
(1961) 03 AP CK 0002

In the Andhra Pradesh High Court

Case No : Criminal Appeal No's. 283 to 292, 351 to 356, 360 and 408 of 1958

Sharaf Shah Khan and Others

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 16-03-1961

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 162, 237, 410, 428

Evidence Act, 1872 — Section 114, 14, 54, 9

Penal Code, 1860 (IPC) — Section 395, 400, 411

Citation : AIR 1963 AP 314 : (1963) CriLJ 121

Hon'ble Judges : Munikanniah, J; Krishna Rao, J

Bench : Division Bench

Advocate : M.A. Nomani, K. Venkatarama Sarma, for D.M. Deshmukh, M.H.

Farooqui, M.J. Reddy, O.V. Reddy and R.P. Saigal, for the Appellant; D.J.

Jagannadharaju, for O. Chinnappa Reddy, Public Prosecutor, for the Respondent

Judgement

Krishna Rao J.

1. Twenty eight accused persons were tried by the Sessions Judge, Hyderabad and Secunderabad, on a charge u/s 400, I. P. C. The charge was that in June, 1953, they belonged to a gang of persons associated for the purpose of habitually committing dacoity and committed dacoities, from July, 1953 to October, 1954, in the districts of Medak, Hyderabad, Mahboobnagar, Karimnagar and Raichur. The learned Sessions Judge acquitted accused 5, 9, 10, 12, 16, 20, 22, 25, 26 and 28 and convicted the remaining 18 accused either u/s 400, or u/s 395 I. P. C. He convicted accused 1, 2, 6, 14, 19, 21, 23, 24, and 27 u/s 400 Indian Penal Code and sentenced them to imprisonment for life. Accused 3, 4, 7, 8, 11, 13, 15, 17 and 18 were convicted u/s 395 I. P. C. and awarded rigorous imprisonment for seven years and fines of Rs. 50/- each. The 18 convicted accused have each preferred a separate appeal.

2. The case for the prosecution is briefly as follows:- The 1st accused, Balooch Khan was an ex-army man, residing in the City of Hyderabad. In June, 1953, he

conspired with some of the other accused, most of whom were also residents of Hyderabad and formed a gang for the purpose of habitually committing dacoity. The approver Amjad AH (P. W. 3) joined the gang even in June, 1953, while the remaining accused became members thereof on different occasions subsequently. The gang operated from Hyderabad and its strength ultimately reached about forty. Detachments of the gang, armed with sten-guns and other lethal weapons, used to raid distant villages at night and rob the residents of cash, gold and silver ornaments and other belongings. Between July, 1953 and October, 1954, the gang committed the following dacoities:-

Sl. No- Date. Place of occurrence. Police Station F. I. R. No.

1. 2. 3. 4.

1. 8-7-1053 Kistareddy pet. 36/53 Patancheru Medak Dt.
2. 27- 7-1953 Tetti Annaram. 33/53, Havatnagar Hyd.Dt.
3. 1-8-1953 Amirpet. 62/53 Rajloor. Hyd. Dt.
4. 2-9-1953 Badnepalli. 34 to 36/53 Peddaliogapur Karimnagar Dist.
5. 22-10-1951 Ajkole. 58/53 Kolkota, Mohbooboagar Dt.
6. 14- 1-1954 Ramsagar. 1/54 Cajvel, Medak Dt.
7. 19-1-1954 Vidra. 51/54 Karimnagar.
8. 19- 8-1954 Thiramapoor. 34, 35/54 Thotapalli, Karimnagar District.
9. 2- 7-1954 Madgumpoor. 18, 19/54 Nagnoor, Medak Dt.
10. 20- 7-1954 Chilasagaf. 28/54. Mulug, Medak Dt.
11. 3-8-1954 Keshavapatam, 52, 53, 54/54 Tadikal, Karimnagar District.
12. 23-8-1954 Asifnagar. 42/54 Karimnagar.
13. 24- 8-1954 Choppadandl. 50/54 Karim nagar
14. 12-10-1954 Kerkahalli. 82/54 Munirabad, Raichur Dt.

Shortly after dacoity No. 6, an Inspector (P. W. 234) of the C. I. D. Crime Branch was directed to take up the investigation, He detected the existence of the gang in August, 1954, after arresting the 14th accused on 10-8-1954. Subsequently he arrested the other accused on various dates, including the approver, on 31-8-1954. He recovered from their possession a number of properties concerned in the dacoities, registered the case u/s 400, Indian Penal Code on 15-3-1955 and laid the charge sheet on 16-8-1956.

3. The principal evidence adduced by the prosecution falls under the following heads: (i) the evidence of the approver narrating how the members of the gang conspired and assembled for each dacoity, committed it and divided the booty:

(2) that of the victims of each dacoity and of other direct witnesses, identifying in Court and at the earlier test parades, individual accused as the participants; (3) that of recovery of properties lost at the dacoities from the possession of the various accused and (4) that of previous convictions of some of the accused. The learned Sessions Judge declined to place any reliance on the evidence of the approver on the ground that besides being tainted, it was belated and inherently improbable. He also declined to rely on the direct witnesses' identification at the test parades, on the ground that the parades were held several months after the accused were arrested and that the accused objected even at the time of the parades that they had been shown to the witnesses. He based the convictions entirely on the identification by the direct witnesses in the trial Court and held that such of the accused as were identified as having taken part in more than one dacoity, were liable u/s 400, I. P. C.: while those that were identified only in one dacoity were liable u/s 395, I. P. C. As regards the recoveries of stolen properties, he treated that evidence only as corroborative evidence against such of the accused whose participation was proved by the aforesaid identification before him. He took into consideration the previous convictions merely for determining the punishment.

4. The accused did not dispute the factum of the dacoities and their main line of defence was that they were falsely implicated by the police. They stated that the approver was a tutored and false witness, that they and their photos were shown by the police to the identifying witnesses before the test parades and that the properties were not recovered from their possession. In the appeals, it is urged by their learned counsel that the identification in the trial Court was as long as about three to four years after the dacoities occurred and has no evidentiary value whatever. A special plea is put forward on behalf of accused, 3, 9, 7, 17 and 18 that they have been lugged into the present case because they were acquitted in the previous Mumtaz Ali Gang case. As against this, it is contended by the learned Public Prosecutor that the approver's evidence was wrongly rejected by the lower Court and that the correct approach is to treat the evidence of identification and of the recovery of stolen properties as furnishing material corroboration for the approver's evidence. It is further contended that the lower Court erred in distrusting the test parades, that the identification in Court is sufficiently corroborated by the earlier test identifications and that the previous convictions are also relevant to determine the guilt of the accused concerned.

5. The first question that arises for consideration is whether the trial Judge was right in jettisoning the entire evidence of the approver as wholly unworthy of Credit. It is true that as laid down by the Supreme Court in Sarwan Singh Vs. The State of Punjab, an approver's evidence has to satisfy a double test, the first test which is common to all witnesses being that the witness must show that he is a reliable witness and the second test, which is special to cases of weak or tainted evidence being, that it is sufficiently corroborated. But we find considerable force in the comment of the learned Public Prosecutor that the

criticisms against the approver's evidence by the trial Judge are not sound. The fact that the raids on the several villages were undertaken as lightly as excursion trips, would merely go to show that the members of the gang were hardened criminals and capable of a great deal of physical endurance. The memory required for describing the events cannot be regarded as extraordinary for a person who actively participated in them. The delay after his arrest on 31-8-1954, in producing him for recording on 5-8-1955, his statement (Ex. P-2) after tendering pardon was probably due to the time taken for verifying the truth of his story by tracing and examining witnesses in diverse distant villages, for obtaining the orders for tendering pardon and the like. The mere fact that the approver's brother is a Head Constable would not point to the inference that he could have been easily tutored. However, it was admitted before us by the learned Public Prosecutor, after consulting the police officer (P. W. 234) who conducted the investigation, that a copy of the statement of the approver, which was recorded on, 4-9-1954 during the investigation was never made available either to the defence or to the committing Magistrate or the trial Judge. It is explained that this was due to an erroneous view of the law taken by the police during the proceedings in the Courts below, namely, that as the approver was treated not as a witness but as himself art accused when he made his statement on 4-9-1954, the defence are not entitled to a copy of his statement, a view which is undoubtedly erroneous on the authorities, for instance *Syamo v. Emperor* AIR 1932 Mad 392 (FB) and *Narayana Swami v. Emperor* 1939 Mad WN 185 : AIR 1930 PC 47. It thus transpires that there was a breach of the proviso to Section 162 Cr. P. C. and that all the appellants were denied the valuable right conferred thereunder for the cross-examination of the approver. In our opinion, this is a fatal objection to bur acting upon the approver's evidence and compels us to exclude it from consideration in favour of the prosecution.

6. The learned Public Prosecutor has argued that the accused are not entitled to challenge the approver's evidence as it stands. His contentions are: (i) that it is too late for the accused to put forward the objection founded upon Section 162 Cr. P. C. because they did not complain in the trial Court that the copies were not furnished and did not raise it in their grounds of appeal (2) that they have not been really prejudiced because they were furnished during the trial, with a copy of the approver's statement (Ex. P-2) recorded after tendering pardon, which is not materially different from his statement of 4-9-1954 recorded during, the investigation and (3) that if it is found that they are prejudiced the case may be sent back to the lower Court for the cross-examination of the approver.

7. On the first point, the answer of the learned counsel for the appellants is that they were made to understand prior to the committal proceedings that no statement of the approver was recorded during the investigation; that they came to know that such a statement was in fact recorded, only during the cross-examination of the investigating officer (P. W. 234) and it was then too late to be of avail to the defence; and that as the trial Judge rejected the approver's evidence altogether, they had no grievance, in this respect, at the time of filing

their appeals.

8. We have called for and perused the original proceedings sheets of the Courts below. It appears that in view of the provisions of the amended Section 173 of the Cr. P. C. which came into force on 1-1-1956, the Magistrate repeatedly directed the police from 17-12-1955 onwards, to furnish the accused with copies of all the papers relating to the investigation. Some of the copies were, furnished on 1-3-1956 and the matter came up again on 23-3-1956. The Magistrate has recorded in his proceedings of that date:

"Sri Nomani, advocate, relying on Section 173 Cr. P. C. maintains, that the statement of the approver recorded before this be also supplied. Prosecution opposes. In my opinion, as the approver is to be examined afresh in Court, it is not incumbent on the prosecution to supply certified copy of this statement, which is not recorded during police investigation by a police officer, but by the Court and does not fall within a category of other documents or relevant extracts on which prosecution proposes to rely as provided by Sub-section (4) of Section 173 Cr. P. C., amended. I therefore hold that it is the accused who can take a copy of this statement from the Court."

His proceedings at a subsequent adjournment on 13-4-1956 read:-

"Sri Nomani, advocate, appeared for some of the accused and presents a petition requesting for an order u/s 173-207 Cr. P. C., amended, that each accused to be supplied with a copy of the statement of the approver u/s 164 Cr. P. C., on the ground that he is also a witness u/s 337, although his statement may have been recorded by a Court and not by any police officer as his statement has been recorded u/s 164 Cr. P. C. The prosecution opposes this petition stating that he has been examined by a Court and not by any police officer and as such prosecution does not rely upon it but would produce the witness approver in Court and get him examined. As laid down in the above section, it is only such witness, who has been examined by the police officer and on which prosecution relies that the accused is entitled under Sections 207 and 173, to insist upon a copy of the statement being given to him, before commencing the case. Moreover, C. I. maintains that an order in this respect has been given by the Hon"ble Court on 22-3-1956. Hence, this same question cannot be raked up again. A separate order in this respect will be given tomorrow." No further orders on the subject were passed by the Magistrate subsequently.

9. Thus the position taken in the Courts below by the prosecution about the statements recorded from the approver was that there existed only a statement recorded by the Magistrate u/s 337 (sic), that they were not bound to furnish a copy thereof and that the defence must obtain it from the Court. Ultimately, after the accused were committed to trial, a copy of Ex. P-2 was furnished by the trial Court on 27-5-1957 in response to an application filed by the defence. But a copy of the statement recorded during the (sic) defence as well as the Courts below proceed-ed on the footing that no such statement was in existence. Even

in the witness-box, P. W. 3, the approver said: -

"My statement was recorded for the first time at Ibrahimpatam". (i. e., by the Magistrate after tendering pardon). I do not know if the police recorded my statement."

The existence of the statement recorded during the investigation was disclosed only at about the time of closing the prosecution evidence, while P. W. 234, the investigating officer was under cross-examination. It is clear that the defence were anxious throughout to obtain a copy of the statement. It was pressed until the investigating officer was obliged to disclose its existence.

10. On the second point, we have compared Ex. F-2 with the copy of the translation of the statement made during the investigation furnished to us and find, that they differ in a number of particulars. To begin with, the narrative of the dacoities in the statement during the investigation L commences from dacoity No. 3, while Ex. P-2 and the evidence at the trial mentions three earlier meetings of the accused and events connected with dacoities Nos. 1 and 2. There are also numerous discrepancies with reference to the details of the parts played by the different accused, from dacoity No. 3 onwards. In our opinion, the contention that Ex. P-2 served as an adequate substitute for the earlier statement is untenable. The decision in *Gurbachan Singh Vs. State of Punjab*, was based on the peculiar facts there that the defence were at fault in not asking for copies of the earlier statements and that there were no discrepancies between the earlier statements and the evidence at the trial. We have to deal with a different situation here and the following observations of the Judicial Committee with reference to Section 162 Cr. P. C. in *Pulukurt Kotayya v. Emperor* ILR [1948] Mad 1 : AIR 1947 PC 67 are apposite:-

"The right given to an accused person by this section is very valuable one and often provides important material for cross-examination of the prosecution witnesses. However slender the material for cross-examination may seem to be, it is difficult to gauge its possible effect. Minor inconsistencies in his several statements may not embarrass a truthful witness but may cause an untruthful witness to prevaricate and may lead to the ultimate break-down of the whole of his evidence"

The rule of common law is stated in Halsbury's Laws of England, 3rd edition, Volume 15 (1956)¹ at page 443 thus:-

"..... No evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination."

Here the opportunity of cross-examination was illegally restricted to the prejudice of the defence and we must hold, in the circumstances, that the approver's evidence is inadmissible in favour of the prosecution.

(II) On the question whether the case should be sent back for the cross-examination of the approver, as the prosecution deliberately withheld the

statement in question, we do not think it proper to invoke our powers u/s 428 Cr. P. C. It is regrettable that the trial Judge chose to reject the evidence of the approver as being unreliable instead of rectifying the defect which was disclosed, when the evidence of P. W. 234 was taken. But it would not be just to reopen now the prolonged trial, which lasted for over nine months. We, are therefore constrained to exclude the approver's evidence and to deal with the appeals on the footing that it is of no value to the prosecution.

12. The next matter for consideration is whether the trial Judge was right in accepting the direct witnesses' identification of the accused in the dock; and that after finding almost all the earlier identifications at the test parade to be of no corroborative value. No doubt he has carefully discussed the evidence of each direct witness and also disbelieved the identification by some of them, in the Court wherever it appeared that they did not have adequate opportunity to observe the miscreant during the particular dacoity or were otherwise unreliable. He had also the advantage of observing the demeanour of the witnesses and the manner of identification before him. But it is well settled that evidence of identification of an accused for the first time in the dock is inherently weak. The trial was held from May, 1957 onwards and the identification in Court was therefore about three to four years after the witnesses had seen the miscreants on the nights of the dacoity.

13. The learned counsel have performed the arduous task of taking us through the whole of the voluminous evidence. We may say at once that no motive has been disclosed for any of the direct witnesses to perjure themselves against any of the accused and we find no reasons to distrust their broad veracity, although the possibility of any mistake in identification by them has to be allowed for and excluded. The most important fact that emerges in this connection is that the witnesses have identified in the dock a number of accused whom they did not identify even at the test parades held in 1954 and 1955. They have also identified accused persons, who according to the approver, did not take part in the particular dacoity. As was observed by the Supreme Court in *Vaikuntam Chandrappa and Others Vs. State of Andhra Pradesh*, :-

"It is also true that the substantive evidence is the statement in Court; but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding. There may be exception to this rule where the Court is satisfied that the evidence of a particular witness is such that it can safely rely on it, without the precaution of an earlier identification proceeding." The trial Judge did not compare at all the results of the identification in Court, with those in the earlier test parades, because he took the facile view that no reliance at all could be placed on the test parade.

14. This leads us to the question whether the trial Judge was justified in rejecting

the identification at the Jail parades, as wholly unreliable. The Magistrates who conducted the parades were examined as P. Ws. 2, 204 and 212. It will be seen that only the parades conducted by P. Ws. 2 and 212 are material to these appeals. The record prepared by P. W. 2 after holding the parades in Secunderabad Jail, on various dates in May to July, 1955, has been marked as Exs. P-4 to P-12. Similarly the record prepared by P. W. 212, after holding the parades in the District Jail, Karimnagar, has been marked as Exs. P-169 to 171. The evidence shows that they took all the usual precautions, such as mixing up the accused with a number of other persons, keeping the witnesses aloof and calling them one by one separately for identification. The criticism which found favour with the trial Judge was that the parades were held long after the accused were arrested and that there were representations to P. W. 2 on the spot on behalf of the accused that they had been shown to the identifying witnesses on more than one occasion. The learned counsel stressed before us that the arrests of the accused began in August, 1954 and that the Investigation Officers obtained their remands to police custody for a number of months, on the ground that these were necessary for tracing the other accused and for recovering stolen properties. It was also pointed out that no record is available of the objections immediately raised by the accused that they and their photos had been shown to the witnesses. But admittedly the witnesses were strangers who had no animus against any of the accused. The contention that they were tutored by the police to identify the several accused, is demonstrated to be untenable by a perusal of Exs. P-4 to P-12 and P-161 to 171 themselves and a consideration of the results of the identification. On each occasion, we find that several of the witnesses were unable to identify any of the suspects at all and many were able to identify only one or two of the accused. If the accused had been shown and if the witnesses had been tutored with the aid of photos of the accused, it is most natural to expect that the results of the identification would have been much more satisfactory to the police. In our opinion, Exs. P-4 to P-12 and P-169 to P-171 intrinsically show that the tests were genuine and that there could have been no attempt to show the accused earlier or influence the witnesses. We have no hesitation in disagreeing with the trial Judge's view and holding that the test parades can be relied upon as affording valuable corroborative evidence. It appears to us that where a direct witness has consistently identified an accused both at the test parade and at the trial, his identification may be safely accepted as establishing the accused's "participation in the particular dacoity, unless we find other circumstances indicating that the witness has probably made a mistake. But where the identification in Court is not supported by any earlier test, it is unsafe to act on that evidence, as there are no exceptional circumstances here, such as adequate descriptive particulars of the accused given early by the witnesses, which corroborate the identification.

15. We do not propose to burden this judgment by recapitulating the evidence of the direct witnesses as to the events of each dacoity. The gist thereof has been correctly set out in the lower Court's judgment and the learned counsel are

unable to say anything against the truth of the account given by the witnesses. The only points canvassed relate to the identification of the accused and to the recovery and the identification of the stolen properties. We shall first proceed to discuss how far the participation of the different accused in each dacoity, is satisfactorily proved by consistent identification.

(His Lordship then discussed the evidence in paras 16 to 19 and proceeded as follows:)

20. Dacoity No. 5: Ajkole: This occurrence was an attempted dacoity at P. W. 22's house which was foiled by the villagers gathering and pelting stones and driving away the party of dacoits. Accused 1, 14 and 27 have been consistently identified by P. W. 24 at the parade on 16-5-1955 (Ex. P-12) and at the trial as the participants and accused 24 has been similarly identified by P. W. 24. P. W. 23 was a kawalikar and P. W. 24 was a homeopathic medical practitioner who had gone on a professional visit to P. W. 22's house. They could have observed the dacoits because it is in P. W. 24's evidence that the night was moonlit. The calendar confirms this that it was full moon night. The trial Judge rejected P. W. 23's identification of A-24 because the witness admitted in cross-examination that he had been shown a photo of A-24. But according to P. W. 23, the photos were shown in an office only on his way home after the identification parade. Nine or ten photos were shown to him including those of accused 5, 9, 13, 14, 18 and 25. He has identified accused 24 alone, both at the parade and at the trial, which shows that his seeing the photos had no connection with his identification. He denies that he was asked to identify after seeing the photos and asserts that he told the police that he would not be able to identify on photos. No doubt accused 24 and a number of other accused have alleged in their statements that the police made the witnesses identify them with the help of their photos. But there is nothing in the evidence to support this complaint. For instance, P. W. 180, who spoke to No. 3 Ameerpet dacoity, was another witness who admitted that she was shown photos. Her version is that she was shown 40 to 50 photos and that she gave out that she would be able to identify the miscreants from the photos. But she did not identify any of the dacoits. She did not figure at any of the test parades and identified only the approver at the trial. The mere fact that photos were shown to some of the witnesses during the investigation does not lead to the inference that it was done with an improper purpose. There is no objection to the police showing a series of photographs and not only one or two in order to seek information as to the person or persons who may have committed a crime. Where photographs have been shown, the value of only any subsequent identification by the witness will be impaired. (See Halsbury's Laws of England, 3rd Edition, 1955 Foot Note (i) at page 439). In the present case, it is possible that photos were in fact shown to the witnesses, in order to check up the statement of the approver. As we have already mentioned, the results of the identifications demonstrate that there could have been no attempt on the part of the police to influence or improperly influence the witnesses. We therefore disagree with the trial Judge's appreciation of P. W. 23's identification. There are

also no reasons to distrust P. W. 24's identifications in so far as they are consistent at the parade and the trial. The participation of accused 1, 14, 24 and 27 in this dacoity is therefore established.

(His Lordship then discussed the evidence in para 21 and proceeded as follows.)

22. Dacoity No. 7 Vidra: The only material evidence apart from that of the approver is the judgment Ex. P-228, whereby accused 19 and 23 were convicted on 5-11-1954 u/s 411 I. P. C. in respect of this occurrence. It is inadmissible as evidence to prove the connection of accused 19 and 23 with the crime, as none of the witnesses to the material facts were called again at the present trial.

(His Lordship then discussed the evidence in paras 23 to 28 and proceeded as follows.)

29. We have next to consider the effect of the recoveries of the "stolen properties. For reasons which do not appear, the trial Judge questioned the accused u/s 342 Cr. P. C. only with regard to some and not all the incriminating articles regarding which evidence was given. It is only to these material objects that we have to confine our attention. The evidence on this part of the prosecution case has to be discussed by us at some length because the trial Judge dealt with it in a very summary manner. The accused denied the truth of the recoveries and did not set up a claim of ownership. We have perused the panchanamas and the evidence of the panch witnesses and felt no doubt as to the genuineness of the recoveries. In these circumstances, it is clear that the accused who did not claim ownership, were in dishonest possession of them. The main question to be decided is whether the articles are proved to have been stolen in some, one of the dacoities, forming the subject-matter of the charge. Several of the material objects were identified and claimed to have been lost in more than one dacoity by the witnesses concerned. There was no attempt by the prosecution to show that one set of witnesses' identification in respect of such material objects was mistaken. In other words, the prosecution themselves had no definite case and gave no assistance to the Court in this respect. Proof that an article, which is traced to the possession of an accused, was stolen is a condition precedent for any presumption u/s 114 of Indian Evidence Act. When the victims of different dacoities made rival claims to a particular article, the natural inference is that no reliance can be placed on their identification. In such circumstances, there is also no scope for raising the presumption u/s 114,

(His Lordship then discussed the evidence in paras 30 to 36 and proceeded as follows.)

37. The result of the foregoing discussion may be summarised thus. The 1st accused is proved to have participated in dacoity Nos. 1, 2, 5, 6 and 10 and to have also been associated with dacoity No. 11. The 2nd accused has already been convicted u/s 395 I. P. C. in respect of dacoity No. 4. He is proved to have also participated in dacoities Nos. 9 and 11. The 4th accused is proved to have participated in dacoity No. 2, the 8th accused in dacoity No. 13, the 14th accused

in dacoities Nos. 3 and 5, the 15th accused in dacoity No. 2, the 17th accused in dacoity No. 3, the 24th accused in dacoities Nos. 1, 5. and 10 and the 27th accused in dacoity No. 5. The rest of the appellants are entitled to the benefit of doubt and to an acquittal.

38. The learned counsel have not contended that there is any legal objection to convict the accused u/s 395 I. P. C., in respect of the dacoities in which they are proved to have participated. No doubt a single charge was framed against all the accused only u/s 400 I. P. C. and the prosecution case of a conspiracy between them has to fail, as the approver's evidence has to be excluded from consideration. But this does not affect the legality of the joint trial for the different dacoities, because the relevant point of time at which the condition of sameness of the transaction has to be fulfilled is the time of the accusation and not that of the eventual number. AIR 1938 130 (Privy Council) It has not been suggested, that there was any prejudice to the defence, either by the frame of the charge or by misjoinder of accused. We see no objection to apply Section 237 Cr. P. C.

39. The only point for consideration is whether there is proof of an offence punishable u/s 400 I. P. C. or only of offences punishable u/s 395 I. P. C. The effect of the findings of the trial Judge was an acquittal u/s 400 I. P. C., in respect of such of the accused as he convicted u/s 395 I. P. C. There is no appeal by the State against the acquittal and it follows that we would not be justified in interfering with the convictions of accused, 4, 8, 15 and 17 u/s 395 I. P. C. The only question is whether the convictions of accused 1, 2, 14, 24 and 2; u/s 400 I. P. C. can be sustained.

40. In this connection, it is necessary to look at the ingredients of Section 400 I. P. C. The prosecution has to prove,

(i) the existence of gang of persons associated for the purpose of habitually committing dacoity;

(3) the acts of association of the particular accused with the gang, sufficient for an inference that he belonged to the gang.

The word "gang" means "any band or company of persons who go about together or act in concert" (Oxford English Dictionary). No doubt the marginal note to the section "punishment for belonging to gang of dacoits" suggests that five or more persons are necessary to constitute a gang. But it is now a well settled rule that marginal notes can afford little guidance to the construction of an enactment. As explained by Baggallay, L. J. in *Attorney General v. Great Eastern Ry. Co.* (1879) II Ch. D. 449 (461):

"I never knew an amendment set down or discussed upon the marginal notes to a clause. The House of Commons never has anything to do with a marginal note".

Lord Macnaghten in the Privy Council considered it well-settled that the marginal notes cannot be referred to for purposes of construction --Thakurain Balraj

Kunwar v. Eai Jagatpal Singh 31 Ind App 132 at p. 142 (PC). In Craies on Statute Law (5th Edition), 1952 at page 183 it is observed:

"It is not uncommon for the marginal note to an Act to refer to matters struck out of the Bill in its passage through Parliament". The gang of person referred to in Section 400 I. P. C. may have taken in different recruits to participate with them in different dacoities. The Oxford English Dictionary quotes from a publication of 1891:

"He was unloading four ships, each with a gang of four men".

The essence of the word is, that the persons should act in concert and therefore two or more persons can constitute a gang. Their purpose of habitually committing dacoity may be proved by their declaration or by their conduct. The only relevant evidence here consists of their conduct in having participated in different dacoities. There is no other evidence available (after excluding the approver's evidence) to prove the criminal purpose and in such a case we think that participation in more than two dacoities within comparatively a short space of time is necessary to prove the existence of the gang.

41. The offence u/s 400 is entirely a creature of statute and is intended to break up the gang mentioned therein, by punishing also their associates who share their purpose. Thus in *Public Prosecutor v. Bongiri Pottigadu* ILR Mad 179 at p. 184 Pinhey, J. said:

"Section 400, I. P. C. appears to postulate the existence of a definite gang operating for a definite period and the object of the section would seem to be to provide for the punishment of those proved to be members of such a gang and against whom evidence is not forthcoming to convict them of specific offences of dacoity".

But the word "belong" implies something more than the idea of casual association; it involves the notion of continuity and indicates a more or less intimate connection with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected has identified himself with a band, the common purpose of which is the habitual commission of dacoity *Bachchu v. Emperor* AIR 1930 Oudh 455. In order to prove that the person charged shared the purpose of the gang, previous convictions for and previous commissions of similar offences are relevant under explanation 2 to Section 14 of the Evidence Act *Empress v. Naba Kumar Patnaik* 1 CWN 146. The previous offence must be of a cognate character so as to reasonably permit an inference as to the state of mind of the person charged. Thus in ILR 32 Mad 179 at p. 184, Munro, J. observed in connection with a charge u/s 400: "...It may at least be doubted whether evidence to show that the accused had committed crimes other than dacoities would be relevant to the present charge. Such evidence is really evidence of bad character and is excluded by Section 54. of the Evidence Act for the bad character of the accused is not a fact in issue in the present case". However, the learned Judge at page 183 took note of the previous

convictions for dacoity of the accused. The acquittal in that case was based on the ground that entirely different batches out of 39 accused, numbering 7, 4, 7 and 2 respectively were identified as having participated in four dacoities and the inference that all of them belonged to a single gang or that their purpose was to habitually commit dacoity was not justified.

42. Applying these principles, we find that both the 1st accused and the 14th accused participated in dacoity Nos. 1, 5 and 10 which took place between 8-7-1953 and 20-7-1954. It is clear that they constituted a gang of persons associated for the purpose of habitually committing dacoity. Even if we assume that more than two persons are necessary to constitute a gang, having regard to the fact that they were residents of suburbs of Hyderabad and committed the crimes in distant villages along with a number of other unidentified persons, it is reasonable to infer that there were more members of the gang, who happened to have been not identified.

43. The 2nd accused is a resident of Karim-nagar District and participated in dacoities Nos. 4, 9 and IT for the first of which alone he has been separately convicted. The gang of accused 1 and 24 was not directly concerned with any of these dacoities. The recovery of M. Order 24 shows that only the 1st accused was associated with dacoity No. 11. No doubt, the 2nd accused is stated by the trial Judge to have a number of previous convictions u/s 395 I. P. C. But it would be too farfetched to draw the inference from the aforesaid circumstances of dacoity No. 11 alone that the 2nd accused belonged to the gang. The 14th accused participated only in dacoity No. 5. along with accused 1 and 24, besides participating in dacoity No. 3 in which accused Nos. 1 and 24 were not proved to have been concerned. The 27th accused similarly participated only in dacoity No. 5 along with accused 1 and 24. A-14 and A-27 are not stated to have previous convictions u/s 395 I. P. C. It is possible that accused 14 and 27 were only casually associated with the gang and did not actually belong to it.

44. It is strongly contended by the learned Public Prosecutor that the commission of a number of dacoities in the short space of 15 months, in which one or more of the accused are proved to have been concerned is itself an indication, that they were perpetrated by their gang. He relied on the following observation of Munro J. in ILR 32 Mad 179 at p. 182:

"If there were sufficient reliable evidence that the accused or groups of them had been concerned in a large number of dacoities, in a comparatively short space of time, it might not improperly be inferred from that evidence alone that they were members of a gang associated for the purpose of habitually committing dacoity". But this does not mean that the identity of the gang concerned in the dacoities in question need not be established. In fact as we have already mentioned, the lacuna in this respect was the ratio decidendi for upholding the acquittal in that case. Here admittedly there had been other gangs which operated from Hyderabad a short period earlier; for instance the Mumtaj AH Gang in 1949-50 and the Hanumanthu gang in 1952-53. Several persons who were charged with

having been members of those gangs were ultimately acquitted and might have well relapsed into crime. We see, therefore, no force in the contention that only the gang constituted by the present accused could have committed the dacoities in question herein. We are also not impressed by the learned Public Prosecutor's contention that the use of sten-guns and khaki dress by the miscreants in several of these dacoities shows the modus operandi of a single gang. Admittedly, illicit sten-guns and other fire-arms were easily available in the city of Hyderabad on account of the events which took place shortly before the police action and there have been several other parties of dacoits who have also used such weapons and khaki dress. In these circumstances, we see nothing in the modus operandi of the dacoits which stamp all the dacoities as the work of the same gang.

45. In the result, the convictions and sentences of accused 1 and 24 u/s 400 I. P. C. are confirmed and their appeals are dismissed. The convictions of accused 2, 14 and 27 are altered to Section 395 I. P. C. and their sentences reduced to rigorous imprisonment for a term of seven years and fines of fifty rupees each, with rigorous imprisonment for six months in default. The convictions and sentences of accused 4, 8, 15 and 17 u/s 395 I. P. C. are continued and their appeals are dismissed. We are not able to agree with the contention of the learned counsel that the sentences are excessive. The appeals of accused 3, 6, 7, 11, 13, 18, 19, 21 and 23 are allowed and their convictions are set aside and they are acquitted.