated 22-7-99 passed by Additional Sessions Judge, 3rd Court, Nadia at Krishnagore by which the learned Judge convicted all the 10 accused/appellants u/s 396 and 120-B of IPC. In addition to that accused/ appellants Shew Kumar Rai, Debasis Khan, Khokan Kunar were also convicted u/s 326, IPC and accused/appellants Tarun Bhattacharjee, Probir Samanta, Debnath Das and Prosanta Dey were convicted u/s 412, IPC. On their conviction, accused/appellants Shew Kumar Rai, Khokan Konar and Debasis Khan Were sentenced to death. Apart from the death sentence, the aforesaid accused/appellants were also sentenced to a fine of Rs. 75,000/- each. Subject to confirmation by this Court u/s 366(1) of the Cr. P.C. other accused/ap-pellants who were convicted as aforesaid were sentenced to imprisonment for life with a fine of Rs. 50,000/- each in default to suffer R.I. for

another five years. Being aggrieved by the order and sentence passed by the learned Additional Sessions Judge, the accused/appellants filed in all eleven appeals. Amongst the accused/appellant Khokan Konar filed two appeals, namely, Crl. Appeal No. 227/99, 267/99 and accused/appellant Debasis Khan also filed two appeals, namely, Crl. Appeal Nos. 228/99, 258/99. These appeals, which have arisen from the common order and judgment of conviction along with death Reference No. 2/99 in connection with the death sentence of the aforesaid three accused/appellants have been heard together and the death reference and the appeals will be disposed of by the present judgment.

2. P.W. 1 Anwar Mallick lodged the FIR on 4-5-98 in the morning, alleging that on that day at about 9.30 a.m. when he was proceeding towards Naki Gram along the National Highway (N.H. 34) he found a dead body of an unknown person with injuries lying by the side of the highway in between village Singhati and Naki. Subsequently, he also came to know that another person with injuries on throat had been admitted at Saktinagar Hospital with serious condition. On the basis of such FIR police started the case u/s 302, IPC and on completion of the investigation submitted C.S. against all the accused/appellants u/s 396/412/120-B, IPC. Subsequently, the learned Additional Sessions Judge raised charge u/s 120-B/396/326 and 412, IPC against all the ten accused/appellants. Thereafter, on the basis of the evidence on record, the learned Judge convicted the accused/appellants and sentenced them as aforesaid.

3. The only point for our consideration in the present appeal is whether the learned trial Court is justified in convicting the accused/appellants under the aforesaid provisions of Indian Penal Code and also in recording the sentence as seen above?

4. In order to bring home the charge, the prosecution here has examined in all 20 (twenty) witnesses, P.W. 1. Anwar Mallik is the informant who lodged such information after discovering a dead body of an unknown person at about 6.30 or 7 a.m. on a day in the first week of May, 1998. P.W. 2, Salim Mallick is a resident of village Singhati near about which village, the dead body was discovered. According to this witness he had been to the spot seeing a crowd there and found the dead body lying and at the request of the police affixed his signature on the inquest report. P.W. 3 Samser Ali Mallik has claimed in his evidence that he affixed his signature on the inquest report in the similar way while passing through the spot. P.W. 4, Md. Juhi was the Assistant to the lorry driver bearing No. W.B. 03/8087. he is an eye-witness and we propose to discuss his evidence at the time of consideration of the total evidence adduced from the side of the prosecution to bring home the charge. P.W. 5, Samar Barman, P.W. 6 Samir Biswas, P.W. 7 Shyam Poddar, P.W. 8 Tapas Ghosh and P.W. 9 Susanta Santra are the seizure list witnesses. P.W. 10 Smt. Mina Sarkar was the Judicial Magistrate posted at Krishnagar in the district of Nadia at the relevant point of time and on 8-7-98 she held the T.I. Parade in respect of appellants Shew Kumar Rai and Debasis Khan at the District Jail at Krishnagar. P.W.

11 Dr. Ajit Biswas, P.W. 18 Dr. Sudhanau Das and P.W. 19 Dr. Asim Kumar Kundu are the doctors who have been examined in connection with the trial. Amongst them P.W. 11 at the relevant point of time was attached to Saktinagar Hospital where he held the P.M. Examination over the dead body of Chadraswar Shaw, the deceased. P.W. 18 as M.O. attached to Bethuadhari P.H.C. examined one unknown person who had a cut injury on his throat and subsequently he was referred to District Hospital at Saktinagar and such injured was sent by the Hospital Ambulance to the District Hospital at Saktinagar. P.W. 19 Dr. Asim Kumar Kundu as the Medical Officer (surgeon) of the Nadia District Hospital, Krishnagar examined the unknown man who was conscious. But he could not record any history of such injury as the patient could not speak due to injury sustained. On examination, the doctor found certain injuries on his person. Subsequently, the man was referred to a teaching hospital in Calcutta for better treatment on 12-5-98. P.W. 12 Zillau Rahaman at the relevant point of time as A.S.I. of Police attached to Dhubulia P.S. He received the written complaint and started P.S. Case No. 41/98. P.W. 16 is a constable who brought one G. D. Entry which was marked Ext. 12 in course of the trial of the case. P.W. 17 Sujit Bhattacharjee was S.I. of Police attached to Dhubalia, P.S. and the instant case, namely, Dhubalia P.S. Case No. 41/98 dated 4-5-98 was endorsed to him by the then O.C. Dhubalia for the purpose of investigation. He took up the investigation, proceeded to the spot and reaching there held inquest over the dead body of the deceased. He found a tatoo on the left hand of the dead body wherein the name "Chandreswar Shau" was written in Hindi. He came to know that another person was admitted in to Saktinagar Hospital via Bethuadahari Hospital with injuries. The witness prepared sketch map of the P.O. sent the dead body to Saktinagar Hospital for P.M. examination. On 4-5-98 he had been to Saktinagar Hospital and found an unknown person admitted in the hospital with a cut injury who was unable to speak. On 6-5-98 he again visited Saktinagar hospital and this time he examined the injured whose name he had come to know from the brother of the deceased as Md. Juhi and recorded his statement. Thereafter, C.I.D. West Bengal took over the charge of the investigation of the case and he handed over the case diary to C.I.D. on 19-5-98. P.W. 20 Mukti Pada Maity was a Sub-Inspector of Police attached to C.I.D. West Bengal at the relevant point of time. He took up the investigation and on completion of the same submitted charge-sheet. We propose to discuss his evidence later on with the evidence of some other relevant witnesses for the purpose of coming to a conclusion regarding the point at issue.

5. Besides these witnesses, the prosecution has also examined P.W. 13 Dukhan Chowdhury a resident of Gandalpara, Chandannagore in the district of Hooghly, who has claimed that he deals in transport business of a vehicle bearing No. W.G.A. 4539 and he took the lorry in lease from another. At the stage, the witness has been declared hostile by the prosecution and the witness has been cross-examined by the prosecution. P.W. 14 Rama Sankar Singh a resident of Calcutta is the owner of the lorry bearing Nos. W.B. 03//8087. According to him his lorry is used for carrying

goods from Calcutta to Jorhat in Assam. They used to collect goods from Hidusthan Road Travels commonly known as H.R.T. at 26, Tarachand Dutta Street, Calcutta 700 007. On 3-5-98, the said vehicle was loaded with goods from the H.R.T. and it came to his garage loaded with goods at 4 p.m. It started for Jorhat from his garage at 6 p.m. The witness has further disclosed that Chandreswar Shau was the driver of that lorry and Md. Jihi (P.W. 4) was the assistant to the driver of that lorry. It is his further evidence that on the following day the driver of the lorry bearing No. W.B. 03A/4088 on returning from Assam informed him over telephone at about 11/11-30 a.m. that the driver of the lorry bearing No. W.B.03/8037 that is to say Chandreswar Shau was lying dead at Dhubulia P.S. on 5-5-98 in the early morning, the witness along with the agent of the H.R.T. and the brother of Chandreswar Shau came to Krishnagar, contacted the S.P. Nadia and went to Dhubulia P.S. to find out the lorry. They also met the injured Juhi who was lying at Saktinagar Hospital. He was in senseless condition. They requested the hospital authority to release him for his better treatment in Calcutta. But considering his condition they did not allow them to shift him. 4/5 days after that day they took the injured Juhi by a private car to Chittaranjan Seva Sadan for his better treatment. It is further evidence that on 26-5-98 he received a telephone message from Habra P.S. that the vehicle was recovered. He went to Habra P.S. and found the lorry at the thana compound. P.W. 15 Anil Singhi is an employee of H.R.T. He has corroborated the evidence of P.W. 14 about the booking of goods for transporting them to Assam in lorry bearing No. W.B. 03/8087 and he further has disclosed that the lorry was loaded with goods like Ganji Gangia, cycle tyre, gum, ink, plastic sheets, wire nails, ready-made garments, chappal, shoes, dendrites etc. The witness has further stated that at the time of sending the goods through that lorry, they prepared two copies of challan for sending the goods. One was kept with them and the other was given to the driver of the concerned vehicle for carrying goods. He has corroborated the evidence of the owner regarding the information about discovery of the dead body of the driver at Dhubulia and regarding his accompanying the owner of the vehicle to Dhubulia P.S. His evidence has further disclosed that certain articles were seized in his presence on a seizure list where he affixed his signature and he has asserted that the article seized in this way were identical to the article loaded in the lorry bearing No. W.B. 03/8087. he has deposed that he affixed his signature as a witness in two seizure lists which have been marked Ext. 3/1 and 4/2.

6. Thus we find on going through the total evidence that the evidence of P.W. 4 Md. Juhi is the most important for the purpose of establishing the charge launched against the appellants specially the charge of dacoity.

7. P.W. 4 in his evidence has stated that at the relevant point of time he was assistant to a lorry driver and on the day of incident he was going to Guahati by lorry bearing No. W.B. 03/8087 from Calcutta along N.H. 34. They started from Calcutta at (sic) p. m. A mini truck boarded by a gang of decoits tried to overtake their vehicle twice in between Santipur and Krishnagar. By the third attempt, the decoits were successful

in placing the said mini truck in front of their lorry. Thereafter three miscreants boarded their lorry one of them showed them a pistol, one miscreant started assaulting him with the reverse side of a bhojali. The third one took the seat of the driver, forcing the driver to sit on the bonet. They demanded money and the witness handed over what he had in his pocket. Thereafter, those miscreants took the driver out of the vehicle to the field by the side of the road and slit the throat and left him there. Then they again boarded the vehicle and drove it for a distance of 5/6 k.m. Thereafter they tied the hands of the witness and brought him out of the lorry and took him to a field and slit his throat twice. Then the witness became senseless. So, he was not in a position to say where the decoits went away after they inflicted the injuries on his person. The witness has further stated that after 10/12 minutes he could open his eyes and tried to rise from the ground. But at first he could not due to his serious injuries. Later on he somehow rose to his feet and came to the road. He tried to stop the vehicles but did not succeed. At last he stood on the middle of the road and managed to stop a vehicle. But the driver of the said vehicle did not allow him to board the vehicle. In spite of that, he caught hold of the back leaf of the lorry and somehow placed his legs on same iron rest and came to a distance of about 2/ 3 k.m. by hanging outside the lorry. It is the further evidence of this witness, after that he got down and stood on the ground and this was noticed by some persons of the hotel who helped him to come to a place where police was present and the police brought him to the police station and thereafter he was taken to Saktinagar Hospital. Later on he was transferred to Chittaranjan Seva Sadan Hospital by the manager of the transport company. The witness identified accused/appellants Khokan Konar as the person who had slit his throat and identified accused/appellant Debasis Khan who had caught hold of his hair and helped the other accused to take him out to the lorry and he also identified accused/appellant Shew Kumar Rai as the person who had slit his throat and also had launched assault on the driver after removing him from the vehicle. In the cross-examination, the witnesses stated that in course of examination by the I.O., he stated to the I.O. that there was light in the driver's cabin. He has also claimed that he stated to the I.O., the circumstances under which he could come to the police station at Dhubulia wherefrom he was sent to Saktinagar Hospital. In such cross-examination he has further stated to the I.O. he could see the miscreant by the light, which illuminated the driver's cabin. It is to be mentioned here that from the evidence of the Judicial Magistrate who held the T.I. Parade on 8-7-98 that is to say more than two months after the incident complained of took place that the witness identified accused/ appellant Shew Kumar Rai in the T.I. Parade, as the person who was driving the vehicle and also identified accused/appellant Debasis Khan and the person who took away his money after catching hold of his neck. It is to be pointed out here that in his deposition the witness identified the three accused/appellants as noted above by attributing completely different type of allegations as we have already noted. Be that as it may, the question here is whether the evidence of the sole eye-witness is acceptable to the Court for coming

to a conclusion that there was a decoity committed by some of the appellants and their associates when the lorry in which a transport company was sending some goods to Assam was on way to Guahati at a place within P.S. Dhubulia in the district of Nadia. At the very outset it should be pointed out that the evidence of sole eyewitness, namely, P.W. 4 clearly indicated that there was three miscreants who were responsible for the entire offence, namely, creating obstruction for their lorry to proceed further, for entering inside the driver's cabin, for committing the murder of the driver after taking him outside the lorry and also for inflicting the serious injuries on the person of the P.W. 4 and taking away the lorry when the witness lost his senses. Close scrutiny of the evidence on record including the evidence of P.W. 4 has failed to indicate even remotely that besides the three as disclosed by the sole eye-witness P.W. 4, there was any other person at the spot when those three miscreants were involved in committing the offence complained of. It transpires from the judgment of the learned Additional Sessions Judge that he also recorded in such judgment, after scanning the evidence of the sole eye-witness, it was established before him that the three accused/ appellants who were later on identified in the T.I. Prade were responsible for the murder of the driver of the lorry in question, namely, Chandreswar Shaw. The learned Judge commented that there was nothing to shake the evidence of P.W. 4 on this point and he was also unable to reject the fact that the same witness later on also identified the two accused/appellants. So the total effect of the aforesaid observation of the learned Additional Sessions Judge is that on the basis of the aforesaid evidence he was satisfied about the involvement of three accused/appellants, namely, Khokan Konar, Shew Kumar Rai and Debasis Khan in the incident complained of. Now, u/s 391, IPC, the offence of decoity has been defined to indicate when five or more persons conjointly commit or attempt to commit a robbery for where the whole number of persons conjointly committing or attempting to commit a robbery and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "decoity". Therefore, from such definition, it transpires that there should be five or more persons for the purpose of committing the offence of decoity. But here as we have noted above, clear finding of the trial Court is that only three persons were present at the spot and they committed the offence. In this background, it is evident that the offence complained of cannot be decoity and therefore the accused persons cannot be convicted u/s 396, IPC. But before leaving this question finally we should point out that the learned Judge in Para 43 of his judgment (at P. 297 P.B.) discussed the ingredients of the offence punishable u/s 396 and pointed out that such offence took place when there was a commission of decoity and one of the decoits committed the murder during the commission of decoity. In Para 33 of his judgment, the learned Judge has indicated sufficiently that he was not oblivious of the definition of decoity by pointing out that Section 396, came into play when five or more persons committed the murder for that purpose. But, thereafter, as it transpires from his judgment he has completely misdirected himself by observing

that it was not necessary that the murder should be committed in presence of all and unnecessarily further observing that when a decoity is planned murder is contemplated from the very first. In the process, he has lost sight of the very definition of decoity that for the purpose of the same, presence of five or more persons at the spot is absolutely necessary. No doubt, the learned Judge in the judgment has tried to justify his conclusion regarding recording the conviction u/s 396, I.P.C. by observing that the other accused persons may not be physically present at the spot but they were party to a criminal conspiracy to commit the offence of decoity. He has gone further by observing that all the ten accused/appellants boarded in a mini truck bearing No. WGY 4539 etc. We fail to understand wherefrom the learned Additional Sessions Judge has got this important evidence that all the ten accused appellants were present at the spot, while the three accused/appellants entered inside the cabin of the driver of the lorry other were in the mini truck ? Practically the observation of the learned Judge in this respect is not based on any evidence. Only allegation against some of the rest accused/appellants is that from their custody some articles which were subject matter of the dacoity have been recovered. But relying only on this fact, a court of law cannot jump to a conclusion that all those accused/appellants were party to a conspiracy hatched for the purpose of committing a dacoity. Language of Section 391 is clear enough to indicate that five or more persons conjointly must commit offence. The word "conjointly" in the definition of the offence dacoity is most significant. It manifestly refers to united or concerted action of the persons participating in the transaction. If individual act of a person cannot be reasonably be referred to a united or concerted action of such person, there cannot be any question of any conviction for an offence of decoity of a group of persons concerned. So at the very outset, it can be said that there cannot be any conviction u/s 396, I.P.C., in the facts and circumstances of the case as discussed above. No offence of decoity as contemplated u/s 391, I.P.C. has been established in the instant case.

8. So far the allegation of robbery is concerned, there is sole evidence of P.W. 4, Md. Juhi. We have already seen that the said witness described the incident in his oral testimony and implicated three accused/ appellants, namely, Khokan Konar, Debasis Khan and Shew Kr. Rai with the offence of robbery. So far, the evidence through which has unfurled the incident, it can be said that the same is acceptable as it goes unchallenged and it does not suffer from any infirmity. The question is how far the evidence of PW 4 connecting the aforesaid accused/ appellants with the offence complained of, is acceptable ? Admittedly the whole incident took place in the darkness of night while the witness with the victim driver was proceeding in the lorry No. W.B. 03/8087 along N.H. 34. In his oral testimony, PW 4 did not disclose how he could see the miscreants responsible for the offence complained of. In the cross-examination on behalf of the accused Khokan Konar, Md. Mokthar and Shew Kr. Rai he only denied a suggestion that there was no light in the drivers cabin of the

lorry. As we have already pointed out that there were two I.Os. in this case. P.W. 17, Sujit Bhattacharjee who at first took up the investigation and proceeded with the same, for sometime before handing over the same to C.I.D. for the purpose of investigation. His evidence goes to indicate that the sole eye witness on the point of incident, PW 4 Md. Juhi was examined by him and his statement was also recorded by the witness. His evidence clearly has indicated that Md. Juhi did not state to him that there was light in the drivers cabin and that he could see the miscreants by the light of the cabin. PW 20, S.I. Mukti Pada Maity, who at the relevant point of time was attached to C.I.D. is the other I.O. who completed the investigation and submitted the charge sheet. His evidence also indicates that in course of the investigation, he examined PW 4 Md. Juhi at Chittaranjan Hospital, Calcutta and recorded his statement. He has also stated that Md. Juhi did not state before him that there was light in the drivers cabin and he could see the miscreants by such light. In this background, it can be said without hesitation that the only witness here on the point of incident has failed to disclose how he could see the miscreants. It is to be pointed out that there is no indication throughout the evidence of PW 4 that he could describe miscreants before the police officers, the I.Os at the time of his examination. The I.Os of the case also did not indicate that PW 4 gave them any description of the miscreants. The only other evidence to connect two of the accused, namely, Shew Kr. Rai and Debasis Khan is the T.I. Parade held by Judicial Magistrate, Krishnagar on 8-7-1998 at Krishnagar District Jail. The question is whether we should come to a conclusion that prosecution through evidence at least could implicate two of the accused Shew Kr. Rai and Debasis Khan with the offence complained of, solely relying on such T.I. Parade? Before proceeding further, it is to be noted here that the incident complained of took place in the night of 3rd/4th May, 1998 and T.I. Parade in question was held on 8-7-1998 that is to say two months after such incident. Learned Counsel for the accused/appellants submitted that in the facts and circumstances, we should not attach any importance to the identification by PW 4 in such T.I. Parade, on the ground that the very basis of the evidence of PW 4 regarding identification of the miscreants who had entered inside the drivers cabin in the night of incident, has been shaken due to his silence as to how he could see the miscreants inside the driver's cabin in the darkness of the night and that too when the lorry was proceeding along National Highway. It is further submitted that the witness did not give any description of the miscreants who had entered inside the driver's cabin and who were responsible for the commission of the offence, namely, robbery and murder. According, to him, this lends credence to the theory that due to darkness, the witness could not see the miscreants who were responsible for the offence. It is also submitted that even if the witness had any occasion to see the miscreants in that night at the time of commission of the offence, it is hardly possible for him to identify those miscreants whom he did not see after the incident in the T.I. Parade, which took place more than two months after the incident. It transpires that a specific question whether he gave any description of the miscreants regarding their statute, complexion,

structure etc. was put to the sole eye witness PW. 4. But, the learned trial Judge erroneously held that question was not relevant and did not record the answer given by the witness. In our considered opinion having regard to the entire facts and circumstances of the case, the question relating to the description of the miscreants had a great bearing on the veracity of the deposition of the PW 4. On this point, the learned Counsel for the accused/appellants has placed his reliance on a decision of the Apex Court in the case of [Wakil Singh and Others Vs. State of Bihar](#), . In para 2 of the judgment, the Apex Court observed as follows :--

"In the instant case we may mention that one of the witnesses in their earlier statements or in oral evidence gave any description of the decoits whom they have alleged to have identified in the dacoity, nor did the witnesses give any identification marks viz. stature of the accused or whether they were fat or thin or of a fair colour or of black colour. In absence of any such description, it will be impossible for us to convict any accused on the basis of a single identification, in which case the reasonable possibility of mistake in identification cannot be excluded."

In our considered opinion, the aforesaid observation of the Apex Court is very much relevant in the instant case, where we are required to depend on the single identification as stated above and where, from the aforesaid facts and circumstances, it is doubtful whether the single eye witness had the occasion to clearly see the miscreants to that he could identify at least two of them in T.I. Parade which took place two months after the incident. The learned Counsel for the accused has further submitted that when a case is based on evidence of solitary witness, evidence of such witness must be wholly reliable. In this context, he has referred to the celebrated judgment of the Hon"ble Supreme Court in the case of [Vadivelu Thevar Vs. The State of Madras](#), . We find that the Hon"ble Court through Paras 11 and 12, of that judgment, has observed that generally speaking oral testimony may be classified into following categories :--

- (1) Wholly reliable.
- (2) Wholly unreliable.
- (3) Neither wholly reliable nor wholly unreliable.

Thereafter, the Hon"ble Court proceeded to observe as follows :--

"In the first category of proof, the Court should have no difficulty in coming to its conclusion either way -- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach of suspicion of interestedness, incompetence or subornation. In the second category, the Court equally has no difficulty in coming to its conclusion. It is the third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. But, where there are no such exceptional reasons operating, it becomes the duty of the Court to convict, if it is satisfied that

the testimony of a single witness is entirely reliable."

Considering the evidence of PW 4, in the light of the observation of the Apex Court as noted above, we find that the evidence of PW 4 so far the same related to his proceeding with the lorry in question as an assistant to the driver for the purpose of delivering goods loaded in Calcutta, to a destination in Assam, the further allegation that while the lorry in question was proceeding along National Highway No. 34 in the night of occurrence a mini truck tried to create obstruction and ultimately it succeeded to do so, for which the driver on the truck in question had to stop the same and his further evidence regarding the circumstances under which the driver of the lorry in question met with a violent death and the witness himself sustained grievous injury on his person and his further evidence regarding the miscreants taking away the lorry in question, is acceptable to us as the same was not at all shaken by the cross examination and there is no circumstance to create any suspicion about the truth of those allegation. In the other portion of the evidence, the witness has described the incident of robbery committed by three unknown miscreants and how he could ultimately come to the police station wherefrom he was sent to the district hospital of Krishnagar at Saktinagar. We have already noted the reasons for which it is not possible for us to accept his evidence regarding the identification of the three miscreants who entered inside the driver's cabin at the time of commission of the offence. The other portion of the evidence also fails to inspire any confidence, it transpires from the evidence of PW 4, the miscreants had tied his hands and brought him out of the lorry, took him to a field and then slit his throat twice. Thereafter, the witness became senseless. His evidence further indicated that after sometime he regained his sense, tried to stand up and ultimately he could rise to his feet and came to the road. Then he tried to stop the vehicle and by standing on the middle of the road he could manage to stop a vehicle. But the driver of the said vehicle did not allow him to board the vehicle, rather he tried to prevent him from boarding the lorry with the help of a lathi. Thereafter, he could catch hold of the back leaf of the lorry and somehow placed his legs on some iron rest and came to a distance of about 2/3 km. by hanging outside the lorry. The lorry stopped near a hotel where he got down and stood on the ground and some people noticed him. The police personnel were also there. The police took him to Saktinagar hospital. But according to PW 19, Dr. Asim K. Kundu, who examined the injured at about 4.30 pm. on 4-5-1998, he found that the patient was not in a position to speak out due to his injuries, and the doctor examined an unknown person and also found sharp cutting injury over the anterior aspect of the neck, and salivary glands were also bifurcated and there was profuse bleeding. In this background, it is doubtful whether the witness reached the hospital, in the manner as described by him in his evidence. In this connection, it should be noted that according to PW 17, S.I. Sujit Bhattacharjee who at first took up the investigation of the case that he for the first time to know from the people who had assembled at the spot in between villages Singhati and Neki by the side of N.H. 34

that another person who admitted into Saktinagar Hospital via Bethuadhari Hospital with injuries and on going to the hospital on 4-5-1998 at 13.45 hrs. he found an unknown person admitted in the hospital with a cut injury who was unable to speak. Later on he came to known from the brother of the deceased that the injured person was Md. Juhi (PW 4). In this way, it transpires that the prosecution has failed to lead any evidence to show how PW 4 was brought to Bethuadhari P.H.C. First of all. PW 18, the Medical Officer attached to Bethuadhari P.H.C. only stated that in his evidence that 4-5-1998 at 2.05 a.m. he had the occasion to treat one unknown person who came to P.H.C. with cut-throat injury and he was sent to Saktinagar Hospital by the Ambulance of Bethuadhari P.H.C. In the cross examination, the witness stated that the condition of the patient was serious and in such condition he could move one or two steps. All these facts and circumstances make this part of the evidence of PW 4 not at all acceptable.

9. So far as the other accused persons are concerned, we find from the evidence of PW 20 that on 19-5-1998 on a source information he had to Palta in the night and reached the house of accused Shew Kr. Rai. He interrogated Shew Kr. Rai and recorded his statement thereafter Shew Kr. Rai was arrested and led him to the house of Prosanta Dey of 143, Basudebpur, P.S. Jagadal. He examined accused Prosanta Dey and recorded his statement, arrested him and thereafter Prosanta also led him to the house of Md. Mokhtar at Telinipara. In the similar way, the witness claimed that he recorded the statement of the accused, arrested him and according to his statement came to Bhadreswar P.S. and thereafter interrogated accused Debasis Khan who had already been arrested in connection with another case. Thereafter accused Prosanta and Md. Kokhtar led him to the house of Tarun Bhattacharjee and he (PW 20) seized articles like electric fans, T.V. Antenna, plastic sheets, gum, ink, ready-made garments, 100 pieces of cherry coloured folding umbrellas, nails etc. under a seizure list. Thereafter he had been to the house of Kanai Dey and Ranjit Dey as shown by Prosanta and Tarun Bhattacharjee. He interrogated both the accused and recorded their statements. Thereafter accused Prosanta and Shew Kumar Rai led him to the house of Khokan Konar who was not found in the house. In this case there is no evidence to connect the accused/appellants like Prosanta Dey, Md. Mokhtar and Kanai Dey with the offence complained of except the evidence of PW 20, the I.O. of the case who as it is seen from the above quoted statement simply indicated that after one accused had been apprehended, he recorded his statement and thereafter he led the police officer to the other accused. u/s 27 of the Evidence Act, which is an exception to the general rule laid down in Section 25, making the confession before a police officer inadmissible, any information given by the accused to the police officer, whether it amounts to a confession or not, which leads to discovery of facts is admissible. But in order to bring the case within the purview of Section 27, three essential ingredients as noted below must be satisfied :-

- (1) the information given by the accused must lead to the discovery of the fact which is the direct outcome of such information.
- (2) Only such portion of information given as is distinctly connected with the said recovery or discovery is admissible against the accused,
- (3) The discovery of the facts must relate to the commission of such offence.

In the instant case, the prosecution has never tried to assert that in the police custody, on being examined, the accused persons made statements, neither those statements have been produced in connection with the trial of the case. The I.O. also did not disclose in his evidence what was the nature of the statement if at all any statement as contemplated u/s 27 of Evidence Act was given by the accused persons or any of them. The Apex Court in the case of [Mohmed Inayatullah Vs. The State of Maharashtra](#), formulated the following conditions necessary for bringing Section 27 into operation, first, the discovery of fact albeit relevant fact, is in consequence of information received from a person, accused of any offence, secondly, the discovery of such fact must be deposed to; thirdly, at the time of receipt of information, the accused must be in police custody and lastly, only so much of the information as it relates distinctly to the fact thereby discovered is admissible but the rest of the information has to be excluded. Considering the whole evidence of the I.O. on this point in the light of the above, we find that in the deposition, the I.O. did not disclose the particular nature of the fact which was discovered through the interrogation of the accused persons. He has only stated that one particular accused led him to another accused. But there is no indication why the first accused led the police officer to the second accused and so on. In that background, we are not in a position to say that information, if any, given by any of the accused, has led to the discovery of any fact and discovery of such facts are related to the commission of the offence alleged. Therefore, the evidence of the I.O. regarding the arrest of the accused persons and recording their statements and his further allegation that one accused led him to another accused, cannot connect the accused persons with the offence complained of.

10. Prosecution has led evidence to show that some articles which were stolen properties being the subject matter of the robbery, were recovered from the possession of some of the accused persons, PW 5 Samar Barman in this way has deposed that on 23-5-1998 police recovered some articles from the house of accused Debnath Das of Panshila Saradapally, P.S. Kharda. He has further testified that the goods like ganji, jangia shoe-sole, hawai chappal, umbrella, cycletyre, dendrite, ink, etc. etc. in huge quantity were recovered in presence of some local people including himself. At the time of his oral testimony, the witness had the occasion to identify five gangis, one shirt, one dendrite container, one packet camel ink and one folding umbrella, which has been marked I to VI. The cross-examination of the witness goes to show that there are many houses in the vicinity of the house where-from the articles were recovered. The witness has disclose in his evidence

that he was resident of Agarpara whereas the articles were recovered from Khardah. In the cross examination he has further disclosed that the distance between the two places is 4/5 k.m. and in between two places there is Sodepur. The cross examination of the witness further has indicated that accused Debnath Das was not known to the witness from before i.e., the date of seizure and the witness has admitted his ignorance about the ownership of the house where from the articles were recovered. In the aforesaid circumstances, it is very difficult for us to come to a conclusion that stolen articles as alleged were recovered from the house of accused Debnath Das relying on the sole oral testimony of PW 5 who admittedly was a resident of a distinct place and who on the face of his evidence was ignorant of the ownership of the house wherefrom the articles were recovered.

11. Next comes the question of seizure of stolen articles from the possession of accused Tarun Bhattacharjee. On this point, the prosecution has examined two witnesses, namely, PW 6 Samir Biswas and P.W. 7 Shyam Poddar, P.W. 6 has stated that he is a resident of Keutia Bazarpara, P.S. Jagadal and he is a driver of vehicle No. W.B. 25/8091. His evidence has further disclosed, that at about 8/9 months back (he deposed on 1-3-1999) at about 12 noon when he was taking rest in a hotel on the highway, some police personnel requested him for carrying some goods on hire from Gurdah Colony to Calcutta. According, he went to that colony and found an old man who was taking out some articles like umbrella, ceiling fans, bag of nails and many other articles in huge quantity. In this way, the witnesses has also identified accused Tarun Bhattacharjee who was taking some articles from the house. P.W. 7 Shyam Poddar is a resident of Gurdan Colony, Shyamnagar, P.S. Jagadal. According to him on 19-5-1998 at about 3.30/4 pm. he was standing in front of his house when some police officers called and asked him to go to the house of Tarun Bhattacharjee. Going there he found that the police was taking out some articles from the house. Police seized articles under a seizure list and witness affixed his signature marked Ext. 4/(1). He has further disclosed that he knew Tarun from before and the house wherefrom the police was seen taking away articles belonged to Tarun Bhattacharjee and his 3/4 brothers. In the cross examination, the witness has further disclosed that he was called by the police at about 3.30/4 p.m. and he stayed with the police for about half an hour and within this period he met with the police and none else. According to him he left the spot after affixing his signature on the seizure list. Now, the evidence of these witness should be considered along with the seizure list prepared in connection with the search and seizure from the custody of accused Tarun Bhattacharjee. At the very out set, it should be pointed out, while both the witnesses in their deposition has stated that the stolen articles were recovered from the house of Tarun Bhattacharjee and his brothers, the seizure list clearly has indicated that those articles were recovered from the godown of accused Tarun Bhattacharjee. Then again according to P.W. 6 police approached him for going to the spot at about 12 noon when he was taking rest in a hotel and accordingly he accompanied the police to the spot and saw the search and seizure.

In the cross examination also, he repeated that he had been to the spot at about 12 or 12.30 p.m. and remained at the spot for about 3 hours. He has further stated that at about 3.10/ 3.15 pm. He took meal in the hotel and from there he started for Calcutta with the goods recovered. But the seizure list (at p.8 P.B. Part II) clearly indicates that the seizure took place in between 16. 15 hrs. to 18.30 hrs. that is to say between 4.15 p.m. to 6.30 p.m. Undoubtedly at the time P.W. 6 was not present at the spot. The same thing can be stated about the presence of PW 7, the other witness, on the point of seizure of articles from accused Tarun Bhattacharjee. According to that witness, he was standing in front of his house at about 3.30/4 p.m. when he saw the police took out some articles from the house of accused Tarun Bhattacharjee. The cross examination of the witness has further clarified the matter. Witness has stated that at about 3.30/4 pm., the police called him to the spot, going there he did not met any other person except the police personnel and he remained at the spot for half an hour within which time he affixed his signature on the seizure list and came back home.

12. Next comes the question of the alleged recovery of some articles from the possession of one witness, namely, P. W. 8 Tapas Ghosh, stated to be kept by accused Probir Samantha. Prosecution has examined two witnesses to prove this allegation. They are P.W. 8 Tapas Ghosh and P.W. 9 Susanta Santra. It appears that P.W. 8 Tapas Ghosh in his evidence has only indicated that he is a resident of Basudebpur road, Shyamnagar, where he stays in a rented house. On 31-5-1998 at about 2 a.m. in the night police raided his house and asked him to put a signature on a seizure list for recovery of some stolen articles. Accordingly the witness affixed his signature on a blank piece of paper. At this stage, the witness has been declared hostile by the prosecution and with the permission of the Court, he has been cross examined by the prosecution, but nothing further has transpires from his evidence. P.W. 9 Susanta Santra has stated in his evidence that police officer arrested accused Probir Samanta and brought him to his hotel on a day about 6/7 months back (the witness deposed in this fashion on 4th March, 1999). The police officer asked him (the witness) to put signature on a seizure list by showing some bags, which stated to be recovered from Probir Samantha. Accordingly, the witness affixed his signature on the seizure list. The witness has been cross-examined both the prosecution with the permission of the Court and also by the defence. But the cross examination of the witness is not relevant for the purpose of implicating the accused Probir Samanta with the allegation of recovery of stolen property from his possession.

13. In this way, we find that the prosecution has failed to establish here that the stolen articles were recovered from the possession of the aforesaid accused persons.

14. From the discussion above, it is clear now that the prosecution here has success fully established that while P.W. 4 along with the driver of lorry No. W.B. 03/8087

was proceeding along N.H. 34, three miscreants managed to stop the lorry, committed the murder of the driver, inflicted serious injury on his the person of Md. Juhi (PW 4) and decamped with the lorry loaded with different articles. But the prosecution has failed to connect the accused persons, namely, Debasis Khan, Khokan Konar and Shew Kr. Rai as the persons responsible for committing the murder and robbery. The prosecution has successfully established that the stolen articles were subsequently recovered and as per the evidence of P.W. 15 Anil Kr. Singh, an employee of the transport company, namely, H.R.T., the goods were seized in his presence and the articles thus seized were identical to the articles loaded in the lorry bearing No.W.B. 03/8087. We have got no reason to disbelieve this witness when there is no effective cross examination on the aforesaid allegations. At the same time, it should be noted that the witness did not state for once that the articles in question were seized from the possession of any particular accused, but having regard to the entire circumstances, it can be said that the cross examination had been done on behalf of the defence clearly indicates that the articles recovered in connection with this case, are not claimed by any of the accused of this case. On the other hand, the witness (P.W. 15) in his evidence has clearly indicated that the articles which were seized were identical to the articles which were being sent by his company through lorry No. W.B. 03/8087.

15. Thus considering the entire facts and circumstances and also evidence on record, we are of the opinion that the conviction and the sentence awarded by the learned Additional Sessions Judge is not at all justified for reasons assigned above. The prosecution has failed to bring home the charge levelled against any of the accused persons. That being so, all the appeals filed by the accused/appellants are allowed. The accused persons are found not guilty to the charge levelled against them and they are accordingly acquitted therefrom. They be released from the jail custody forthwith if not wanted in connection with any other case. If any accused persons are on bail, such accused be released from the bail bond. Death reference u/s 366, Cr.P.C. is also disposed of accordingly. Let the articles seized be returned to the transport company, if not already returned.

Nure Alam Chowdhury, J.

16. I agree.