

**Digamber Singh Vs. the State**

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**Court :** Allahabad

**Decided On :** Oct-14-1988

**Reported in :** 1990CriLJ489

**Judge :** V.P. Mathur and ;M.M. Lal, JJ.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 396

**Appeal No. :** Criminal Appeal Nos. 1922 and 1929 of 1978

**Appellant :** Digamber Singh

**Respondent :** The State

**Advocate for Def. :** Dy. Govt. Adv.

**Advocate for Pet/Ap. :** P.N. Misra and ;F.N. Sharma, Advs.

**Judgement :**

**V.P. Mathur, J.**

1. These two appeals arise out of the same judgment and order passed by Mr. N. B. Asthana, the then IV Additional Sessions Judge of Bulandshahr on 19-6-1978 in Sessions Trial No. 271 of 1976 and hence they have been heard together and are being disposed of by this judgment.

2. Mr. N. B. Asthana, the then IV Addl. Sessions Judge Judge found Digamber Singh and Prempal Singh both guilty on a charge under Section 396 of the Indian Penal Code, convicted them accordingly and sentenced each one of them to imprisonment for life. Feeling aggrieved, the two appellants now come up to this Court.

3. It appears that the learned Judge was disposing of two Sessions Cases Nos. 271 of 1976 and 92 of 1976. In the first case, seven persons stood their trial and in the Second case Kunwarpal and one other person Gurveer Singh were facing the trial but, it appears that Gurveer Singh absconded during the course of the trial and, therefore, his trial was separated and has been numbered as Sessions Trial No. 92-A of 1976. Kunwarpal Singh was acquitted and so also five of the accused of Sessions Trial No. 271 of 1976 namely Bhoja, Prem Singh, Harkesh, Bhura and Vijendra Singh. The present two appellants namely Digamber Singh son of Jagannath r/o Pali, P. S. Aurangabad, District Bulandshahr and Prempal Singh son of Charan Singh resident of Saidpur. P. S. Chandaus, District Aligarh were found guilty and sentenced.

4. Shortly stated, the prosecution story was that in village, Yaqubpur, which lies within the area of police station Kotwali, District Bulandshahr, an armed dacoity was committed by about 8 or 9 persons in the night between 24/25th of Oct. 1975 at about midnight. The father of the first informant Bhagmal, whose name was Mukhtiar Singh was murdered as a result of firing by the dacoits. The dacoits had looted variety of the property from the house of the first informant namely Bhagmal (P.W. 1) and had committed dacoity for about an hour. They had caused injuries to three persons namely Kali Charan, Baley Singh, both sons of Bhagmal and Smt. Kashmiri, wife of Bhagmal. A lighted lantern was present hanging by a peg in the upper storey-room towards the open verandah and a lighted lamp was present in the ground floor where Smt. Kashmiri, her daughter and son Baley Singh were sleeping. The dacoits tortured these three persons, in order to know about the place where cash etc. had been kept concealed. Two of the dacoits were on the roof of a Kotha of one Sullarh Singh, whose house is adjacent to the house of the victim and they were firing from the roof and it is said that as a result of firing by them, Bhagmal's father Mukhtiar Singh was killed. After committing dacoity, the

cacoits, on the arrival of village people and on firing by them, retreated and went out from the house.

5. According to the first information report, which was lodged in the Thana at a distance of five miles at 7 a.m. by Bhagmal on 25-10-1975, there were four named persons belonging to the same village Yaqubpur who had taken part in this dacoity. They were Harkesh, Bhoja, Prem Jaat and Kunwarpal. The others were unknown and they were put up for identification on two different dates. Four persons namely Bhura. Digamber Singh, Vijendra Singh and Prempal Singh son of Charan Singh were put up for identification in the District Jail on 12-11-1975 and Gulbir was put up for identification on 7-1-1976. Twelve witnesses in all went to take part in the identification proceedings on 12-11-1975. Digamber appellant was identified by ten out of these twelve persons and the remaining two made mistakes in his parade. Out of these good witnesses namely P.W. 1 Bhagmal, (P.W. 2) Manvir Singh, (P.W. 3) Badan Singh and (P.W. 4) Baley Singh have been examined as witnesses in this case. Similarly Prempal was correctly identified by seven witnesses out of ten; and out of them Badan Singh (P.W. 3) and Baley Singh (P.W. 4) have been examined in this case.

6. It may be mentioned here that in the identification of Gulvir only eight witnesses were sent. Badan Singh (P.W. 3) did not take part in these proceedings and so also Onkar son of Mukandilal. The overall position of the witnesses who have taken part in the proceedings dated 12-11-75 and dated 7-1-76 is as follows -- P.W. 1 Bhagmal He is a 100 per cent good witness. P.W. 2 Manvir Singh is also a 100% good witness. P.W. 3 Badan Singh correctly identified three persons in the parade including Prempal Singh and Digamber Singh and made one mistake in the parade of Bhura. His performance will be 75 per cent good. P.W. 4 Baley Singh is again a 100% good witness.

7. It may be mentioned here that since Badan Singh did not take part in the proceedings dated 7-1-76, the defence has argued that this will go against the prosecution case, because if he had taken part, he might not have correctly identified Gulvir and even might have made mistake in his parade; he was unnecessarily withheld by the prosecution and not sent to take part in these

identification proceedings. It may also be mentioned in passing that according to P.W. 13 Investigating Officer Sri Pitam Singh, Digamber Singh appellant as well as Prempal Singh appellant were arrested after 8.30 p.m. on 6-11-75 and Gulvir had been arrested by the police of police station Khurja on 26-12-75. The identification proceedings of Digamber Singh and Prempal Singh were held within six days of their arrest and within about 20 days of occurrence and identification proceedings of Gulvir were held within six days of his arrest.

8. The fact of dacoity at the house of Bhagmal, the looting of his property and the causing of injuries at least to Bhagmal's wife Smt. Kashmiri and one son Kalicharan is not disputed. It is also not disputed that during the course of dacoity, as a result of shooting by some dacoits, Bhagmal's father Mukhtiar Singh died on the roof of the house. The Investigating Officer took into custody the blood stained and simple earth from the place where the dead body of Mukhtiar Singh was lying. He also recovered five tiklis and one empty cartridge from the house. The injury report Ext. Ka-8 shows that Smt. Kashmiri had sustained as many as seven injuries on her person including a lacerated wound on the left side of the nose, a contusion in the left back middle part and other contusions on the outer side of the left back middle part and two more contusions one on the left back and abdomen below injury No. 3 and the other on the left back of the abdomen in the lower part. She had also sustained two abrasions one on the left thigh and the other on the outer side of the right foot. According to the doctor who examined her on 25-10-75, these injuries were all simple and had been caused by blunt object and by friction and were about 18 hours old.

9. Similarly Kalicharan's injuries were also examined on 25-10-1975 by the same doctor, vide, Ext. Ka-7. He had two scabbed abrasions both on the back of the right forearm.

10. The injuries of Baley Singh were not got examined, but, there is evidence of the witnesses to the effect that he had also sustained injuries. Possibly, it appears that they were not so serious and because he was a child aged about 11-12 years of age, he was not medically examined.

11. The post-mortem examination report is Ext. Ka-6. Mukhtiar Singh was found to be a man about 70 years of age. He had sustained multiple small gun shot wounds of entry on his chest. The doctor Sri Aqil Ahmad has described them under four heads in the postmortem examination report and in his opinion he had died because of shock and haemorrhage due to the ante-mortem injuries and his death could have taken place at about midnight on 24/25-10-1975 24/25-10-1975 .

12. There is the sworn testimony of a large number of witnesses examined in this case namely Bhagmal (P.W. 1), Manvir Singh (P.W. 2), Badan Singh (P.W. 3), and Baley Singh (P.W. 4) to the effect that a dacoity did take place at the house of Bhagmal in the night in question and the dacoits were armed with fire-arms sticks etc. and they caused injuries to three persons of the house and looted properties from the house of Bhagmal and during the course of the dacoity, they murdered Mukhtiar Singh.

13. The question that remains however is as to how far the guilt of the present appellants has been established. The learned Sessions Judge came to the conclusion from the perusal of the entire evidence that so far as Digamber Singh and Prempal Singh were concerned, their implication in this case was established beyond doubt.

14. We shall first take up the case of Prempal Singh. He was not known from before and he has been correctly identified by two witnesses namely Badan Singh (P.W. 3) and P.W. 4 Baley Singh. There is an attempt on the side of the defence to show that this accused was known to the witness of Yaqubpur from before also, and the contention is that for the last 14-15 years he had been living with his phupha Ramlal in village Daulatgarh which is just adjacent to the village Yaqubpur and since the people of both the villages visit each other, hence Prempal Singh was also known to villagers of Yaqubpur. The fact is disputed and denied by the prosecution witnesses who have come to depose in this case. From one of them namely P.W. 3 Badan Singh, however, it has been elicited that the boundary of Daulatgarh and the boundary of Yaqubpur are adjacent; and further that people of Daulatgarh visit Yaqubpur and people from Yaqubpur visit Daulatgarh. But it is specifically denied that Prempal Singh ever visited Yaqubpur or was seen in

Daulatgarh, by the witnesses. The learned Sessions Judge has dealt with this aspect of the matter in his judgment. This accused was arrested at village Porhi from the tube well of Buddha. He has not disputed his arrest from that place. On the contrary he says that his grandfather used to live there and he used to visit Porhi for about 15-20 days. There is nothing on the record to show that he had for any reason earned the enmity of the police personnel or the witnesses and hence was falsely named in this case.

15. D.W. 1 Ramlal who is a resident of village Daulatgarh, simply comes to say that Prempal Singh was living with him for the last 14-15 years since the age of about 4 or 6 years. He also gave out that this accused was reading in Chandaus and thereafter in a school at Mirzapur. Ramlal was shown as is guardian. Nothing from the school papers has been placed on the record. The Admission form or some other certificate could have been produced in Court to show that Ramlal was recorded as his guardian and his place of residence was shown as Daulatgarh. Similarly copy of the Kutumb Register has also not been placed on the record although it could be obtained and in it, if it was a fact, there would have been a mention of the name of this man Prempal Singh along with the family members of Ramlal. The learned Court below has rightly rejected the testimony of Ramlal and we are also convinced that the story put forth by this accused that he was living in village Daulatgarh and was visiting Yaqubpur and was known to the witnesses from before is all made up and false.

16. Nevertheless the position of the identification evidence against him has to be seen in order to come to a conclusion about his having taken part in this occurrence. Out of the witnesses who have been examined in Court Badan Singh (P.W. 3) and Baley Singh (P.W. 4) only have identified him. These are apparently two good identifications, Baley Singh being 100 per cent good and Badan Singh being 75 per cent good. We have already mentioned earlier that co-accused Gulveer was arrested on 26-12-75 and soon after his arrest, he was put up for identification on 7-1-76. It is not a case in which the identification has been held long after the arrest. And in the identification proceedings of Gulveer, Badan Singh (P.W. 3) did not take part. The prosecution has not been able to explain, why it so happened and the defence will be entitled to argue that if this witness had gone to

take part in the identification proceedings of Gulvir, he would have made a mistake. It is argued that the identification evidence of Badan Singh (P.W. 8) against Prempal Singh therefore, will be reduced to only 60 per cent good and the total identification evidence against Prempal Singh will be less than two good identifications. Even if this argument is accepted and it is held that Badan Singh would have made a mistake in the parade of Gulvir, the position would still be that Badan Singh would be a 60 per cent good witness. Against Prempal Singh, therefore, there is the testimony of a cent per cent good witness Baley Singh and of 60 per cent good witness Badan Singh. This amounts to two good identifications. Similarly against Digamber Singh, there is the testimony of two cent per cent good witnesses namely Bhagmal and Baley Singh and one sixty per cent good witness namely Badan Singh, even if it is assumed that Badan Singh would have made a mistake if he had gone to attend the identification proceedings against Gulvir. In either case the identification evidence against these two accused persons is good enough to result in conviction, provided it is proved that these witnesses had an opportunity to see the faces of the dacoits, specially of these two persons Digamber Singh and Prempal Singh and were assisted by sufficient light available on the spot.

17. The question of light may be taken up first. The occurrence took place in the night between 24/25-10-75 at about midnight and the almanac will show that the moon rose at 15-52 hours and set at 3-54 a.m. on 25-10-75. Therefore, during the entire night, there was sufficient moon light on the spot. There is also the testimony of these witnesses to the effect that a lighted langern was present in the first floor of the house where Mukhtiar Singh was killed and a lighted lamp was present in the aangan of the house on the ground floor, where in the beginning Smt. Kashmiri and Baley Singh were sleeping. The Investigating Officer has shown the place where Smt. Kashmiri and Baley Singh were sleeping by letters 'KM' and has shown the place where the lighted lamp was kept by letter 'L'. Similarly by letter 'A' the place where the lighted lantern was hanging by a peg has been shown. It may be mentioned here that the portion of the house which has been separately shown, as being a room between the two chaubaras in the extreme south-eastern corner of the site plan is actually the upper portion over the south-western portion of the house namely Chaubara, the kotha and the Rasoi etc.

The testimony of the witnesses will bear it out. They say that it was on the roof of Rasoi that Mukhtiar Singh was murdered. The testimony of all the witnesses is that in the beginning Baley Singh along with his mother was sleeping at point 'KM' of the site plan. This is so shown in the site plan also. Baley Singh's testimony is that he and his mother were beaten by the dacoits and injured, when they started demanding informations about their belongings. They were then taken on the first floor of the house where in the light of lantern they were again beaten and again information about the placing of the valuables was sought to be elicited from them. They were again brought down and during the entire course of dacoity, they came into close contact with some of the dacoits. In our opinion, so far as Baley Singh is concerned, he had sufficient opportunity to see the faces of the dacoits and to vividly remember their characteristics so as to be able to identify them satisfactorily during the identification proceedings dated 12-11-75. He was less than 11-12 years of age, when this occurrence took place. His testimony is, therefore, straightforward and completely believable. It was a moonlit night and he was assisted further by the light of the lamp so long as he remained with the dacoits in the aangan of the house and by the light of the lantern when he was taken up along with his mother. He had, therefore, a very good opportunity of seeing the faces of the dacoits and he is a reliable witness.

18. The other witness is Bhagmal. The Investigating Officer has shown by point 'C' the place, where Bhagmal was present and if we peruse his statement it also appears that this is the place from which Bhagmal saw the dacoits, while they were receding. The Investigating Officer has clearly admitted during the cross-examination that he did not show the presence of any witness including Bhagmal by the side of the southern wall of Gher of Sullarh Singh, whose son is Manvir Singh (P.W. 2). That was a lapse on the part of the Investigating Officer and will not affect the testimony of eye-witnesses. Bhagmal, Manvir Singh, Baley Singh and Badan Singh, all say that except Baley Singh all other witnesses had first collected towards the north of the southern wall of the Gher of Sullarh Singh in between the two cattle troughs and under the neem tree, and therefrom, they looked into the Sahan of the first informant, where the dacoits were committing the dacoity. The Investigating Officer found tiklis and one empty cartridge lying in the sahan and this has been shown by letters 'TT' in the site-plan. It means, therefore,

that the dacoits were firing from there and were moving about in the sahan. Our attention has been drawn by the learned counsel for the defence to the case of Anant Ram v. State decided by the Division Bench of this Court and reported in 1984 All Cri R 537 : (1985 Cri LJ NOC 11) and it is argued that with the help of moon-light, if it is a full moon and the period of moon is very bright, one can recognise at a distance of 33 to 36 feet. In tropical countries this distance may increase. In Modi's Medical Jurisprudence and Toxicology 20th Edition page 61, the opinion of Tidy has been reproduced to lay down that the best known persons cannot be recognised in the clearest moon-light beyond a distance of 17 yards. Mr. N. J. Modi had also quoted the opinion of Colonel Bary to lay down that at distances greater than 12 yards the stature and outline of the figure alone is available as a means of identification. To define the features even at shorter distance is practically impossible by moon-light.

19. It means, therefore, that recognition of unknown persons can be made in strong moon-light from a distance of 10 to 12 yards. Witnesses Bhagmal, Manvir Singh and Badan Singh were present behind the boundary wall of the Gher of Sullarh which is not very high and because they were under a neem tree and by the side of two cattle troughs, they were obviously in protected place and could not be seen by the dacoits on account of the neem tree but from their position there was no obstruction for them to see the faces of the dacoits when they were coming into the sahan of the house of the first informant, where not only there was light of the moon but also the light of the lamp. The distance between the place shown by letters 'TT' in the site plan and the cattle troughs inside the Gher of Sullarh has not been disclosed by any witness and the defence has not elicited it, nor proved it by its own evidence, and it cannot be said that it was such a long distance that identification from there could be impossible.

20. The further evidence on the record is consistent to say that after committing the LOOT, when some pressure was exerted by the village people, the dacoits scaled the north-western wall of the house of Bhagmal and then took turn towards the south-west and passed from very close to point 'C' where there are houses of some Dhobis and some neem trees standing. At this place, these three witnesses came and from there they raised cries. As a result of these cries the village people

were attracted, and tried to put up resistance. In the site plan prepared by the Investigating Officer also at point 'C we find mention of the presence of Bhagmal and Badan Singh. Clearly when the dacoits were running away after committing LOOT and going towards the south-west, the witnesses were facing them while standing under the neem trees. In the moon-light they could, therefore, see their faces for the second time and this was sufficient to reinforce their earlier recognition of their faces.

21. The identification proceedings were held with promptitude. The occurrence took place in the night of 24/25-10-1975 24/25-10-1975 . Digamber Singh and Prempal Singh were arrested on 6-11-1975 and within six days, they were put up for identification. Under these circumstances we are in agreement with the learned Sessions Judge that witnesses Bhagmal, Manvir Singh, Badan Singh and Baley Singh had good opportunity of seeing the faces of the dacoits during the course of the dacoity and three of them namely Bhagmal, Manvir Singh and Badan Singh also could see their faces subsequently when they were running away after the commission of the dacoity and they were assisted by sufficient light of the moon both inside the house and outside and of the lighted lamp which was present in the aangan of the house where the dacoits were frequently coming and committing loot. It is contended that the identification evidence against Digamber Singh is too good to be believed. Out of twelve persons who went to identify him, ten could correctly identify him. The performance will be 83 per cent. It should also not be forgotten that two of these witnesses namely Onkar son of Pooran and Onkar son of Mukundi not only did not identify him in the parade but also made mistakes about him.

22. This being the situation we are convinced that both Digamber Singh and Prempal Singh did take part in this dacoity with murder and since the murder of Mukhtiar Singh was committed during the course of the dacoity when he tried to put up resistance by throwing brickbats towards the dacoits and by giving out the names of some of them, hence the case shall be clearly covered by Section 396 of the Penal Code. As a result of this, the appeals have no force and have to be dismissed and the convictions of the appellants Digamber Singh and Prempal Singh under Section 396, IPC, and their sentences to imprisonment for life have to

be upheld. Ordered accordingly.

23. The appellants are on bail. Their bail bonds and sureties shall be cancelled. They shall surrender and be taken into custody forthwith to serve out their sentences.

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