

(1998) 12 PAT CK 0036
In the Patna High Court
Case No : Criminal Appeal No. 518 of 1993

Gulab Sain and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 11-12-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 157, 159
Penal Code, 1860 (IPC) — Section 302, 390, 396

Citation : (1999) 1 PLJR 325

Hon'ble Judges : R.N. Prasad, J;B.P. Sharma, J

Bench : Division Bench

Advocate : P.N. Pandey, Uday Bhanu Roy, in Cr. Appeal Nos. 518 and 549 of 1993 and Ashwani Kumar Sinha, in Govt. Appeal No. 4 of 1994, for the Appellant; Answani Kumar Sinha in Cr. Appeal Nos. 518 and 549 of 1993, D.K. Sinha, Ram Bilash Roy "Raman", Bajrangi Lal, Anil Kumar Singh, No. 1 for informant in Cr. Appeal Nos. 518 and 549 of 1993, P.N. Pandey and Uday Bhanu Roy, in Govt. Appeal No. 4 of 1994, for the Respondent

Judgement

B.P. Sharma, J.—All these three appeals have been filed against the judgment and order passed by 2nd Addl. Sessions Judge, Rohtas at Sasaram in Sessions Trial No. 7 of 1991. By a judgment dated 19th October, 1993 the learned Addl. Sessions Judge convicted altogether 11 persons u/s 396 of the Indian Penal Code and sentenced them to undergo R.I. for life. By the same judgment dated 19th of October, 1993 the learned trial court acquitted 7 of the accused persons of the charge u/s 396 of the Indian Penal Code. Out of 11 persons convicted by the trial court 8 persons, namely, Gulab Sain, Jahndar Sain, Bramha Singh, Munni Singh, Jhakai Bind, Briksh Bind, Kera Bind and Babulal Bind, filed an appeal which was registered as Cr. Appeal No. 518 of 1993. out of these 8 Appellants, Appellant No. 4, Munni Singh has since died and the appeal against him stood abated as per the order dated 25.11.1998. Two of the convict, namely, Bhan Singh and Subhas Singh filed a separate appeal which has been registered as Cr. Appeal No. 549/93. The State of Bihar also filed an appeal against the order of acquittal

passed by the trial court against 7 of the accused, namely, Sheo Murat Bind, Shankar Bind, Raja Ram Chamar, Nithonar Chamar, Prem Chamar, Dularchand Chamar and Rashid Mian. This appeal has been registered as Govt. Appeal No. 4/94. No appeal appears to have been filed on behalf of one of the convicts, namely, Mohan Bind. It is thus clear that Cr. Appeal No. 518/93 stands against seven Appellants excepting Appellant No. 4, Munni Singh and there are two Appellants in Cr. Appeal No. 549/93.

2. The facts of the case, in brief, are like this. In the evening of 1st of September, 1989 the informant Gulab Singh (P.W. 6) had returned from the market at Bhabhua to his village Fakhrabad within P.S. Chainpur, District Bhabhua in the company of his nephew Krishna Singh (P.W. I). They had purchased fertilizers and had brought the same on a tractor. After reaching their home they went inside the house and started taking breakfast. While they were taking breakfast they heard some sound of firing from outside and both of them came out of the house and they saw a group of persons coming towards their house. They further saw that one Madan Singh, the nephew of the informant, came out of his Baithaka from the side of his house and started moving and when he was on the Southern side of a temple known as "Mahabir Asthan" the Appellant Gulab Sain fired at him which hit him in his leg. Thereafter Munni Singh (Appellant No. 4) of Cr. Appeal No. 518/93 (since dead) opened fire and this shot hit the chest of the said Madan Singh and he fell down and instantaneously died. Thereafter the group of persons moved ahead uttering that their ambition was fulfilled and also uttered that they shall loot, in the house of the informant. As the dacoits came near the house of one Pritam Singh they found his Karinda Hasim Khan standing and the Appellant Jahandar Sain (Appellant No. 2) of Cr. Appeal No. 518/93) opened fire hitting in the chest of the said Hasim Khan who also fell down and died. Then the informant and his nephew Krishna Singh ran towards their house to save their lives and they went upstairs hurriedly and the culprits entered the house of the informant and started enquiring from the female members present in the house as to who was the wife of Madan Singh, the deceased and they also enquired from them as to where were those two persons who had returned from the market on the tractor. The female inmates did not disclose it by saying that they were not available and the dacoits assaulted some, female members and thereafter procured the keys of the house and boxes from the ladies and ransacked the different rooms and removed valuables. They also snatched the ornaments from the person of the lady inmates present there and thereafter they ran away. The informant had seen some of the dacoits and identified them. Subsequently, a Police Officer arrived from the Police Station at Chainpur on getting information about this dacoity and murder and at 8.30 P.M. he recorded the statement of the informant (P.W. 7) in a Fardbeyan (Ext. 3). The informant gave the details of the occurrence and also stated that the dacoits committed dacoity with murder as the family of the informant has some enmity with them. He named some of the dacoits in his Fardbeyan. They were Brahma Singh, Briksh Bind, Kera Bind, Babulal Bind and

Mohan Bind of village Khurde, Durga Singh of village Baburhan, Sub-hash Singh of village Betari and Bhan Singh of village Kurasan. On the basis of this Fardbeyan a formal F.I.R. was drawn up and a case u/s 396 of the Indian Penal Code was registered. It appears that subsequently in course of investigation the names of some other persons were also taken by the witnesses and on completion of investigation the I.O. submitted charge sheet against altogether 18 accused persons. Cognizance was accordingly taken and the case was committed to the court of Sessions. The case was transferred to the court of 2nd Addl. Sessions Judge, Rohtas at Sasaram before whom the trial commenced and the charge was framed. The charge was explained to the accused persons, who denied the same and pleaded not guilty. Accordingly, the trial proceeded and on conclusion of the trial the learned 2nd Addl. Sessions Judge, Rohtas at Sasaram delivered the judgment and passed the order, as stated above.

3. In this case the prosecution examined altogether 9 witnesses in support of the charge against the accused persons. Out of these 9 witnesses, P.W. 8 Dr. Satyendra Kumar happened to be the doctor who held Postmortem Examination over the dead bodies of the two victims, namely, Madan Singh and Hasim Khan on 2nd of September, 1989 while he was posted as C.A.S. in Bhabhua hospital. So far as the postmortem of Madan Singh is concerned, the doctor found the following antemortem injuries:

- (i) One lacerated wound 4" x 3" x muscle deep on the medial side of left knee with margin tattooed.
- (ii) One lacerated wound 11" x 1/2" x muscle deep with margin inverted and tattooed on lateral surface of left thigh with margin. It is the wound of entrance.
- (iii) One lacerated wound 2" x 2" x abdominal cavity deep with margins inverted.

According to the doctor omentum was coming out from injury No. (iii) and this injury No. (iii) was a wound of entry. On opening the abdominal cavity the doctor found the same to be full of blood. The spleen was lacerated torn into pieces. The colon was ruptured. Liver, pancreas, both kidneys were pale and small intestine contained liquid and gas. The injuries were antemortem in nature and caused by fire arm. Injury No. (iii) was sufficient to cause death in ordinary course. The death was due to haemorrhage and shock as a result of injury No. (iii) and the time elapsed since death was 12 to 24 hours. A Carbon copy of the postmortem report is Ext. 2. On the same day this doctor P.W. 1 held the postmortem Examination over the dead body of Hasim Khan and found only one antemortem injury. It was lacerated wound 2" x 3" chest cavity deep margin inverted tattooed on the front portion of chest with fracture of body of sternum. Brain substance was found to be pale and on opening the chest cavity it was found full of blood. Right chamber of heart was ruptured. Left chamber empty. Similary right lung was punctured and lacerated. In the opinion of the doctor the death was due to shock and haemorrhage caused by the injury and the injury was such which was sufficient in ordinary course to cause death. The time elapsed since death was

between 12 to 24 hours. It is, therefore, clear from the medical evidence in this case that both the deceased persons had died of fire arm injuries sustained by them and the injuries were also caused from the close range as tatooings were found on the injuries on their persons. Thus, the medical evidence in the case lends support to the manner of occurrence as alleged in the prosecution in this case.

4. P.W. 9 is the I.O. of the case. He has stated that he had received a confidential information at the Police Station that there was a dacoity in village Fak-rabad and he made the station diary entry to this effect and proceeded alongwith some other police personnel to village Fakrabad where he reached at about 8.30 P.M. He recorded the Fardbeyan of Gulab Singh (P.W. 6) subsequently on the basis of this Fardbeyan of Gulab Singh a formal F.I.R (Ext. 4) was drawn up and a case was registered. However, this Police Officer proceeded with the investigation of the case. He thereafter recorded the statement of the informant Gulab Singh and Krishna Kumar Singh (P.W. 1) and inspected the P.O. According to this witness the temple of Mahabir Jee is located near a pond and there is a path on the eastern side of the temple and alongwith it is the baithaka or Palan of the informant. According to the prosecution story the deceased Madan Singh was sitting in this Baithaka before the incident and when he started moving on the southern side of the temple he was hit by the assailant. According to this witness (P.W. 9) the dead body of Madan Singh was found lying about 8" from the southern side of the temple. The I.O. further observed that at a short distance from the temple there was a Baithaka of Pritam Singh where the dead body of Hasim Khan was recovered. It was lying near the stairs on the southern side of the Baithaka. The I.O. had picked up these two dead bodies and had prepared the inquest and sent the dead bodies for Postmortem Examination. The I.O. further inspected the P.O. which was the house belonging to the informant Gulab Singh. It was a double storeyed pucca house with entrance on the Southern end. On entering the main entrance door, there is another door and thereafter there are stairs for going to the upper floor of the house. On alighting from this stair a person enters the main house where there is a further door. All the entrances were fitted with doors. There was a courtyard inside the house and rooms were all around courtyard. The I.O. (P.W. 9) on examination of the rooms found several boxes, suitcases and Attachies broken and articles were also found scattered inside the rooms. He had also collected blood stained earth from the place where the dead bodies were found lying. The blood stained earth were seized by him by preparing the seizure list.

5. In connection with the evidence of the P.O. and regarding the F.I.R. it was contended on behalf of the Appellants that actually the F.I.R. was not recorded as shown in the papers and it was subsequently manoeuvred and managed and the names of the accused persons were mentioned in the charge sheet after the consultation and preparation. In this connection, it was pointed out that according to the I.O. (P.W. 9) after he had recorded the Fardbeyan the same was sent to the Police Station for registering a case and he had proceeded with the

investigation in anticipation of registration of the case, but in the inquest reports and the seizure list the case numbers are mentioned. Therefore it was submitted that it indicates that these papers were subsequently prepared. However, this kind of submission appears to be under misconception. As a matter of fact when the Police Officer takes up the investigation in a case in anticipation of the registration of the case he leaves scope for mentioning the number of police case on the papers and subsequently, it is mentioned on the papers which is necessary for the purpose of connecting the papers with the case. It does not indicate that actually such mentioning of number of police case indicate some manipulation. Moreover, it was also submitted on behalf of the Appellants that so far as the F.I.R. is concerned, it is said to have been registered on 1st of September, 1989, but the F.I.R. appears to have been received in the court of Addl. Chief Judicial Magistrate, Bhabhua on 3.9.1989 and it appears from Column 3 of the F.I.R. that the F.I.R. was sent to the court through Special Messenger. Therefore, there was no reason why the F.I.R. was received in the court so late and in this background, it is contended that the F.I.R. appears to be antedated and antedated. In this connection, it was pointed out on behalf of the prosecution that first of all the delay in receipt of the F.I.R. in court in all cases does not mean that there is manipulation and manoeuvring in the case. Moreover, it was pointed out that in this case the dates mentioned below the signature of the A.C.J.M. on the formal F.I.R. (Ext. 4) and the Fardbeyan (Ext. 3) indicates that No. 3 has been made subsequently over written which was originally 2. From the close examination of the dates mentioned on the two documents below the endorsement of the office of the A.C.J.M. it appears that actually the dates were originally mentioned as 2.9.89 and it was subsequently changed to 3.9.89. It appears that it was because of the fact that though the F.I.R. was received in the court on 2.9.89 it could not be put up before the A.C.J.M. on the same day and the staff who had received the documents had made an endorsement showing its receipt on 2.9.89, but when the document was put up before the A.C.J.M. on 3.9.89 he ordered him to make it 3.9.89 because actually he had not seen the document on 2.9.89. It so happens in practice that a document sent from the Police Station is received by the Clerk In-charge of G.R. who makes entry of this fact in the register and the documents are put up before the Chief Judicial Magistrate or the Addl. Chief Judicial Magistrate for obtaining signature and some times the office makes delay in putting up the papers before the C.J.M. or the A.C.J.M., as the case may be, and such kind of discrepancy occurs. It is therefore obvious that actually, as pointed out, there was no delay in receipt of the F.I.R. in court. Moreover, even if it is so that an F.I.R. was received in court late, in itself it is not sufficient to lead to the conclusion that there has been manoeuvring and manipulation in the investigation of the case.

6. The matter came up for consideration before their Lordships of the Supreme Court in the case of *Pala Singh and Another Vs. State of Punjab*, . In this regard it was observed by their Lordships that

No doubt, the report reached the magistrate at about 6 p.m. Section 157 Code of Criminal Procedure requires such report to be sent forthwith by the police officer concerned to a magistrate empowered to take cognizance of such offence. This is really designed to keep the magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction u/s 159. But when we find in this case that the F.I.R. was actually recorded without delay and the investigation started on the basis of that F.I.R. and there is no other infirmity brought to our notice, then, however improper or objectionable the delayed receipt of the report by the magistrate concerned it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable. It is not the Appellants' case that they have been prejudiced by this delay.

7. In another case *State of U.P. Vs. Gokaran and Others*, it was held by their Lordship that

the relevant provisions contained in Section 157 Code of Criminal Procedure is really designed to keep the Magistrate informed of the investigation of a cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction u/s 159 Code of Criminal Procedure but if in a case it is found that the F.I.R. was recorded without delay and the investigation started on that F.I.R. then however improper or objectionable the delayed receipt of the report by the Magistrate concerned that cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable. In the instant case the material on record clearly shows that steps in investigation by way of drawing inquest report and other Panchanamas had been taken in the early hours of the morning of 28th March and these could only follow the handing over of F.I.R. by Ram Narain Singh to the Station Officer at about 2.15. In view of these facts the delayed receipt of the special report by the District Magistrate on 29th March would not enable the court to dub the investigation as tainted one nor could F.I.R. be regarded as ante-timed or antedated.

8. In the third case *Paresh Kalyandas Bhavsar Vs. Sadiq Yakubbbhai Jamadar and Others*, it was observed that "though there was some delay in sending the F.I.R. to the Magistrate that is not a ground to doubt the genuineness of the report.

9. In another case *Pala Singh and Another Vs. State of Punjab*, was relied on and it was held that "where the F.I.R. was promptly lodged and the investigation started promptly on the basis of the F.I.R. the mere delay in despatch of the F.I.R. and for that matter in receipt thereof by the Magistrate would not make the prosecution case suspect."

10. In another case *Shiv Ram and Another Vs. State of U.P.*, it was held by their Lordships that

It is also true that there was a delay in forwarding the copy of the F.I.R. to the Illaqa Magistrate but that circumstance would not demolish the other positive and

credible evidence on record. This would only show how in such a serious crime the investigating agency was not careful and prompt as it ought to be.

11. It is, therefore, clear that merely because the F.I.R. is received in the court of the Chief Judicial Magistrate a little late it cannot be a circumstance to throw out the prosecution case or doubt the correctness of the F.I.R. It is obvious from the materials on record that the investigation was started soon after the ardbeyan was recorded. The I.O. in the case (P.W. 9) Ambika Singh has stated in his evidence that after recording the Fardbeyan he sent the same to the Police Station for registering a case and proceeded with the investigation and thereafter recorded the statements of Gulab Singh (P.W. 6) and Krishna Kant Singh (P.W. 1) and thereafter he inspected the P.O. and also prepared the inquest reports (Ext. 5 and 5/1) and after collecting blood stained earth from the P.O. prepared the seizure lists (Ext. 6 and 6/1) and he also sent the dead bodies for Postmortem Examination. Therefore, it cannot be said that there was any scope for manipulation in the F.I.R. and it is difficult to hold that the F.I.R. was not recorded promptly or that there is any reason to doubt the correctness of the F.I.R.

12. So far as the witnesses on the point of occurrence are concerned, P.W. 6, Gulab Singh, the informant and P.W.1 Krishna Kant Singh are two important witnesses and both of them have consistently stated that soon after they returned from Bhabhua with the tractor after purchasing fertiliser and were taking breakfast they heard the sounds of gun fire and came out of the house. They further stated that on coming out they saw Madan Singh, the deceased, going towards Mahabir temple after leaving his Baithaka and they also saw about 20-25 persons coming from the South towards the temple. They were holding guns and rifles and they saw that one of them Gulab Singh opened fire with his gun causing injury in the leg of Madan Singh and thereafter accused Munni Singh fired at Madan Singh and the shot hit his chest and he fell down. Thereafter they raised slogans and moved towards the house of these witnesses. However, when they saw one Hasim Khan standing at the Dar-waja of Pritam Singh, the accused Jahan-dar Sain fired at him which hit Hasim Khan on his chest and he also fell down. Thereupon both these witnesses rushed inside their house and they went to the upper floor of the house. The dacoits also entered behind them. They were also firing at this stage. According to these witnesses after they went to the first floor of the house they jumped on the roof of the house of Ramjee Singh nearby and then jumped down in the land and went to the house of Lalbati Singh where some persons were found and P.W. 1 narrated the incident to them, but no one was ready to confront the dacoits. However, both these witnesses also stated that while they were mounting over the roof of the house they heard the dacoits making queries from the lady members of the house and assaulting them. They also claimed that they identified the assused persons named in the F.I.R. in this case.

13. The other witnesses supporting the prosecution story are P.W. 2 Kamlesh

Kunwar, wife of late Madan Singh, P.W. 3 Kaushalya Devi, wife of late Amarnath Singh, P.W. 4 Pushpa Devi, daughter of the informant Gulab Singh and P.W. 5 Sabitri Devi, wife of the informant Gulab Singh. They have also consistently stated that at about 5 P.M. in the evening on the alleged date of occurrence while they were in the house the two persons, i.e., the informant (P.W. 6) and Krishna Singh, who is also known as Krishna Kant Singh, (P.W. 1) were taking breakfast and then they heard the sound of firing from the outside and both of them came out of his house and soon after they returned and hurriedly went to the upper floor of the house and the dacoits then entered inside the house and started making enquiries and assaulting the ladies. Thereafter they procured the keys of the boxes etc. and entered inside the room and removed the valuables. In this process these witnesses have claimed to have identified the culprits. It is important to note in this connection that the Baithaka where the deceased Madan Singh was sitting before he started moving-towards the temple is situated at a distance of about 25 steps from the house. He happened to be the nephew of the informant and he was killed in the process of moving. It is also clear from the evidence of P.W. 1 that this Baithaka is close to his house because the western wall of the house touches the Baithaka and there is a temple on the Northern side of this Baithaka. The deceased Madan Singh was hit about 8" away from the said temple on the Southern side which has been stated by the I.O. (P.W. 9). So far as P.W.s 3 and 4 are concerned, they identified some accused persons who have been acquitted by the trial court, but so far as P.W.s 2 and 5 are concerned, they identified some persons including the Appellants of this case. As the time of occurrence was about 5 P.M. and the accused persons were known to the informant and his family members including female witnesses, there was no difficulty in identification and the statements of these witnesses cannot be disouted, so far as the point of identification is concerned. So far as P.W. 2 is concerned, she identified Munni Singh (Appellant No. 4 of Cr. Appeal No. 518/93), who is now dead, Durga Singh, who did not face trial," Jhak-hari Bind (Appellant No. 5 of Cr. Appeal No. 518/93), Briksh Bind (Appellant No. 6 of Cr. Appeal No. 518/93), Gulab Sain (Appellant No. 1 of Cr. Appeal No. 518/93), Jahandar Sain (Appellant No. 2 of Cr. Appeal No. 518/93), Sheo Murat Bind (acquitted by the trial court) and Kera Bind (Appellant No. 7 of Cr. Appeal No. 518/93). P.W. 5 claimed to have identified Sheo Murat Bind (acquitted), Jahandar Sain (Appellant No. 2 of Cr. Appeal No. 518/93), Gulab Sain (Appellant No. 1 of Cr. Appeal No. 518/93), Jhakhari Bind (Appellant No. 5), Kera Bind Appellant No. 7, Ram Briksha Bind (c) Briksh Bind (Appellant No. 6) and also Munni Singh (Appellant No. 4, since dead) and Durga Singh, who did not face trial. These witnesses have claimed that they knew these accused persons from before and they used to see them from time to time. Some of these persons belonged to the same village Bhaburahan and some of the accused belonged to village Khurde where the family had some land and some members of the family also reside there in connection with cultivation work. These ladies also claimed that they were assaulted by the dacoits, who were asking about the wife of the deceased Madan Singh and about two male members who had returned from Bhabhua on

tractor; meaning thereby P. Ws 1 and 6 and thereafter by terrorising and assaulting the ladies they obtained the keys and broke open the boxes and Attachies and removed valuables. It is evident from the evidence of P.W. 9 the I.O. that he had found the rooms of the house ransacked and in different rooms he found the boxes and Attachies and suitcase broken and some clothes were also found scattered. He also found a chest in a room on the ground floor broken and screen of the T.V. set was also found broken. Therefore, from the evidence of the eye witnesses, who are inmates of the house which was raided by the dacoits and from the objective evidence collected by the I.O., it becomes evidently clear that the dacoits raided the house of the informant on the alleged date of occurrence in the evening and looted away valuables and it also appears that in the process of their committing dacoity they shot at two persons, namely, Madan Singh and Hasim Khan by firing shots, who died as a result of it.

14. It was submitted on behalf of the Appellants of Cr. Appeal Nos. 518/93 and 549/93 that the manner in which two murders were committed before the dacoity was committed shows that it was not a case u/s 396 of the Indian Penal Code. Relying upon a decision in 6 Calcutta Weekly Notes 72 and AIR 1955 Hyderabad 147 it was submitted by the learned Counsel for the Appellants that in order to constitute an offence u/s 396 it is necessary that the murder must be committed in commission of dacoity. It was submitted that since two murders were committed before the dacoits entered the house and since it appears that the commission of murders of the two deceased persons in this case had no connection with the commission of dacoity, it was not a case u/s 396 I.P.C.

15. Section 396 I.P.C. reads as follows:

396. If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

16. So, it is clear that the murder has to be committed by any member of the gang in the commission of dacoity. It was submitted on behalf of the Appellant that it appears that two persons who were murdered by some members of the gang of dacoits were away from the house, which was raided by the dacoits and it also appears that killing of these two persons had no connection with the commission of dacoity by the dacoits, two acts are separate from each other and therefore, it has been submitted that all the accused persons who have been, held guilty in this case could not be held responsible for committing an offence u/s 396 I.P.C. It is submitted that the persons, who actually killed those two persons might be held responsible for killing them and they should be held guilty u/s 302 I.P.C., but rest of the persons could be convicted u/s 396 I.P.C. for committing dacoity but they do not appear to hold common intention for committing murder of these two deceased persons and therefore, it is submitted that the conviction of the appellants u/s 396 does not appear to be correct.

17. However, this argument on behalf of the Appellants has been countered by Mr. Ashwani Kumar Sinha, learned Counsel appearing for the State. It has been pointed out on behalf of the State that it is clear from the circumstances emerging from the evidences of witnesses of this case that a gang of dacoits had raided the house of the informant at the relevant time and as the dacoits were coming towards the house they located these two persons, i.e., the deceased Madan Singh and Hasim Khan and to facilitate the commission of dacoity they killed these two persons and thereafter entire gang of dacoits entered into the house and committed dacoity and therefore, the act of the members of the gang in committing murder of these two persons cannot be separated from the act of commission of dacoity. In this regard certain decisions are relevant. In a Case AIR 1932 367 (Lahore) it was observed by his Lordship that

There is ample evidence that a body of dacoits, more than five in number, armed with guns, were approaching the village in order to commit dacoity when they were met by Rulia and others who were going to the fields. One of the dacoits fired at Rulia and killed him. The Appellants, however have been acquitted of the offences of murder and dacoity with murder punishable under Sections. 302 and 396, I.P.C on the ground that there was no common intention proved to commit murder and that the murder was committed by one of the dacoits before the dacoity commenced. When an unlawful assembly of five or more persons is responsible for a murder, it is sufficient under the provisions of 149 I.P.C. that the members of such assembly knew that murder would be likely to be committed in prosecution of the common object, and it seems to me that, when dacoits go armed with guns, it is easy to hold that they knew that murder is a likely result. Further, the dacoity, in my opinion, started the moment force was used, that is, when the gun was fired at Rulia, so that Section 396 I.P.C. would also apply.

18. In a case Laliya and Others Vs. State of Rajasthan, it was observed by his Lordship that

On an examination of the entire case law, I record my respectful agreement with the observations made in (1900) 2 Bom. IR 325 that the question whether murder was committed while committing dacoity is a pure question of fact and of degree not to be determined by any general rule, but by the special circumstances of each case. In deciding a question whether the transaction of murder is separate or distinct from the transaction of dacoity the following facts-

1. Whether the dacoits retreated without plunder and the murder was committed while retreating;
2. The lapse of interval between the attempt of dacoity and the commission of the murder;
3. The distance between the places where the attempt at dacoity was committed and the murder was committed; and

4. Whether the dacoits abandoned all the booty and the lapse of interval between the abandonment of the booty and the commission of the murder are helpful and deserve consideration but each fact by itself should not be invariably treated as conclusive for arriving at a positive conclusion. The decisions as to the murder being a part of the transaction of the dacoity or otherwise should be taken on an over all consideration of the facts and the circumstances of individual cases.

19. In a case Emperor Vs. Bechan Chero and Others, it. was observed by their Lordships that

Every person who has taken part in a dacoity must have known that the gun with which one of the dacoits was armed was intended to be used, and every one of them is liable for the murder caused by the shot of that gun by reason of the provisions of Section 396.

20. In a case Bhulan v. Emperor AIR 1926 Oud 245 it was observed by their Lordships that

For a charge u/s 396 it is not necessary for the prosecution to prove that the murder was committed jointly by all the accused.

21. In a case AIR 1934 30 (Rangoon) it was observed by his Lordship that

If a person was shot outside the house when he challenged the dacoits as they were approaching the house and it is clear that this offence of the murder was committed by a member of unlawful assembly in prosecution of the common object, namely, the commission of dacoity, consequently, under 149 I.P.C. all the persons belonging to that unlawful assembly were guilty of this offence of murder.

It was also further observed that moreover in Section 390 I.P.C. it is laid down that theft is robbery, if in order to committing of the theft hurt is caused to any person and therefore, when in order to facilitate the commission of dacoity or in order to move the booty a person is hit or killed it makes out a case u/s 396 I.P.C.

Thus, there is no doubt about it that if any murder is committed by any of the member of the gang of dacoits in the process of commission of dacoity or removal of booty it constitutes an offence u/s 396 I.P.C. and all the members of the gang are equally responsible for an offence u/s 396 I.P.C.

22. So far as the present case is concerned, it appears that while the dacoits were approaching the house of the informant one of his family members who was sitting at Dalan close to the house, got up and started looking towards the dacoits. Similarly, another person Hasim Khan was also standing near the Darwaja of the house of master Pritam Singh close to the P.O. house, the dacoits shot at them resulting in their death. Therefore, it has rightly been submitted on behalf of the State that it appears that when the dacoits were approaching the P.O. house since it was time of 5 P.M., and there was sufficient light, the deceased persons saw them and they started moving because in such a situation there must be a commotion which appears to have caused apprehension in the

mind of the dacoits that they might create some problem for them in the commission of dacoity or they might try to resist. Therefore, they attacked them, killed these two persons and thereafter committed dacoity. Therefore, it is clear that the murder of these two persons, namely, Madan Singh and Hasim Khan cannot be treated as incident separate from the commission of dacoity and it is clear that the double murder was committed by the dacoits in order to facilitate their commission of dacoity. Therefore, Section 396 I.P.C. has rightly been applied in this case.

23. So far as the question of identification is concerned, it appears that out of the Appellants in Cr. Appeal No. 518/93 Appellant No. 1 Gulab Sain was identified by P. Ws. 1, 2, 5 and 6. Similarly, Appellant No. 2 Jahandar Sain has also been identified by P. Ws. 1, 2, 5 and 6. Appellant No. 5 Jhakhari Bind has been identified by P. Ws. 1, 2, 5 and 6. In similar manner Appellants No. 6 Briksh Bind and Appellant No. 7 Kera Bind also been identified by P. Ws. 1, 2, 5 and 6. However, Appellant No. 3 Brahma Singh and Appellant No. 8 Babulal Bind have been identified by P. Ws. 1 and 6 and similarly two Appellants, namely, Bhan Singh and Sub-has Singh of Cr. Appeal No. 549/93 have been identified by two witnesses, i.e., P. Ws. 6 the informant and P.W. 1 Krishna Nand Singh. Therefore, all these Appellants in the two appeals have been identified at least by two witnesses each, and the evidence of the witnesses, who are inmates of the house in which the dacoity was committed, cannot be disbelieved and discarded. However, it was submitted on behalf of the Appellants that the Appellants have been falsely implicated in this case because of enmity, but there is no sufficient material to show that the Appellants have such strong reason to falsely implicate these accused persons and since the F.I.R. in this case was lodged soon after the occurrence there was no chance of consultation and manipulation to falsely implicate the Appellants in this case. In this view of the matter, there does not appear to be any reason to disagree with the findings of the trial court so far as the conviction recorded against the nine Appellants in the aforesaid two appeals are concerned.

24. So far as the evidence of D. Ws. is concerned the learned trial court has considered the same and has refused to rely on their evidence. So far as D.W. 1 Butan Singh, though he supported the occurrence as he was also a person who has sustained injuries in course of this occurrence, but he refused to identify any of the Appellants. But in this connection, the learned trial court did not accept his version so far as this negative evidence is concerned because this Butan Singh happens to be related to one of the accused Durga Singh, whose brother is Appellant Brahma Singh. It has been, therefore, observed by the trial court that he has deliberately suppressed the fact of identification of the Appellants. So far as P. Ws. 2, 3, 4 and 5 are concerned, they tried to prove the alibi of the accused Brahma Singh by saying that he has got fish business at Calcutta. From the evidence of these witnesses it appears that they have tried to support a plea of alibi of the Appellant Brahma Singh, but the learned trial court has rightly observed that the materials are not sufficient to prove the presence of this

Appellant Brahma Singh at Calcutta on the relevant date and therefore their evidence is of no worth. So far as P. Ws. 6, 7, and 8 are concerned, they have spoken regarding enmity between the parties, but in this regard also the learned trial court has observed that this kind of evidence without any supporting material in the form of document cannot be treated as sufficient to show enmity between the parties leading to motivation to the informant and the witnesses to falsely implicate them. There does not appear to be any reason to interfere with the findings of the learned trial court in this regard. Therefore, I hold that the conviction of the nine Appellants is justified and there is no ground to interfere with the findings of the trial court.

25. However, the State also filed an appeal against the acquittal of some of accused facing trial in this case. They are seven in number. The order of acquittal against these Respondents has been made by the learned trial court on the ground that the names of some of these Appellants did not appear in the F.I.R. which according to the trial court appears to be un-natural. It has been observed by the learned trial court in this connection that from the evidence of P. Ws. 1 and 6, it appears that after the dacoits left they returned to their house and they met the lady members of his house and therefore, it was not natural that two ladies P. Ws. 3 and 4 did not disclose the names of the persons whom they had identified. The result was that the names of some of the Respondents did not occur in the F.I.R. and their names first of all were taken by the ladies in the statement before the police and therefore, the learned trial court has observed that it appears to be an afterthought that the names of these persons have been taken by these two witnesses. It has been pointed out on behalf of the Respondents in this connection that so far as Respondents No. 2 and 7, namely, Shankar Bind and Rashid Mian, are concerned, they were neither named in the F.I.R. nor any of the witness for the prosecution claimed to have identified them. So far as Respondent No. 1 Sheo Murat Bind, is concerned, he was also not named in the F.I.R. in this case and there is sufficient material on record to show that he had serious kind of enmity with the family of the accused because it has come in the evidence that the deceased Madan Singh was accused in a case of murder of the brother of this Sheo Murat Bind. In this background, the learned trial court has come to the conclusion that this Respondent No. 1. Sheo Murat Bind though identified by three witnesses appears to have been falsely implicated. The reasonings are correct and there does not appear to be any reason to disagree with the findings of the trial court on this point. So far as Respondent No. 3, 4, 5 and 6, namely, Raja Ram Chamar, Nithonar Chamar, Prem Chamar and Dularchand Chamar, are concerned, they have been identified by two lady witnesses, i.e. P. Ws. 3 and 4. In this connection, it has been observed by the learned trial court that it was un-natural that the names of these Respondents were not disclosed to the informant of P.W. 1 by the lady witnesses after the occurrence when they met. Moreover, they were not identified by the informant and two other lady witnesses also which appears to be unnatural and therefore, the learned trial court has refused to accept the evidence of P. Ws. 3

and 4. So far as the identification of these Respondents is concerned the conclusion drawn by the learned trial court appears to be justified and there does not appear to be any reason to hold that the view taken by the learned trial court in this regard is perverse.

26. In the circumstance, the interference with the findings of the learned trial court, so far as acquittal of the Respondents in Govt. Appeal No. 4 of 1994 is concerned, is not warranted. There is no necessity of interfering with the findings of the learned trial court in this connection. Accordingly, Govt. Appeal No. 4 of 1994 is hereby dismissed. Similarly, Cr. Appeal No. 518 of 1993 and Cr. Appeal No. 549 of 1993 are also dismissed. The judgment and order of the trial court are hereby confirmed. Appellant Brahma was on bail. His bail bond is cancelled and he is directed to surrender to serve out the rest period of sentence.

R.N. Prasad, J.

27. I agree.