HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

S.B. Criminal Appeal No. 863/2001

1. Bhagwat Singh S/o Bhur Singh R/o Baddu, P.S. Kareda;
2. Pushpendra Singh S/o (Since Died) through his legal representatives:-
2/1. Smt. Renu Singodia W/o late Pushpendra Singh aged 49 years;
2/2. Kum. Sapna Singodia D/o late Pushpendra Singh aged 23 years;
2/3. Yash Singodia S/o late Pushpendra Singh aged 20 years;
Respondents No.2 to 4, all B/C Singodia, R/o Ankur Niwas, Bohra Colony, Brahmanand Road, Beawar, District Ajmer.

----Appellant

Versus

State Of Rajasthan.

----Respondent

<u>Connected With</u>

S.B. Criminal Appeal No. 864/2001

1.Nenu Singh S/o Laxman Singh, By Caste Maruka R/o Tatgarh;
2. Ram Sigh S/o Kesar Singh R/o KukarKhera (Bheem);
3. Manmohan Singh S/o Bheem Singh, R/o Maloa Ki Vair, P.S. Tatgarh;
4. Chhotu Singh S/o Bhanwar Singh, by Caste Rajput; R/o Raipur, P.S. Ranoti, District Sikar

----Appellant

Versus

State Of Rajasthan

----Respondent

For Appellant(s) : Mr. D.S. Udawat
Mr. Shreyash Ramdev
Mr. Manish Bhargav
Mr. Raj Singh Bhati
Mr. Vinod Sharma
Mr. Dilip Kumar

Mr. Nenu Singh
Mr. Ram Singh
Mr. Manmohan Singh

For Respondent(s) : Mr. Gaurav Singh AGA

HON'BLE MR. JUSTICE FARJAND ALI

Judgment

ORDER RESERVED ON :::: 18/05/2023
ORDER PRONOUNCED ON :::: 02/06/2023

BY THE COURT:-

1. These two appeals have been preferred by the appellants Bhagwat Singh, Pushpendra Singh (since died), Nenu Singh, Ram Sigh, Manmohan Singh and Chhotu Singh under Section 374 Cr.P.C. against the judgment of conviction and order of sentence dated 19.11.2001 passed by the learned Additional Sessions Judge (Fast Track), Rajsamand in Sessions Case No.53/2001 whereby the learned Judge convicted the appellants for the offence under Section 395 of the IPC and sentenced them to suffer seven years rigorous imprisonment along with a fine of Rs.5,000/- each and in default of payment of fine, they were to further undergo one year simple imprisonment.

2. As both the appeals are arising out of the same judgment, thus, they have been heard together and are being disposed of by this common judgment.

3. During the course of appeal, appellant No.2 Pushpendra Singh (S.B. Criminal Appeal No.863/2001) passed away on 18.09.2017. An application came to be preferred on behalf of the

legal representatives of Pushpendra Singh, namely Smt. Renu, Ms. Sapna and Mr. Yash, his wife, daughter and son respectively, for their impleadment as appellants and to allow them to continue the course of appeal. Of course, the legal representatives of deceased appellant have a right to seek acquittal and continue the appeal against conviction of the deceased appellant so as to remove the stigma of conviction of their family member who has permanently left for the heavenly abode. It is understandable that the family members that have been left behind would want to remove the blemish of conviction from the image of their beloved-deceased as human beings are part of a society and it is important for them to be able to live while keeping their heads held high. In any civilised society, the conviction of a family member tarnishes the image of the entire family and the family has a right to seek removal of the stain so attached to their lives as well as the life of the deceased individual. Even though the deceased-accused is no more but the way people look/perceive the family members of a person so convicted may hurt their sentiments. Sometimes, they may be deprived of getting service/retiral benefits duly accruable to the deceased employee which were not given on account of his conviction.

4. In this view of the matter, vide order dated 21.04.2023, this Court allowed the application for impleading the legal representatives of deceased Pushpendra Singh in Criminal Appeal No. 863/2001 and they were allowed to continue the appeal so as to make a challenge to the judgment of conviction on behalf of the deceased-appellant.

5. Bereft of elaborate details, the brief facts giving rise to the instant appeals are that on 23.06.2000, one Mohd. Harun lodged a report at the Police Station Bhim alleging inter alia that he was the owner of Kelika Jewellers, Beawar and was indulged in sale and purchase of gold and silver bars and ornaments. On 22.06.2000, he handed over a bag to Hanuman Singh and Chhotu Khan containing cash amounting to Rs.45 lacs and a demand draft of Rs.36 lacs which was to be carried from Beawar to Ahmedabad in an Ambassador car bearing registration No.RJ-01-2454. It was alleged that on 22.6.2000, at around 11.00 p.m., when the car was passing through the area of Police Station Bhim, 4-5 policemen and four other persons stopped the car and searched it, however, during search, nothing was recovered from the car. The aforementioned policemen were not convinced and directed the drivers of the car to sit in a Gypsy and then, kept on searching the car for sometime and after completion of search, they were set free and the policemen said that nothing was found in the car and thus, the vehicle was handed over to them. It is further stated in the FIR that the driver took the car to Ahmedabad and upon reaching there, the bag containing cash amounting to Rs.45 lacs and demand draft of Rs.36 lacs was not found and only Rs. 1 lac was found in the car. It was alleged that since the huge amount of money and the demand draft were missing, a doubt that the money in question and the demand draft of Rs.35 lacs might have been taken out by the people who made the search of the car near Police Station Bhim was cast. When this matter was reported by these two persons to the complainant on the next morning, at

about 1 O'clock, the first informant went to the police station to lodge an FIR.

6. On the basis of the said report, an FIR No.225/2000 came to be registered at the Police Station Bhim for the offence under Section 395/34 of the IPC and the investigation commenced. During the course of investigation, accused-appellants were arrested. It is alleged that on the basis of the information supplied by one Ram Singh, a sum of eight lakh and fifty thousand odd rupees was recovered; upon information furnished by accused Manmohan Singh, a sum of Rs.1.5 lacs was recovered; and in pursuance of the information given by accused Nenu Singh, Rs.28,28,000/- were recovered.

7. After conclusion of the investigation, a charge-sheet came to be filed against the accused appellants for the offences punishable under Section 395/34 of the IPC. Another accused Khet Singh was absconding, therefore, the proceedings against him were separately pursued. As the offence was triable by Court of Sessions, the case was committed to the Court of Additional Sessions Judge (Fast Track), Rajsamand where charges were framed against the accused appellants for the offence punishable under Section 395/34 of the IPC. They denied the charges and claimed trial. As many as 16 witnesses were produced at the behest of the prosecution and reliance was placed upon some documentary evidence as well for proving its case. Upon being confronted with the prosecution allegations, in their statements under Section 313 CrPC, the accused denied the same and

claimed to be innocent, however, they did not opt to adduce evidence in their defence.

8. After hearing the arguments advanced by the learned counsel for the appellants and learned Public Prosecutor and appreciating the evidence available on record, the learned trial court proceeded to convict and sentence the appellants for offence under Section 395 IPC by judgment dated 19.11.2001 which is assailed in these appeals.

9. Learned counsel, appearing on behalf of the appellants in both the appeals, have vehemently and fervently urged that the judgment of conviction and order of sentence passed by the learned trial Judge is contrary to law and facts. The learned trial Judge has not appreciated the prosecution evidence in light of the checks available on record. The prosecution has miserably failed to prove its case beyond reasonable doubt. It has utterly failed to prove the fact that the cash and demand draft allegedly lying in the car were taken by the police officials who conducted search of the car near police station Bhim as alleged by the driver of the vehicle Chhotu Khan and Hanuman Singh. It can not be comprehensible to any prudent man as to how a bag containing Rs.45 lacs and a demand draft of Rs.36 lacs went missing and the same came into the notice of both the drivers after reaching Ahmedabad since leaving from the area of Police Station Bhim. Interestingly, the person who took the vehicle after reaching Ahmedabad and found that the amount was missing has not been produced in evidence by the prosecution; thus, a long gap occurred which disconnected the link of evidence and the

possibility cannot be ruled out that the money was stolen either by the drivers of the car or by the person who conducted the search of the vehicle at Ahmedabad because as per their own version, nothing was found in the car when the search was conducted by the alleged policemen near the area of police station Bhim.

10. It has been further contended that there is nothing on record to show that the currency notes were having any specific identification mark, this fact is neither mentioned in the FIR nor in the statements recorded during investigation and not even in the testimonies of any of the witnesses but strangely, when the recovery was allegedly made from the accused, the currency notes were bearing specific five star identification marks. This is a serious loop-hole in the case of the prosecution which makes the entire recovery highly doubtful and gives rise to the suspicion that the recovery was nothing but a farce or sham or that false recoveries have been planted so as to get success in the case. It is also pleaded that admittedly, the accused persons were not known to the aforesaid star witnesses Chhotu Khan and Hanuman Singh, however, no test identification parade was conducted to ascertain the fact as to who were the persons on the fateful night of incident when the car was stopped and searched near the police station Bhim. In absence of identification of the accused, booking and arraigning the appellants as accused persons is against the spirit of criminal law. It was imperative upon the prosecution to establish the fact before the trial Court that it were the appellants who conducted search of the disputed vehicle in question so that a doubt of theft of the amount could be cast upon them.

11. The car from which the amount was allegedly stolen has also not been produced before the Court so as to establish the fact of the missing amount from the car and as also the fact that the car has a large cavity in which huge packets of currency notes in a gunny bag could be concealed. Even, nothing has come on record from which it can be inferred that the car in question was having an area for concealing a gunny bag in it. It has also been urged that if the appellants were the same persons who stopped the car, made the search and stole the amount from the car then it is not comprehensible that why Rs.1 lac were left in the car. If the accused-persons had an intention to loot the cash that was being carried in the vehicle then they had no reason to leave behind one lac rupees only inside the vehicle.

12. Learned counsel has further argued that even if the allegations are taken on their face value, no case of robbery is made out; at the best, either it can be a case of cheating or theft without using force. Serious doubt has been raised in respect of recording of information allegedly made by the accused persons and effecting the recovery of cash in pursuance thereof for which even the learned trial Judge has deprecated the conduct of the investigating officer. Finally, it has been submitted that apparently, it seems that the whole story was concocted and the evidence adduced during trial is not credible enough to sustain conviction, therefore, the judgment of conviction may be set aside and the accused appellants be acquitted from the charges.

13. Per contra, learned Public Prosecutor has opposed the submissions advanced by learned counsel for the appellants and

has submitted that ample evidence has been produced on behalf of the prosecution which got corroboration from the fact of recovery of cash and demand draft. The judgment impugned is a well reasoned judgment requiring no interference of this Court and as such, no case of their acquittal is made out, therefore, the appeals are liable to be dismissed.

14. Heard learned counsel for the appellants and learned Public Prosecutor and have gone through the judgment impugned and the record of the case. Upon considering the entire material the observations of the Court are as under:-

15. At the threshold, it would be pertinent to point out that the eye-witness account of the alleged robbery or removing of the bag of currency notes and demand draft from the car in question is not available on record and these facts are totally based upon circumstantial evidence as no one has witnessed the crime of robbery for which, the accused-appellants stand charged.

16. The prosecution case is primarily based on the confessional statements made by them to the police while in custody which then led to the recovery of currency notes and demand draft allegedly recovered from the accused. The submission made by learned counsel for the appellants seems to be worth considering that the testimonies of prosecution witnesses Nos. 2 & 3 Hanuman Singh and Chhotu Khan are not at all credible enough so as to bring home the guilt of the accused. Similarly, the statement of first informant P.W. 1 Mohd. Harun does not help the case of the prosecution so as to sustain conviction of the accused appellants as he was informed regarding the incident on the next date of the

occurrence and as per the story of the prosecution, he was informed when the drivers of the car P.W.-2 Hanuman Singh and PW-3 Chhotu Khan had reached Ahmedabad on the next date of incident and had found that the bag of currency notes and demand draft was missing. Currency notes worth Rs.45 lacs have a considerable weight and area. There is no evidence whatsoever as to where the bag containing the currency notes and the demand draft was lying in the car; whether it was lying on the rear seat or in aisle or in dicky or in some other concealed area of the car.

17. It is also not clear from the evidence that whether P.Ws. 2 & 3 - Hanuman Singh and Chhotu Khan respectively were having knowledge regarding the bag containing currency notes or were they not aware of the same. It took around 6 to 10 hours to reach Ahmedabad from the police station Bhim to Ahmedabad but despite that no cognizance was taken of the bag gone missing from the car in which a huge amount and the demand draft were lying; this fact is beyond the belief of any reasonable man of common prudence. This becomes even more significant considering that they were sent by their employer solely for the purpose of delivering the bag and they were having no other cause to go to Ahmedabad. The likelihood that both of them did not suspect that something was amiss during the whole stretch of the journey from P.S. Bhim to Ahmedabad which is approximately 412 kms long is so absurd and based on common understanding of a reasonble, prudent man, it is a hundred-to-one shot. It is so commonplace to check or verify presence of valuables if a short

halt is taken at any place along the journey. It is ordinary human conduct that even if it is not suspected that soemthing is out of place yet a person always tends to have a look to ensure that the valuables/commodities are well-kept and secured. When such checking is second nature in normal circumstances, then it is very obvious that when one is carrying a package, that too a valuable one containing a huge amount of cash which is umpteen times higher than the salary of the individual entrusted to carry the package, then he would definitely check multiple times to assure its safe-keeping. Also, the possibility that the bag was taken or went missing at one of the pitstops or stoppage made enroute Ahmedabad cannot be ruled out. As alleged at the behest of the appellants, the possibility of the bag being embezzled by these two witnesses cannot be obviated.

18. Moving on, assuming for a moment that the police personnel who conducted the search at P.S. Bhim had stolen the bag from the car as suspected by the two prime witnesses as mentioned above, the question would arise whether the appellants were the same person who stopped the car and conducted the search of the car. To ascertain this important fact, it would be incumbent upon the prosecution to establish the fact beyond any reasonable doubt that it were the accused appellants only who stopped the car near police station Bhim, conducted search therein and then let the two witnesses free to move ahead. There is nothing on record from which it can be safely inferred that these appellants were present at the spot to stop the car and to conduct search therein. Normally in a Police Station around 20 to 60 policemen are

deployed ranking from Constable to Police Inspector then how these appellants were booked without any specific evidence regarding identity.

19. The entire judgment of conviction is based upon the alleged recovery of the currency notes and a DD from the accused but without ascertaining the vital fact that it were the appellants who, in fact, committed the crime of alleged dacoity which has not been done in this case. The same is not permissible under rule of law and rule of prudence as well as under the established principles of criminal jurisprudence and the prime duty of the prosecution was to establish the fact beyond reasonable doubt that it were the appellants only who stopped the car, conducted the search and took away their property. In absence of such ascertainment and identification, if the accused-appellants are made to stand trial for the offence of dacoity, then, the same infringes their fundamental right to life and personal liberty as guaranteed by Article 21 of the Constitution of India. One cannot be arraigned as an accused in a case of robbery who was not previously known to the victim without placing the culprit in a test identification parade. It has to be done during the course of the investigation so as to verify the direction of the investigation as well as he is required to be identified during the course of trial because the identification in trial is the only substantive piece of evidence. Booking an accused for an offence of robbery without his identity certainly impinges his personal liberty and this may lead the court to an erroneous decision. In every case of robbery, if the accused is not already known to the victim, then that case rests only upon three

necessary factors which are to be proved inevitably during trial. First being the identification of the accused; the second being the recovery of the alleged property and the third being the identification of the looted property. These factors are imperative to be proved by adducing requisite evidence.

20. In a detailed judgment passed by Hon'ble the Supreme Court in Dana Yadav and Ors. vs. State of Bihar reported in AIR 2002 SC 3325, the importance of test identification parade has been discussed and the relevant paragraphs of the same have been reproduced for reference as follows:

> "5. Shri Prabha Shankar Mishra, learned Senior Counsel appearing on behalf of the appellants in support of the appeals raised several points. It has been submitted that Deo Nandan (appellant No. 3) was not named in the first information report and neither known to the informant nor to any of the prosecution witnesses and although no test identification parade was held, he was identified in court for the first time, as such no reliance should have been placed upon such an identification more so when there was no exceptional circumstance to place reliance upon his identification for the first time made in Court without the same being corroborated by previous identification in the test identification parade or any other evidence. Section 9 of the Evidence Act deals with relevancy of facts necessary to explain or introduce relevant facts. It says, inter alia, facts which establish the identity of any thing or person whose identity is relevant, in so far as they are necessary for the purpose, are relevant. So the evidence of identification is a relevant piece of evidence under Section 9 of the Evidence Act where the evidence consists of identification of the accused at his trial. The identification of an accused by a witness in court is substantive evidence whereas evidence of identification in test identification parade is though primary evidence but not substantive one and the same can be used only to corroborate identification of the accused by a witness in court. This Court has dealt with this question on several occasions. In the case of

Vaikuntam Chandrappa and Ors. v. State of Andhra Pradesh AIR 160 SC 1340 which is a three Judge Bench decision of this Court, Wanchoo, J., with whom A.K. Sarkar and K. Subba Rao, JJ. agreed, speaking for the Court, observed that the substantive evidence of a witness is his 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 stranger to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding or any other evidence. The law laid down in the aforesaid decision has been reiterated in the cases of Budhsen and Anr. v. State of U.P. : 1970CriLJ1149 , Sheikh Hasib alias Tabarak v. The State of Bihar (1912) 4 SCC 733, Bollavaram Pedda Narsi Reddy and Ors. v. State of Andhra Pradesh: 1991CriLJ1833 , Ronny alias Ronald James Alwaris and Ors. v. State of Maharashtra: 1998CriLJ1638 and Rajesh Govind Jagesha v. State of Maharashtra: 2000CriLJ380 . It is well settled that identification parades are held ordinarily at the instance of the investigating officer for the purpose of enabling the witnesses to identify either the properties which are the subject matter of alleged offence or the persons who are alleged to have been involved in the offence. Such tests or parades, in ordinary course, belong to the investigation stage and they serve to provide the investigating authorities with material to assure themselves if the investigation is proceeding on right lines. In other words, it is through these identification parades that the investigating agency is required to ascertain whether the persons whom they suspect to have committed the offence were the real culprits. Reference in this connection may be made to the decisions of this court in the case of Budhsen, (supra), Sheikh Hasib (supra), Rameshwar Singh v. State of Jammu & Kashmir : 1972CriLJ15 and Ravindra alias Ravi Bansi Gohar v. State of Maharashtra and Ors. : 1998 CriLJ 4059 .

6. It is also well settled that failure to hold test identification parade, which should be held with reasonable despatch, does not make the evidence of identification in court inadmissible rather the same is very much admissible in law. Question is what is its probative value? Ordinarily identification of an accused

for the first time in court by a witness should not be relied upon, the same being from its very nature, inherently of a weak character, unless it is corroborated by his previous identification in the test identification parade or any other evidence. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what a witness has seen earlier, strength or trustworthiness of the evidence of identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. If a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence. We are fortified in our view by catena of decisions of this Court in the cases of Kanta Prashad v. Delhi Administration: 1958CriLJ698 , Vaikuntam Chandrappa (supra), Budhsen (supra), Kanan and Ors. v. State of Kerala : 1979 CriLJ 919 , Mohanlal Gangaram Gehani v. State of Maharashtra : [1982] 3 SCR 277 , Bollavaram Pedda Narsi Reddy (supra), State of Maharashtra v. Sukhdev Singh and Anr. : 1992 CriLJ 3454 , Jaspal Singh alias Pali v. State of Punjab: 1997 CriLJ 370 , Raju alias Rajendra v. State of Maharashtra: 1998 CriLJ 493 , Ronny alias Ronald James Alwaris (supra), George and Ors. v. State of Kerala and Anr.: 1998 CriLJ 2034 , Rajesh Govind Jagesha (supra), State of H.P. v. Lekh Raj and another: 2000 CriLJ 44 and Ramanbhai Naranbhai Patel and Ors. v. State of Gujarat: 1999 CriLJ 5013 .

7. Apart from the ordinary rule laid down in the aforesaid decisions, certain exceptions to the same have been carved out where identification of an accused for the first time in court without there being any corroboration whatsoever can form the sole basis for his conviction. In the case of Budhsen (supra) it was observed:-

"They may, however, be exceptions to this general rule, when for example, the court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration."

8. In the case of State of Maharashtra (supra), it was laid down that if a witness had any particular reason to remember about the identity of an accused, in that event, the case can be brought under the exception and upon solitary evidence of identification of an accused in court for the first time, conviction can be based. In the case of Ronny alias Ronald James Alwaris and others (supra), it has been laid down that where the witness had a chance to interact with the accused or that in a case where the witness had an opportunity to notice the distinctive features of the accused which lends assurance to his testimony in court, the evidence of identification in court for the first time by such a witness cannot be thrown away merely because no test identification parade was held. In that case, the concerned accused had a talk with the identifying witnesses for about 7/8 minutes. In these circumstances, the conviction of the accused, on the basis of sworn testimony of witnesses identifying for the first time in court without the same being corroborated either by previous identification in the test identification parade or any other evidence, was upheld by this Court. In the case of Rajesh Govind Jagesha (supra), it was laid down that the absence of test identification parade may not be fatal if the accused is sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement or is arrested on the spot immediately after the occurrence and in either eventuality, the evidence of witnesses identifying the accused for the first time in court can form the basis for conviction without the same being corroborated by any other evidence and, accordingly, conviction of the accused was upheld by this Court. In the case of State of H.P. (supra), it was observed that "...test identification is considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identify of the accused who are strangers to them. There may, however, be exception to this general rule, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely without such or other corroboration." In that case, laying down the aforesaid law, acquittal of one of the accused by High Court was converted into conviction by this Court on the basis of identification by a witness for the first time in court without the same being corroborated by any

other evidence. In the case of Ramanbhai Naranbhai Patel and others (supra), it was observed "It, therefore, cannot be held, as tried to be submitted by learned counsel for the appellants, that in the absence of a test identification parade, the evidence of an eyewitness identifying the accused would become inadmissible or totally useless; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case." The Court further observed "...the fact remains that these eyewitnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well remain imprinted in their minds especially when they were assaulted in broad day light." In these circumstances, conviction of the accused was upheld on the basis of solitary evidence of identification by a witness for the first time in court.

9. In the present case, appellant No. 3-D-Deo Nandan was undisputedly not named as one of the accused in the first information report, though names of several other accused persons were enumerated therein. In statement made before the police, no prosecution witness has named him. He was named in court by Balroop Prasad (PW 3), Chandrika (PW 4), Bal Govind (PW 8) and Shambhu Prasad Komal (PW 14) but PW-4 and PW-8 identified another person as this appellant and thus these two witnesses wrongly identified this appellant. So far the other two witnesses, namely, PW-3 and PW-14 are concerned, though they have identified this appellant in court, but they did not disclose his name before the police. There may be a case where an accused is known to a prosecution witness who did identify him at the time of the occurrence but for manifold reasons, he could not have divulged his name to the informant before the first information report was lodged. One of the reasons may be that such a witness could not meet the informant before the first information report was lodged and no sooner, after lodging of the first information report, without any reasonable delay, when he was examined by the police, name of the accused was disclosed. The other reason may be where such a witness received injuries during the course of the occurrence and became unconscious, as such he could not get

opportunity to disclose name of the accused to the informant before the lodging of the first information report and no sooner he regained consciousness, name of the accused was 'disclosed by him in his statement made before the police. These instances are by way of illustrations and cannot be exhaustive. In view of these and similar other circumstances, it can be said that merely because the accused was not named in the first information report, though he was known to some of the prosecution witnesses, no adverse inference can be drawn against the prosecution for not naming such an accused in the first information report. Likewise there cannot be an inflexible rule that if a witness did not name an accused before the police, his evidence identifying the accused for the first time in court cannot be relied upon. There may be a case where a witness has received injury during the course of occurrence, became unconscious and remained as such for few months while in the meanwhile, charge sheet was submitted by the police. In such an eventuality, statement of the witness could not have been recorded by the police and his identification for the first time in court may be relied upon. In the present case, there is no evidence that this appellant was known to PWs 3 and 14 from before. The occurrence is said to have taken place on 25th April, 1983 whereas PW-3 was examined after two years in the year 1985 and PW-14 after more than two and a half years after the occurrence, i.e., in the month of June, 1986. Thus, it would not be safe to place reliance on the identification of this Appellant for the first time in court by these witnesses after an inordinate delay of more than two years from the date of the incident, especially when the identification in court is not corroborated either by the previous identification in the test identification parade or any other evidence. This being the position, we are of the view that the High Court was not justified in upholding conviction of Deo Nandan (appellant No. 3).”

21. Indisputably, the appellants were not already known to the two witnesses; they were not at all familiar with the names & designations of the suspected persons. In these circumstances, conducting a test identification parade becomes an absolute

necessity before charge-sheeting the appellants as accused. Admittedly, no test identification parade was conducted in the instant matter and hence, the fact that the appellants were actually the offenders remains disputed and the issue of identification of the accused remains unresolved.

22. As mentioned earlier, there is nobody to say that the bag of currency notes was taken by the appellants. So both the points are very much clear that neither there is any evidence to establish the fact that appellants were the persons who stopped the car near police station Bhim, made a search of the car as well as the fact that the appellants stole the bag containing currency notes and the draft in question. As such, there is no direct evidence in relation to the prime and crucial fact of the case and for that, the entire case of the prosecution hinges upon circumstantial evidence. There is no evidence on record even for the namesake to connect the appellants with the crime except the alleged recovery. The law on circumstantial evidence is well settled. In every case which is totally based upon circumstantial evidence, the circumstances put forth must singularly point towards the guilt of the accused only, shutting out every other possibility or all other hypothesis. The cardinal principles for appreciation of circumstantial evidence have been propounded by Hon'ble the Supreme Court in the case titled as ***Sharad Birdichand Sarda Vs. State of Maharashtra*** reported in ***AIR 1984 SC 1622*** as per which the circumstances upon which the case of the prosecution is based should be of a definite tendency and must be un-erringly pointing towards the guilt of the accused. The

circumstances if taken cumulatively should form a chain so complete that there remains no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else and the evidence should be incapable of explanation of any reasonable hypothesis other than that of the guilt of the accused. It should be inconsistent with his innocence and must be consistent only with his guilt.

23. In the cases based upon circumstantial evidence, the two-fold requirements that the law postulates are firstly, every link in the chain of circumstances necessary for establishing the guilt of the accused must be established by the prosecution beyond reasonable doubt and secondly, it must point towards the guilt of the accused. To establish the guilt of the accused, the prosecution has relied upon the singular fact in the form of evidence that the currency notes and the demand draft were recovered. In this connection, the foremost and the most important point which cannot be ignored as that there is no whisper or even an iota of evidence on record to show or suggest that the alleged currency notes were having any specific mark of identification. It is judicially noticeable that all currency notes are like in nature; bearing impression of Mahatma Gandhi, signature of Governor of Reserve Bank of India and the specification of different denomination of certain amount on them. This court cannot lose sight of the fact that the first informant P.W. 1 Mohd. Harun or any other witnesses have not clarified before commencement of the trial and have neither specified as to what were the denominations of the recovered stacks and what was the colour of the bag, what

were the specifications of the bag; whether the currency notes were wrapped with any paper or were having a bank seal on them or were they packed with a rubber band or were they tied with any other string. It is not scrutable that in absence of any such specification, how the recovery of currency notes effected from the accused could possibly be linked with the robbed amount. The submission with regard to recovery being a farce or planted cannot be ruled out in light of the defects which can be noticed from the naked eyes and are apparent on the memos i.e. Ex.P/21 to Ex.P/28.

24. A bare perusal of the same is revealing that the time and place of recovery are mentioned in bold ink and apparently seem to have been inserted subsequent to preparation of memos. It is further reflecting from the perusal of the aforementioned memos that the ink of the rest of the text is different than the ink in which the date and time have been reflected. It is not understandable as to why no independent witness to vouch safe the fact of recovery of currency notes was called for from the area where the recovery was made. Interestingly, the key witnesses Bhanwar Singh who was examined as P.W. 5 and Tulsa Singh who was examined as P.W.-6 have not supported the story of prosecution rather they have turned hostile and both the witnesses have stated in an unequivocal term that no recovery was effected from these persons rather their signatures were taken by the police on blank papers. This Court has no reason to disbelieve or discard the testimonies of these two witnesses, namely P.W.- 5 Bhanwar Singh and PW-6 Tulsa Singh, more particularly, in light of the other

procedural defects, loopholes and laches of the prosecution, coupled with the fact that the recovered articles have no specific mark of identification.

25. This Court deems it appropriate to mention here that even the learned trial Court has deprecated the manner in which the information of the accused persons regarding disclosure of the currency notes were recorded by the investigating officer. In light of the above, even recovery of DD from the appellants becomes fishy and no reliance can be placed on it.

26. Another aspect of the case would be that whether the case of the prosecution would fall within the ambit of Section 395 of the IPC or not.

27. Chapter XVII of the Indian Penal Code appertains to offences that are committed against property and it is further divided into ten parts and comprises the provisions of Sections 378 to 462. The parts that we are concerned with are the first three, namely '*Of Theft*', '*Of Extortion*' and 'of *Robbery and Dacoity*'. Section 378 defines the crime of theft and as per the stipulation therein, there are five essential ingredients that constitute the offence of theft. The first being dishonest intention; the second being movable property; the third being that the property was in someone's possession; the fourth being that the property is moved in order to take it out of the possession of any person; and lastly, the fifth being the lack of consent in the whole ordeal. Section 378 is reproduced herein below for ease of reference:

> **378. Theft.**—Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that

property in order to such taking, is said to commit theft.

Explanation 1.—A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.—A moving effected by the same act which effects the severance may be a theft.

Explanation 3.—A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4.—A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.—The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

28. Coming to the definition of extortion, Section 383 states that when a person intentionally puts another in fear of any injury to himself/herself/themselves or to any other person and then dishonestly induces the said person to deliver any property or valuable security or anything signed/sealed which maybe converted into a valuable security to any other person, he/she/they commit the crime of extortion. Section 383 is also reproduced below for easy reference:

> **383. Extortion.**—Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property, or valuable security or anything signed or sealed which may be converted into a valuable security, commits "extortion".

29. Both the above provisions constitute crimes involving dispossession of property of an individual but the difference

between the two lies in the manner in which such dispossession is made/caused. In the case of theft, the dispossession is made/caused by the accused who *takes* the movable property out of the possession of a person and in case of extortion, the accused induces a fear in the person and makes that person *deliver/give* the property/valuable security/potentially valuable security to the accused or any other person that the accused may direct. In simple words, it can be comprehended that the main difference in these two kinds of mischief is of 'taking' or 'giving' of the property. In the case of theft, accused takes the property and in the case of extortion, victim gives/hands-over/delivers the property.

30. These become relevant to the present case in light of the first line of the provision of Section 390 as per which in all robbery, there is either theft or extortion. It simply means that when elements (death/instant death, hurt/instant hurt, wrongful restraint/instant wrongful restraint etc.) are combined with either the offence of theft or the offence of robbery, only then the offence of robbery can be constituted. Section 390 contemplates when theft is considered robbery and when extortion is considered robbery. It is considered apt to reproduce the provision of Section 390 herein below:

> **390. Robbery**.—In all robbery there is either theft or extortion.
> **When theft is robbery.**—Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

> **When extortion is robbery.**—Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.
> Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

31. As per the first part, theft would be considered robbery when in the course of committing the theft or while carrying away or attempting to carry away the property obtained by theft, the offender either voluntarily causes or attempts to cause death/hurt/wrongful restraint or causes fear of instant death/instant hurt/instant wrongful restraint to any person in order to achieve his/her/their end of committing the theft or carrying away the stolen property. The second part prescribes when the offence of extortion would translate into an offence of robbery and the important aspects are the presence of the person inducing the fear, the delivery of the extorted thing right there and then and the manner in which the extortion is being committed. When the offence of extortion is being committed and the offender is in the presence of the person whom he is inducing with the fear and the offender commits extortion by way of putting the said person in fear of instant death, instant hurt or instant wrongful restraint of that person himself or any other person and inducing the said person to deliver the thing being extorted right in that

moment, then the offender is said to have committed the offence of robbery borne out of extortion.

32. Normally, when the offence of theft is committed, it is carried out in a clandestine or surreptitious manner and the person from whose possession the property is taken is generally not aware from the get-go that theft is being committed though he may discover the same soon thereafter. These circumstances would constitute an offence of theft. But, when during the course of commission of theft, the victim is in presence of the offender and if the offender is faced with resistance/ obstruction/ protest/ restriction by the victim or any other person in the course of theft and the offender uses force to thwart the same to take away the property and to make a smooth exit so that he may not be nabbed at the spot, then, it shall constitute the offence of robbery.

33. It is an admitted fact of the prosecution that in the course of committing theft neither the accused caused any injury or made an attempt to cause an injury to victims P.W. 2 Hanuman Singh and P.W. 3 Chhotu Khan nor is there any allegation that in order to commit theft these witnesses were put to fear of death or hurt.

34. In case of transformation of an offence of extortion into an offence of robbery, it is required that during the course of the offence, the offender is in the presence of the victim, he puts the victim under fear of instant death/hurt/wrongful restraint of him and any of his near or dear ones and then induces the victim to deliver the thing being extorted to him and if under compulsion, if the victim hands the said thing over to the offender then it can be

said that the offence of robbery is committed which is borne out of extortion.

35. In the present set of facts and circumstances, neither the five ingredients of the offence of theft are made out nor are the ingredients of the offence of extortion are present and since the offence of robbery can only be committed by way of committing either of the two, thus, it can be concluded that the offence of robbery was not committed as the ingredients essential to constitute the offence are conspicuously absent. It is reiterated that the offence of dacoity is nothing new but an offence of robbery committed or attempted to have committed by five or more persons conjointly. As defined under Section 395 of IPC, when five or more persons commit or attempt to commit a robbery, every person so committing the offence of robbery is said to have committed dacoity. From the material available on record, when the commission of robbery has not been established then Section 395 of the IPC would not be attracted. It seems that the investigating agency was in hang-haste or was of the view that serious aspersions against police officers should be washed out so that they conducted the investigation from that outlook and made the appellants accused in this case.

36. Here, in the case at hand, the learned judge has convicted the accused-appellants for the offence of dacoity but without pondering over the vital legal issue of presence of essential elements of loot.

37. A plain reading of statements of the two star witnesses, namely PW-2 Hanuman Singh and PW-3 Chhotu Khan, does not

indicate that either a force was used upon them while taking the bag from their possession or they were induced to deliver the property by putting them under fear. On the contrary, even the fact of the bag going amiss came into their notice on the next day at Ahmedabad. As deposed by them, throughout the way, from Bhim to Ahmedabad (around 412 kms), the absence of the bag containing the currency and the demand draft was not in their knowledge and this very fact clearly rules out the very application of either commission of the offence of theft or extortion as enunciated above. There is no evidence in the slightest that could prove or show that the accused-appellants either took away the property in question or induced the two witnesses, P.W. -2 Hanuman Singh and P.W.-3 Chhotu Khan, to deliver the same to them, thus, the offences of theft and extortion and by default, the offence of robbery are not made out against the accused-appellants by any stretch of imagination. The offence of theft or the offence of extortion augment into the offence of robbery and robbery is nothing but an aggravated form of theft or extortion. When an offence of robbery is not traceable from the evidence available on record, there would be no question of invoking the offence of dacoity. Dacoity is not an offence separate from robbery; it is just an offence of robbery committed by five or more persons. The only difference between Section 390 and Section 391 is that of the number of accused required to constitute the two offences. No other form of act of an accused has been envisaged in the Penal Code which may attract commission of an offence of robbery in the given facts and circumstances of the case.

38. It is emanating from the record that the learned trial judge has failed to take into account the legal aspect of the matter which is the spine of the case while appreciating the evidence and reaching the conclusion of guilt of the accused and thus, the same does not stand firm on its ground.

39. It would be worthwhile to mention here that one of the accused Khet Singh S/o Kan Singh had absconded when the trial of the present appellants commenced and therefore, the trial against him was kept pending. It is apprised to this Court that subsequent thereto, the aforementioned accused Khet Singh was apprehended and then put to trial in Sessions Case No.16/2006, in which, after facing the rigor of trial, vide judgment dated 03.05.2007, the learned trial Court acquitted the accused Khet Singh from the charges under Sections 395 and 120B of the IPC. The copy of the judgment dated 03.05.2007 is available on record.

40. As an upshot of the discussion made hereinabove, it is more than clear that neither the prosecution succeeded in establishing the fact that the appellants were the same persons who stopped the car or removed the bag of currency notes from the car since no identification was conducted nor has it been established beyond reasonable doubt that the alleged recovery of currency notes belonged to the complainant or that they were the same as the complainant claimed. The absence of bag and evidence regarding its specification creates further doubt upon the genuineness of the allegation. It is not comprehensible that how the fact of removal of the bag could not be noticed by P.W. - 2 Hanuman Singh and P.W.-3 Chhotu Ram till they reached

Ahmedabad. The story of the prosecution that the bag of currency notes was lying in the car seems to be concocted and in absence of recovery of car or evidence in this regard as to whether the bag was lying in the car or not makes the case highly doubtful. The substratum or the basis of allegation would be the recovery of currency notes for which both the witnesses P.W. - 5 Bhanwar Singh and P.W. - 6 Tulsa Singh have turned hostile rather have negated the story of the prosecution. The manner in which the investigation was conducted and the serious aspersion of planting of false recovery give rise to a grave uncertainty regarding a doubt-free recovery. As far as the recovery of the demand draft from the possession of the accused is concerned, in this regard, no particulars of the draft or any specification of the same were given viz., date and name of the branch, bank name or date mentioned on it, until its recovery. The delay in lodging of FIR casts a serious doubt over the credibility of the allegation and the possibility of embellishment or concoction cannot be ruled out. It is doctrine of Criminal Jurisprudence that the burden to prove its case always lies upon the prosecution and the standard is to prove the case beyond every shadow of reasonable doubt and the position of the accused in it is not more than that of a mute spectator. Neither it is expected from him to prove the fact that he is innocent nor does the onus lie upon him to disprove the charge.

41. Thus, viewing from any angle, there seems no justification to rely upon the evidence available on record or to base conviction of the accused appellants for offence under Section 395 of the IPC

rather the attraction of Section 395 of the IPC and framing of charge under it is per-se illegal in view of the evidence brought on record.

42. The considerations that moved this Court to reverse the finding arrived at by the trial court are summarised in brief as follows:

a) The credence of the testimonies of prosecution witnesses No.(s) 2 and 3 is doubtful and cannot be relied upon as there are several laches and they are not believable in any manner in view of their unnatural conduct and defective testimony on vital aspect of the matter.

b) No identification parade was conducted to ascertain the identity of the persons who allegedly intercepted the vehicle and conducted the search as well as the identity of the property in question. This amounts to being a crater in the surface of the case of the prosecution that remained unplugged throughout the course of investigation and the trial.

c) There are two witnesses to verify the factum of recovery, however, both have not supported the story of the prosecution, thus, maintaining conviction which is based upon recovery alone would not be wise.

d) Even if the facts narrated by the prosecution witnesses are taken on their face value, no offence of robbery/dacoity as defined under the Code is made out.

e) Prosecution has miserably failed to discharge the onus that lies upon it to prove the case beyond reasonable doubt.

43. Suffice it would be to say that the prosecution evidence available on record is not sufficient enough to substantiate the charge alleged and therefore, the judgment of conviction is not sustainable in the eyes of law and the accused-appellants deserve to be acquitted from the charges.

44. Accordingly, both the criminal appeals succeed and are allowed. The judgment of conviction and order of sentence dated 19.11.2001 passed by the learned Additional Sessions Judge (Fast Track), Rajsamand in Sessions Case No.53/2001 is hereby quashed and set aside. The appellants in both the appeals namely Bhagwat Singh, Nenu Singh, Ram Sigh, Manmohan Singh and Chhotu Singh including deceased Pushpendra Singh are acquitted from the charges of committing the offence under Section 395 of the IPC. Their bail bonds are cancelled.

45. All pending applications, if any, are disposed of.

46. The accused-appellants, except the deceased-appellant Pushpendra Singh, would be required to execute a bond of a sum of Rs. 50,000/- with surety of like amount before this Court within a period of two months from the date of passing of this judgment to the effect that if an appeal is preferred agaisnt this judgment before the Apex Court within a period of six months, they shall appear before the Higher Court as and when such Court issues notice in respect of an appeal.

(FARJAND ALI), J

330-331/Mamta/-