

---

**(2012) 02 PAT CK 0066**

**In the Patna High Court**

**Case No : Criminal Appeal (DB) No. 600 of 2002**

Suraj Singh Koeri @ Suraj Singh and Ramdeo Koeri

APPELLANT

Vs

State of Bihar

RESPONDENT

---

**Date of Decision : 10-02-2012**

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 391, 395, 396, 412

**Citation : (2012) 02 PAT CK 0066**

**Hon'ble Judges : Navaniti Prasad Singh, J; Ashwani Kumar Singh, J**

**Bench : Division Bench**

---

## **Judgement**

Mr. Justice Ashwani Kumar Singh

1. The two appellants have challenged the judgment and order dated 6th August, 2002 passed by the learned 6th Additional Sessions Judge, Aurangabad in Sessions Trial No.91 of 1986/238 of 2001 by which they have been convicted u/s 396 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life. Appellant no.1 Suraj Singh Koeri @ Suraj Singh has further been held guilty for the offence u/s 412 of the Indian Penal Code but no separate sentence has been passed.

2. The prosecution case is based upon the fardbeyan of Raj Kapoor Ram (P.W.10) which was recorded on 4.2.1986 in S.K. Bose Hospital, Dehri at about 6.30 a.m. regarding an occurrence which took place in the preceding mid night. It is alleged in the fardbeyan that while the informant and his family members including his brothers Rajendra Ram (P.W.1), Ghanshyam Paswan (P.W.2), Vinay Ram (deceased) and lady members of the family after taking meal in the night of 3.2.1986 were sleeping, the informant woke up noticing human movement on the thatched roof of the house. The informant claims that he immediately understood that it was miscreants who wanted to enter inside the house. He raised alarm calling "Chor" Chor". Other family members also woke up and they all raised alarm in chorus. In the meantime, 8-10 dacoits jumped into the courtyard from the roof of the house. The miscreants ordered to open the door.

The door was not opened. The miscreants thereafter threatened that if the door is not opened, they will break open the door and kill them. The informant and the family members still continued to raise alarm shouting "Chor" "Chor" but did not open the door. Ultimately, they broke open the door of the room in which the informant was present. The house of the informant was connected with electricity and lights in the courtyard and in the room were on. Four of the miscreants entered into the room of the informant. He could identify them in the electric light. They were aged between 23 to 30 years. One of them was armed with rifle. They looted ornaments, clothes, utensils, Usha fan, Tape recorder, sewing machine, watches etc., details of which have been mentioned in the first information report. They were 12-15 in number. The dacoits thereafter opened the main door of the house and fled towards north. The informant's brother Vinay Ram sustained gun shot injury at the hands of the miscreants whose condition was precarious and at the time of recording of fardbeyan, he was undergoing treatment. The informant has also alleged that his brother Vinay Ram had caused injury to one of the miscreants by Bhala. The informant claimed that if he and his family members got an opportunity, they could identify the dacoits and the looted articles. Fardbeyan of the informant was signed by one Kamlesh Ram and Ram Prasad Arya.

3. The aforesaid fardbeyan was recorded by one Jagdhar Tiwari, Officer Incharge of Barun police station. On the basis of fardbeyan, a formal first information report was registered on 4.2.1986 at 10.15 p.m. u/s 395 of the Indian Penal Code being Barun P.S. Case no. 13 of 1986 against 15 unknown accused persons and investigation was taken up. The injured brother of the informant subsequently in course of treatment died. The police on conclusion of investigation submitted charge sheet u/s 396 of the Indian Penal Code. The learned Magistrate took cognizance of the offence and committed the case to the court of sessions. Charge u/s 412 of the Indian Penal Code was framed against appellant no.1 Suraj Singh Koeri for dishonestly receiving and retaining looted property such as one old Usha Diplomat watch, one Philips Transistor and utensils belonging to the informant and his family members. Both the appellants were further charged for the offence punishable u/s 396 of the Indian Penal Code for committing dacoity with other unknown dacoits in the house of the informant and in commission of the offence of dacoity they shot dead Vinay Ram, the brother of the informant. The appellants denied the charges and claimed to be tried.

4. Initially in course of trial on behalf of the prosecution only seven witnesses were examined in support of the charges. P.W.1 Rajendra Prasad and P.W.2 Ghanshyam Paswan, are brothers of the informant and the deceased, P.W.3 is wife of P.W.1 Rajendra Prasad, P.W.4 Sheoraj Devi is the mother of the informant and the deceased, P.W.5 Kalawati Devi is widow of the deceased, P.W.6 Ram Nagina Singh is a formal witness who brought material exhibits from the police station Malkhana and produced the same in the court and P.W.7 Ajay Ram has been declared hostile by the prosecution. Thus, we find that out of seven

prosecution witnesses, five are family members of the informant who were present inside the house when occurrence of offence took place. It is to be noted here that when the present appeal was taken up for hearing on 17.5.2007 a Division Bench of this court found necessity of taking additional evidence in terms of section 391 of the Code of Criminal Procedure. Thus, the trial court was directed to record additional evidence of all necessary witnesses particularly the police officer who had investigated the case, the Judicial Magistrate who had conducted test identification parade in respect of the accused persons and the Executive Magistrate who conducted the test identification parade in respect of recovered looted articles. This court further directed that if possible the witnesses of the seizure of articles should also be examined and efforts should be made to bring on record the first information report, seizure list, test identification chart and the postmortem report. By the said order the lower court records were sent back to the trial court in order to comply with the order. The trial court thereafter examined P.W.8 Himanshu Shekhar Pandey, who had conducted the test identification parade of the appellants. P.W.9 Suman Kumar, the then Circle Officer, Barun Police Station, who had conducted test identification parade of the recovered articles, P.W.10 Raj Kapoor Ram, informant of the case, who has proved first information report. The trial court thereafter submitted its report and sent the depositions so recorded by it. The report indicated that despite all efforts the investigating officer, the doctor and the seizure witnesses could not have been produced before the court for recording their evidence. A Division Bench of this court on receipt of the report by order dated 22.12.2008 directed the trial court to make one more effort to record the evidence of the investigating officer, the doctor and the seizure witnesses and send the same to this court. It appears from the record that after much efforts made by the trial court as also by this court a report could be received from the Superintendent of Police, Dhanbad, which revealed that the investigating officer of the case Jagdhar Tiwari had already superannuated and died on 10.3.2007. In spite of efforts taken by the court, the doctor who conducted the postmortem examination of the deceased Vinay Ram could not be examined. However, additional evidence of P.W.11 Sheo Shankar Singh, P.W.12 Indradeo Singh, P.W.13 Awadh Bihari Prasad, P.W.14 Sudarshan Singh and P.W.15 Sarju Singh all seizure list witnesses was recorded by the trial court and transmitted to this court. Thus, when this appeal was taken up for hearing by us, there are in all fifteen witnesses who have been examined on behalf of the prosecution. No defence witness has been examined in this case.

5. As stated above, both P.W.1 and P.W.2 are brothers of the informant. They have claimed themselves to be the eye witnesses of the occurrence. They have supported the factum of dacoity and murder by the miscreants on the alleged date and time of occurrence. They are consistent with the initial version of the informant in saying that while they were sleeping they heard some sound of movement on the roof of their house. Thereafter, the dacoits jumped into the courtyard after removing "Khapra". They broke open the door. They were

abusing the inmates of the house. P.W.1 Rajendra Prasad has stated that he hid himself in the room and saw the accused persons committing dacoity. He also states that after the dacoits went away the victim was first taken to Dehri hospital where one doctor Sunil treated him and from there he was taken to Varanasi hospital where in course of treatment he died. They have also stated that in course of commission of dacoity one of the dacoits injured their brother Vinay Ram by shooting upon him and the dacoits looted away clothes, ornaments, utensils and other house hold articles worth Rs.3,000/-. P.W.1 and P.W.2 claim to have identified both the appellants in the test identification parade and they have also identified the appellants in court at the time of deposition. P.Ws.1 and 2 have further claimed to have identified the looted articles in the test identification parade before the Executive Magistrate. P.W.2 has identified the material exhibits produced in the court at the time of his deposition which were marked as material Ext.1 to material Ext.28/1. These witnesses were cross examined on behalf of the defence at length. P.W.2 admits in cross-examination that he could not identify appellant no.1 Suraj Singh Koeri in the test identification parade but he insisted that he was also one amongst the dacoits.

6. P.W.3 Manju Devi, who is wife of P.W.1, has stated that she was at her house at the time of occurrence. She was sleeping together with her mother-in-law (P.W.4 Sheoraj Devi) in the night of the occurrence. About 5-6 miscreants entered in the courtyard. In the electric light she saw the dacoits breaking the box and looting away utensils, fans, clothes, ornaments and other house hold articles. She participated in the test identification parade of looted articles held at the police station and identified them. In cross-examination she admits that apart from looted utensils some other utensils were also mixed at the time of holding test identification parade. She admits that on the articles identified by her small stickers were affixed.

7. P.W.4 Sheoraj Devi in her deposition stated that on the relevant date and time of occurrence while she was awake the miscreants entered into her house after the door was ripped to shreds. The dacoits were 12-14 in number. One of them fired from rifle causing injury to his son Vinay Ram. She could identify them by face. The miscreants had also put the rifle on her chest. They looted ornaments, fan, sewing machine, utensils and cash amounting to Rs.5,000/-. She was taken to jail for test identification parade where she had identified the appellants. The looted articles were recovered from the house of the appellants which were identified by her in the test identification parade. She identified the appellants in the court also. In cross-examination she admits that she did not identify appellant no.1 Suraj Singh Koeri in the test identification parade.

8. P.W.5 Kalawati Devi is widow of the deceased Vijay Ram who was killed by the dacoits in the alleged occurrence. She has also supported like other witnesses, the factum of dacoity and injury caused upon her husband by firearm by one of the miscreant. She has stated that her husband died in course of treatment after 2-3 days in the hospital at Varanasi. She has stated that dacoits snatched away

ornaments and wrist watch on the point of rifle and they looted away fan, clothes, sewing machine, utensils etc. from her house. She claims to have identified two persons at the time of commission of dacoity. She pointed towards Ram Deo Koeri (appellant no.2), who was standing in the dock as the person who had fired from rifle causing injury to the deceased Vinay Ram. In cross-examination she admits that she did not participate in the test identification parade. She admits that she had seen the appellants in the dock at the time of deposition for the first time after occurrence. It is to be noted that her deposition was recorded on 20.8.1999 whereas the alleged occurrence had taken place more than 13 years ago i.e. in the night intervening between 3rd and 4th February, 1986. She claims to have participated in the test identification parade of the looted articles and had identified looted utensils in the test identification parade held at the police station. In cross-examination she admits that small stickers were affixed on the utensils at the time of test identification parade. In cross-examination she has further deposed that when her husband was shot dead she was present in the same room. The dacoits had resorted to five rounds of firing inside the room in which she was present as a result whereof smoke had clouded the room.

9. P.W.6 Ram Nagina Singh is a police Havildar. He had produced material exhibits like blood stained soil, fired cartridge of .315 bore of rifle, a pellet, one Bhala and its Lathi, a table fan, an old transistor, two watches, utensils, ornaments etc. from Malkhana of the police station and had proved list of materials produced which were marked as material Ext. 1 to 28/1. He has also proved two requisitions written and signed by the Officer Incharge Sakaldeep Ram which have been marked as Ext.1 and 1/1. In cross-examination he has stated that he brought the aforesaid material exhibits from Malkhana of the police station and had no personal knowledge about the same. The materials produced were kept in two gunny bags which were not sealed.

10. As noted above, P.W.7 Ajay Ram has already been declared hostile by the prosecution after he said that on the date of occurrence he was at Barwadih in Palamu district. He was cross-examined by the prosecution in which he denied the fact of seizure of fired cartridge and blood stained soil in his presence. He also denied the fact that he went in collusion with the accused persons and, as such, deposed falsely.

11. As notice above, at the stage of appeal pursuant to the direction of this court additional evidence of eight more witnesses were taken in course of trial.

12. P.W.8 Himanshu Shekhar Pandey was posted as a Judicial Magistrate, 1st Class in Aurangabad at the relevant time. He has stated that at the request of the learned Chief Judicial Magistrate, Aurangabad he conducted test identification parade on 31.3.1986 of the appellants in which the informant Raj Kapoor Ram (P.W.10), Rajendra Prasad (P.W.1), Ghanshyam Paswan ( P.W.2), and Sheoraj Devi (P.W.4) participated as witnesses. The test identification parade was conducted inside the divisional jail, Aurangabad. In the test identification parade

suspects were mixed with ten other persons of same age group and identical personalities. All the four witnesses identified appellant Ramdeo Koeri as one amongst the dacoits. They claimed to have identified him in the electric light while he was trying to rip the door to shred. P.W.8 has further stated that he had taken all precautions prescribed under law while holding Test Identification Parade. P.W.8 has proved the test identification chart relating to appellant no.2 prepared in his writing and signature which was marked as Ext.2. He has given vivid description regarding the disclosure made by the witnesses and dress of appellant no.2 Ramdeo Koeri as disclosed to him by the witnesses at the time of test identification parade. He states that the informant Raj Kapoor Ram (P.W.10) had stated before him that while he saw the suspect Ramdeo Koeri he was wearing under-wear and check shirt. He saw him for about 25 minutes from a distance of three feet while he was ripping the door to shreds. According to him, P.W.1 Rajendra Prasad disclosed him that while ripping the door the suspect was identified by him and at that time he was wearing white Pant and Khaki shirt. He further disclosed that P.W.2 Ghanshyam Paswan disclosed to him while identifying the suspect that he was ripping the door and at that time he was wearing a "Lungi" and was putting on a dirty shawl. P.W.4 Sheoraj Devi disclosed that she identified the suspect while he was engaged in breaking open the door and was wearing a green under-wear and a dirty shawl. In-chief itself the learned Magistrate Himanshu Shekhar Pandey (P.W.8) stated that the suspect Ramdeo Keori (appellant no.2) disclosed him at the time of holding of test identification parade that he was kept in Barun Police Station on 22.3.1986 and was got identified by the witnesses which fact was clearly noted in the test identification chart by him.

13. P.W.9 Suman Kumar has stated that on 10.04.1986 he was posted as Circle Officer, Barun. On that day he conducted the test identification parade of the articles in connection with alleged offence in Barun Police Station which contains utensils, tape-recorder, radio, ornaments made of silver, clothes including Sarees, blouse, petti-coats, full-pant etc. The witnesses who participated in test identification parade were P.W.3 Manju Devi, P.W.5 Kalawati Devi, Saroj Devi (not examined), Raj Kapoor Ram ( P.W.10), Sheoraj Devi (P.W.4), Rajendra Prasad (P.W.1) and Ghanshyam Paswan (P.W.2). Three separate test identification charts were prepared by him of the articles put on test identification parade and the same were marked as Ext.3, 3/1 and 3/2. The details of the articles put on test identification parade have been mentioned in test identification chart. He has extensively been cross-examined. In cross-examination he admits that all the articles put on test identification parade were kept in the police station by the officer incharge. In the police station itself a test identification parade was conducted where witnesses were called. He had not issued any notice to the witnesses rather the witnesses were called by the officer incharge himself. He did not go through the list of looted articles mentioned in the first information report. The officer incharge had also not given him any such list prior to test identification parade. He admits that the recovered articles were of daily use and

no specific mark was put on them. Such articles are found in almost all the houses. He did not enquire regarding invoice of articles purchased from the witnesses. No time has been mentioned in the test identification chart. All the articles were kept without any seal over it. Even after holding test identification parade he did not seal those articles. It has not been mentioned in the test identification chart as to who recovered those articles and that the articles were handed over to whom after holding the test identification parade. He has stated that the police never recorded his statement in course of investigation. He denied the suggestion that no test identification parade was conducted in his presence by the witnesses and the officer incharge after preparing the test identification chart took his signature over it.

14. P.W.10 Raj Kapoor Ram is the informant of the case. He has supported initial fardbeyan. He has proved the same which has been marked as Ext.4. He has also proved the signature of Kamlesh Ram and Ram Prasad Arya over the fardbeyan which has been marked as Ext.4/1 and 4/2. He has proved the signature of Jagdhar Tiwari who had recorded the fardbeyan which has been marked as Ext.4/3. He has also proved the formal first information report in the writing of Jagdhar Tiwari which has been marked as Ext.4/4. He claims to have participated in the test identification parade and identified the accused persons. However, he states that he does not identify the appellants. His deposition has been recorded on 19.5.2008. In cross-examination he admits that he did not identify any dacoit in course of investigation or thereafter and nothing was recovered in his presence. He has been examined after twenty two years of the occurrence pursuant to the order of this court.

15. P.W.11 Shiv Shankar Singh has identified his signature over three seizure lists prepared by the then officer incharge, Barun which have been marked as Ext.5, 5/1 and 5/2 respectively. In cross-examination he has admitted that the seizure lists were not prepared in his presence. He denies to identify the signature of the police officer. He further admits that nothing was recovered in his presence and his signature was taken under duress by the police officer on a blank paper.

16. P.W.12 Indrajeet Singh has proved his signature on the seizure list which has been marked as Ext.5/4 but has stated that nothing was recovered in his presence. At this stage, he was declared hostile by the prosecution.

17. P.W.13 Awadh Bihari Prasad has also proved his signature over seizure lists which have been marked as Ext.5/5 and 5/6. In cross-examination he has stated that nothing incriminating was recovered in his presence. His signatures were obtained by the police officer under duress.

18. P.W.14 Sudarshan Singh has also proved his signature on the seizure list which has been marked as Ext.5/7. In cross-examination he too admits that nothing incriminating was recovered in his presence and his signature on blank sheet of paper was obtained by the police under duress.

19. P.W.15 has also proved his signature on the seizure list which has been marked as Ext.5/8. In cross-examination he has also made identical statement to that of other seizure witnesses that nothing incriminating was recovered in his presence and his signature was obtained under duress by the police officer.

20. Learned counsel for the appellants submits that the testimony of the witnesses is not reliable. The investigating officer has not been examined by the prosecution. Non-examination of the investigating officer has caused serious prejudice to the defence. Appellant no. 1 Suraj Singh Koeri has been identified for the first time by the witnesses in the court. None of the witnesses identified him in the test identification parade held in course of investigation. The prosecution has deliberately withheld the test identification chart of appellant no.1. Both the appellants were put on test identification parade on the same day before P.W.-8 Himanshu Shekhar Pandey. The informant Raj Kapoor Ram (P.W.-10) has clearly stated in cross-examination that neither in course of investigation nor thereafter he identified any accused persons and nothing was seized in his presence. It has also been contended that the prosecution case rests solely on the deposition of the witnesses who are family members and related to each other. No independent witness has come forward to support the prosecution case. The death of the victim Vinay Ram has not been proved. Neither the doctor who treated him for 2-3 days as stated by the widow of the deceased in course of deposition nor the doctor who conducted post mortem examination has been examined in this case. Even post mortem report is not on the record. The seizure lists of the looted articles have not been proved. The witnesses to the seizure have clearly stated that their signatures were taken on blank papers by the police under duress.

21. We have heard the parties and have appreciated the evidence on record. It is true that the first information report was registered against unknown accused persons. The appellants were apprehended by the police in course of investigation. They were put on test identification parade. From the record it appears that in this case test identification parade was conducted on 3.3.1986 in which appellant no.1 Suraj Singh Koeri was not identified by any of the witnesses whereas appellant no. 2 Ramdeo Koeri was identified by the informant Raj Kapoor Ram (P.W.-10), P.W.-1 Rajendra Prasad, P.W.-2 Ghanshyam Paswan and P.W.-4 Sheoraj Devi. The prosecution has though examined the learned Judicial Magistrate, Himanshu Shekhar Pandey (P.W.-8), who conducted test identification parade but deliberately withheld the test identification chart of appellant no 1 Suraj Singh Koeri as he was not identified by the witnesses. In such circumstance, his identification in the court by the witnesses such as P.W.-1, P.W.-2 and P.W.-4 is not of much assistance to the prosecution case. P.W.-1 claims to have identified the accused persons through a hole in the plank of the door. In cross examination, he has admitted that he did not show the hole to the investigating officer. He has stated that the dacoits did not enter into his room and he has concealed himself under wooden cot. He came out of the room after retreat of the dacoits. Thus, it has rightly been pointed out by the learned



counsel for the appellants that claim of identification by P.W.-1 of the accused persons become doubtful. P.W.-3 Manju Devi did not identify any of the accused. P.W.-5 Kalawati Devi has stated in cross-examination in paragraph-3 that she did not participate in the test identification parade and she identified the accused persons in the dock.

22. As noted above, all the seizure list witnesses of the article seized have categorically denied seizure of any incriminating article in their presence. They have admitted that their signatures were taken by the police under threat or coercion on blank papers. Thus we find that the prosecution has failed to prove recovery of incriminating articles either from the person or from the possession of any of the appellants. When seizure of incriminating articles has not been proved, the test identification chart held for identification of material exhibits carries no weight.

23. The admitted case of the prosecution is that the victim Vinay Ram after sustaining gun shot injury was alive for few days. He was undergoing treatment in hospital. In course of treatment, he succumbed to the injuries sustained. The prosecution has failed to bring on record any chit of paper in support of the treatment given to the victim by any doctor. Neither the doctor who treated the victim while he was undergoing treatment has been examined by the prosecution nor the doctor who conducted the post mortem examination of the deceased has been examined in this case. Even the post mortem report of the deceased has not been brought on record. Thus, it is apparent that save and except the oral testimony of the witnesses regarding gun shot injury caused to the victim Vinay Ram and his death subsequent thereto, there is no documentary proof to support their version. There is no explanation on behalf of the prosecution for non-examination of the doctor or non-production of the post mortem report.

24. Learned counsel for the appellants has, thus, rightly pointed out that non-examination of the doctors has caused serious prejudice to the defence and for their non-examination and non-production of the medical reports including post-mortem report an adverse inference should be drawn against the prosecution. Failure by the prosecution to bring on record the medical evidence has certainly created lacuna in the prosecution case. We further notice that the investigating officer has not been examined in this case. It is true that subsequently when this court passed order for recording additional evidence, a report has been received that the investigating officer of the case died after superannuation in the year 2007. The judgment of the trial court is of the year 2002. Thus, while the trial was going on, the evidence on record is that the investigating officer was alive. The prosecution has failed to examine him without any reasonable explanation in this regard. His non-examination has, thus, certainly caused prejudice to the defence.

25. Thus, upon analysing the entire evidence on record, we find that save and except the oral testimony of the witnesses, who are family members, there is no credible evidence on record to sustain the conviction of the appellants. The

informant Raj Kapoor Ram (P.W.10) has proved the fardbeyan. He is said to have participated in the test identification parade and identified appellant no.2 but in chief itself he categorically states that he did not identify these two appellants. He claims to have participated in the test identification parade and identified the accused persons but it was not the appellants. In absence of examination of the investigating officer, neither place of occurrence nor time of occurrence nor manner of occurrence has been fully proved. The inquest report has not been brought on record. The post mortem report has also not been brought on record. The death has also not been conclusively proved. There are several lacuna in the prosecution case.

26. In cases relating to dacoity and commission of murder in course of dacoity the identification by the witnesses is the main evidence, as such the prosecution has to satisfy, that the witnesses were in a position to identify the culprits, during the commission of dacoity. This claim is later tested at the test identification parade, which although, not a substantive evidence but is a mode to verify the claim of the witnesses before they identify the accused persons in court. Any such claim that the witnesses identified the culprits during the commission of crime has to be examined by the court with reference to the circumstance of a particular case. In the present case, all the witnesses have asserted that the electric light was there in the house when dacoity was committed. Thus, the witnesses claim that they identified appellant no.2 in the electric light. Let it be noted, as noted above, that the learned Judicial Magistrate Himanshu Shekhar Pandey (P.W.8), who conducted test identification parade, in course of deposition clearly stated regarding cloth of the suspect Ramdeo Koeri which he was wearing at the time of occurrence as disclosed to him by the witnesses at the time of test identification parade. P.W.10 stated that he was wearing under-wear and a check shirt. P.W.1 Rajendra Prasad stated that he was wearing white Pant and Khaki shirt. P.W.2 has stated that he was wearing check "Lungi" and was clad with a dirty shawl. P.W.4 has stated that he was wearing a green under-wear and was clad with a dirty shawl. Thus, we find that all the witnesses who claim to have identified appellant no.2 at the time of test identification parade gave different version with regard to cloth he was wearing at the time of occurrence. This kind of evidence of identification of appellant no.2 is not only weak but somewhat confusing. We have already noted that appellant no.1 was though put on test identification parade was not identified by any witness. His test identification chart was purposely withheld by the prosecution. The Judicial Magistrate who held test identification parade has been examined in the court. The court would draw an adverse inference against the prosecution for withholdment of test identification chart relating to test identification parade of appellant no.1.

27. We further find from the evidence of P.W.8 Himanshu Shekhar Pandey that appellant no.2 had disclosed him at the time of test identification parade that he was taken into custody on 22.3.1986 and was kept at Barun Police Station. He was shown to all the witnesses in the police station. This fact was noted by him on the test identification chart of appellant no.2 itself. In this background of

allegation made by appellant no.2 at the very first instance at the time of test identification parade during course of investigation non-examination of investigating officer by the prosecution has certainly prejudiced the case of the defence. In order to get ourselves satisfied we have seen the order-sheet of the court below. From the order-sheet it appears that appellant no.1 was produced and remanded to judicial custody on 17.3.1986 to be produced on 29.3.1986. The appellant no.2 was produced in the court and remanded to judicial custody on 26.3.1986 to be produced on 5.4.1986. Again, on 29.3.1986 appellant no.1 was produced from jail in the court and further remanded to judicial custody to be produced on 10.4.1986. On 31.3.1986 a requisition was made by the investigating officer of the case for holding test identification parade of the arrested accused persons and, accordingly, test identification parade of the appellants were held. Thus, if appellant no.2 Ramdeo Koeri's stand taken before the Magistrate at the time of holding of test identification parade is to be believed, he was taken into custody by the police on 22.3.1986 but was produced before the court for the first time on 26.3.1986. The best person to clarify the allegation made by appellant no.2 was the investigating officer who has not been examined in this case and for whose non-examination there is absolutely no explanation. We thus find that because of non-examination of investigating officer there has been serious prejudice to the defence. The contradiction in the evidence of the witnesses could not be brought on record. Admittedly no one is named in the first information report as accused and the first information report was lodged against unknown. The accused persons have been brought in this case on the basis of materials collected by investigating officer and by holding test identification parade. We find on appreciation of evidence that the evidence regarding identification of the appellants is not reliable. Thus, in the facts and circumstances of the case, participation of the appellants in the crime becomes doubtful because of failure of the prosecution to lead convincing evidence about the identity of the appellants as dacoits. There is even no corroboration in the form of recovery of firearm and other weapons or of the looted articles from the appellants, so as to lend some assurance to the participation of the appellants in the crime. Thus, under the facts and circumstances of the case, we are of the view that in spite of three identifications as against appellant no.2 the prosecution has failed to prove its case beyond reasonable doubt.

28. In the result, we set aside the impugned judgment and order of conviction and sentence passed by the trial court. The appellants, who are in custody, are directed to be released forthwith if not required in any other case.

Navaniti Prasad Singh, J.

29. I agree.