

Bhima Shaw and ors. Vs. the State

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Court : Orissa

Decided On : Jan-10-1956

Reported in : AIR1956Ori177; 1956CriLJ1208

Judge : Narasimham and ;Mohapatra, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 395 and 400; Indian Law; [Code of Civil Procedure \(CPC\) , 1908](#); [Evidence Act, 1872](#) - Sections 9, 24, 30, 54 and 114; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 109, 110, 164, 337 and 342(1)

Appeal No. : Criminal Appeal Nos. 9, 15, 20 to 27 and 36 to 41 of 1954 and Govt. Appeal No. 8 of 1954 and Crimina

Appellant : Bhima Shaw and ors.

Respondent : The State

Advocate for Def. : Adv.-General and ;S. Acharya and ;R.K. Mohapatra, Adv. In Criminal Appeal No. 9 of 1954, ;Adv.-General and ;S. Acharya and ;R.K. Mohapatra, Adv. In Criminal Appeal No. 15 of 1954, ;Adv.-General and

Advocate for Pet/Ap. : M.N. Das and ;S.N. Dasgupta, Adv. In Criminal Appeal No. 9 of 1954, ;B.C. Raymohansay, Adv. In Criminal Appeal No. 15 of 1954, ;B.K. Pal, Adv. In Cr. A. Nos. 20 to 27 of 1954 and Cr. A. Nos. 36 to 41

Judgement :

Narasimham, J.

1. This is an appeal from the judgment of the Sessions Judge of Balasore convicting the appellants under Section 400, Penal Code and sentencing them to various terms of imprisonment. Fortyfive persons were tried in the Court of the learned Sessions Judge for an offence under Section 400, I.P.C., on the allegation that they belonged to a gang of persons associated for the purpose of habitually committing dacoity during the period from 28-11-49 to 18-7-52.

The learned Sessions Judge convicted twenty-three persons and acquitted the rest. The State Government preferred an appeal (Government Appeal No. 8 of 1954) against the acquittal of Abhi-manyu Sahu, Paramananda Behera and Kalicharao Maharana, They also filed a revision petition (Crl. Rev. No. 103/54) for enhancement of the sentence passed on Gour Chandra Dutta and Amulya Chandra Das. Of the convicted persons, accused Haradhan Mukherji, Gour Chandra Dutta, Kalu Khan, Sk. Kasi alias Kasiruddin and Gourhari Jena did not prefer any appeal against their conviction and sentence.

The remaining convicted persons preferred both regular appeals and jail appeals. All these appeals and the criminal revision were heard together and will be dealt with in one judgment.

2. The accused persons belong to various communities, diverse castes and two different States. Some of them, namely, Tarak Chandra Banerji, Haradhan Mukherji, Gour Chandra Dutta and Amulya Chandra Das belong to Bengal. The rest of them belong to Orissa; but most of them are residents of Balasore district. Accused Pranath Patnaik and his cousin Kali Charan Patnaik, however, belong to Puri district and accused Ma-heswar Maharana belongs to village Patpur, P. S. Dharmasala in Jaipur subdivision of Cuttack district. All the dacoities were said to have taken place either in Balasore district or in Cuttack district during the period in question.

3. I give below a list of the offences of dacoity or burglary which, according to the prosecution case, were committed by the gang during the said period.

Sl. No. Sl. No. as given in the Sessions Court Judgment. Nature of Offence Place of Occurrence Date of Occurrence Police Case No.

123456

1.o9 Burglary Motiganj Bazar. 28-11-1949 Balasore P. S. Case No. 562. o10 Dacoity Jagaunath Prasad. 12-2-1950 Bhandaripokhari P. S. Case No. 113. o11 'Alwarpur 21-2-1950 Khaira P. S. Case No. 54. o12 'Manitiri 22-3-1950 Soro P. S. Case No. 275. o13 'Tarada 23-3-1950 Bhadrak P. S. Case No. 546. o14 'Berhampur 13-4-1950 Khaira P. S. Case No. 97. o15 Burglary Motiganj Bazar. 15-5-1950 Balasore P.S, Case No. 1248. o16 Dacoity Goburgadia 9-8-1950 Simulia P. S. Case No. 339. o17 Dacoity Erandai 14-3-1950 Bhadrak P. S. Case No. 11610. 18 'Badamisrapur 16-1-1951 Basudebpur P. S. Case No. 711. 19 'Mulsin 2-3-1951 Soro P.S. Case No. 10 12. 20 'Kasindpur 26-2-1952 Tihidi P. S. Case No. 1013. o21 'Polisahi 1-3-1952 Mahauga P. S. Case No. 161422 'Riti Bank 5-3-1952 Remuna P. S. Case No. 715. o23 'Mahammadnagar 20-3-1952 Jaleswar P. S. Case No. 3816. 24 'Sindhia 28-3-1952 Balasore P. S. Case No. 9617. 25 'Khannagar 18-4-1952 Balasore P. S. Case No. 12818. o26 'Baigadia 27-4-1952 Bhandaripokhari P. S. Case No. 2019. 27 'Malisahi 28-4-1952 Basta P. S. Case No 4720. o28 'Kurupada 15-5-1952 Korai P. S. Case No. 4321. 29 'Barisahi 24-5-1952 Nilgiri P. S. Case No. 392230 'Basuchakri 2-6-1952 Basta P. S. Case No. 6123. o31 'Gambaria 18-7-1952 Korai P. S. Case No. 61. o (Approver concerned.)

Note:- In the charge the period of association of the gang was said to be from 15-2-1947 to 18-2-1952. But during the trial of the case the period of the operation of the gang was limited to the interval between 28-11-1949 and 18-7-1952. This period alone will be taken as the relevant period for the purpose of this case.

4. The learned Sessions Judge held that of the aforesaid offences items 9, 10, 11, 12, 13,, 14, 15, 16 17, 20, 21, 23, 26, 27, 28, 30 and 31 were committed by the gang either with or without the participation of the approver but that in respect of items 18, 19, 22, 24, 25 and 29 it was not clearly established that the gang was responsible for these offences.

The prosecution case was that during the year 1949 appellants Nalinikanta Das, Pranathan Patnaik, Sk. Koresh and approver Upendra Dikhit, who were said to be

the ring leaders of the gang, were in Balasore District Jail in connection with some other offences committed by them. During their stay there they conspired together with some other accused persons and decided to habitually commit dacoity, burglary and other allied offences soon after their release from jail.

The exact date of the conspiracy was not clear from the evidence of the approver though from certain statements made by him about their having met together on a Sunday while all the persons were collected in the jail to hear religious discourses given by a Hindu Pandit the Public Prosecutor tried to fix the date somewhere between the 14th and the 16th June, 1949.

Approvers Upendra Dikhit was released from Balasore District Jail on bail on 19-11-49 and the burglary at Motiganj in Balasore town (item 9) was said to have been committed by him in association with some other members of the gang on 28-11-49. The gang thus continued to commit seven dacoities and one burglary during the year 1950 at various places in Balasore district (items 10 to 17). But on 15-8-50 these ring-leaders and some other persons were arrested in connection with the commission of a dacoity and they remained as under-trial prisoners for about fifteen months. The result was that during the year 1951 the number of dacoities committed in Balasore district was reduced to only two (items 18 and 19).

But in the first half of 1952 the ring leaders of the gang were released from jail and thereupon the number of dacoities committed in that district and in the adjacent areas of Cuttack district suddenly rose to twelve. The operations of the gang, however, came to the notice of the police mainly through the confessions of accused Prana-nath Patnaik, Haradhan Mukherji and Gour Chandra Dutta. On the basis of their confessions approver Upendra Dikhit was also arrested in July 1952 and he also made confessions from 8-8-52 to 12-8-52.

Appellant Kali Charan Patnaik also made a confession in respect of his participation in one dacoity. The confessions of the different accused persons were placed before the District Magistrate of Balasore who granted pardon to Upendra Dikhit and he was made the approver in the case (P W. 2). He is the principal witness against the appellants and the remaining witnesses have been examined mainly to corroborate him either on the question of association of the

various accused persons with the leading members of the gang or their identification by the victims of the dacoities or the recovery of some of the properties stolen by the dacoits from the possession of some of the appellants.

5. For the purpose of this appeal it is unnecessary to summarise in detail the full story of the activities of the gang as narrated by the approver. His examination-in-chief alone runs into twentyfour printed pages in the Paper Book and it gives an exhaustive and interesting account of how the ring-leaders of the gang gradually got into touch with other criminals and bad characters of Balasore, Cuttack and Calcutta and systematically raided the houses of rich persons and committed dacoity after assaulting the inmates, including females, whenever they resisted.

The detailed account of the activities of the gang and the accurate description of the various places as given by the approver and as subsequently verified by a Magistrate (P. W. 113) are alone sufficient intrinsic evidence to show that the approver was not drawing on his imagination. It is impossible to believe that any criminal, however clever he may be could have, from his imagination, concocted such an interesting story.

The learned Advocates for the appellants very properly did not challenge the approver's evidence regarding the commission of dacoities at various places as described by the approver and by the other witnesses. They also did not press the appeal so far as appellants Prananath, Sk. Koresh and Nalini were concerned. The evidence against these appellants is overwhelming and the learned Sessions Judge did not exaggerate when he stated that each of them was a dare-devil and that they all created havoc in the district of Balasore. It is therefore unnecessary to describe in detail the case against each of these appellants.

6. The main argument advanced by the learned Advocates on behalf of the remaining appellants was that the evidence of the approver was not adequately corroborated by independent sources so as to lead to a reasonable inference that these appellants belonged to that gang.

The learned Sessions Judge rejected the prosecution story of a specific conspiracy amongst the accused persons in Balasore District Jail sometime

between the 14th and 16th June, 1949. But he thought that there was ample evidence of Joint participation of several members of the gang in the commission of dacoity, their association at (1) Jaipur (2) Calcutta (3) Bhadrak (4) Madakhhol hill and (5) Parikhi near Balasore town and other circumstances from which the existence of the gang could be reasonably inferred.

On the main question as to whether each of the accused persons (excepting of course appellants Prananath, Sk. Koresh, Nalini and approver Upendra Dikhit) belonged to that gang the learned Sessions Judge thought that their past bad record as borne out by their previous convictions, some evidence of their association with the ringleaders at the place mentioned above coupled with their own participation in one or two offences of dacoity committed by the gang and other circumstances would suffice.

Mr. Pal, however, challenged the correctness of this reasoning and urged that mere participation of an individual accused in the commission of one or two dacoities with the other members of the gang was not sufficient to show that he 'belonged' to the gang within the meaning of Section 400, I.P.C.

7. Before discussing the case against each of the appellants I may dispose of some interesting questions of law raised in the appeal. Section 400, Penal Code, is as follows :

'Whoever at any time after the passing of this Act shall belong to a gang, of persons associated for the purpose of habitually committing dacoity, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine'.

As pointed out in Sri H. S. Gour's Penal Law of India, this section is a re-enactment of Section 1 of the Dacoity Act, 1843 (Act 24 of 1843) which ran as follows :

'Whoever shall be proved to have belonged to any gang of dacoits shall be punished with transportation for life or with imprisonment for any less term with hard labour'.

The Law Commissioners who framed the Penal Code made the following observation in respect of the aforesaid section:

'We would suggest, with reference particularly to the observations of Mr. Thomas as to the constitution of these gangs that some definition be given of what is meant by a person belonging to a gang of dacoits- The preamble to Act 24 of 1843 shows that the phrase is intended to designate, not a person who ordinarily lives by honest labour, and who on some occasion has been tempted to join himself to a gang and to take a subordinate part in a robbery committed by such gang but one who is habitually associated with a gang of professional dacoits, systematically employed in carrying on their lawless pursuits in different parts of the country, accompanying them in their expeditions, and actively participating in their operations.'

Though debates in a Legislative Assembly during the passage of a Bill are held to be inadmissible in construing an Act there is sufficient authority for the view that in construing the provisions of the Indian Penal Code and ascertaining the intention of the Legislature the report of the Indian Law Commissioners may be referred to : see *Queen-Empress v. Kartick Chundir*, 14 Cal 721 (A); and *Romesh Chunder Sanuyl v. Hiru Mondal*, 17 Cal 852 (B).

Hence, on the basis of the aforesaid observations of the Law Commissioners it may be held that the expression 'belong' in Section 400, I. P. C. implies something more than casual association for the purpose of committing one or two dacoities by a person who was ordinarily living by honest means. It refers to those persons who habitually associate with a gang of dacoits and actively assist them in their operations.

The same view was reiterated in *Bhabuti v. Emperor*, 1921 All 32 (AIR V 8) (C) where it was pointed out that the aforesaid expression

'involves the notion of continuity and indicates a more or less intimate connection with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected has identified himself with a band, the common purpose of which is the habitual commission of dacoity'.

The mere participation in the commission of one or two dacoities by a person who was otherwise leading an honest existence and suddenly fell into temptation may not suffice to show that he belongs to a gang of dacoits. But as pointed out in *Lale v. Emperor*, 1929 Oudh 321 (2) (327) (AIR V 16) (D),

'Evidence showing the actual participation by an accused in any given theft or robbery is evidence both of his association with the gang and of his object in such association.'

Doubtless it is only a piece of evidence and may not by itself suffice to show that he belongs to the gang. But if a person with a bad past record participates in the commission of dacoity even on one occasion in association with a well-known gang of habitual dacoits knowing them to be such a gang it may be reasonably inferred that he belongs to that gang unless there is some other material on record to justify an inference that the association was of a casual nature.

For instance, if it could be established that the said person, had a special private grudge against the victims of the dacoity and that he instigated the gang to commit that offence in the house of that victim and that he had no other kind of association with the gang it may be reasonably held that he did not belong to the gang but that he joined the gang merely to take private vengeance on his enemy.

The question ultimately turns on a fair inference to be drawn from all circumstances including the antecedents of the accused, the nature of his participation in the commission of one or two dacoities and the evidence of his association with the gang. The number of dacoities actually committed by him, though a piece of evidence, is not by itself decisive.

8. Again, a person may belong to a gang of dacoits without having actually participated in the commission of even one dacoity. A clever member of the gang may always remain in the background while organising the operations of the gang, giving them active assistance for the purpose of meeting together, furnishing them with weapons and also screening them after the commission of the offence and helping them in the disposal of the looted property. It is true that a mere receiver of stolen property or a mere harbourer of a gang of dacoits cannot be said to belong

to such a gang. In *Nidhi v. Emperor*, 1925 Oudh 144 (2) (AIR V 12) (E) this point was emphasised in the following words :

'Generally speaking, we are of opinion that only those persons can be convicted of this offence who have either taken an active part in the crime or been employed for the purpose of scouting or in other ways facilitating the commission of the crime . We are not prepared to lay down that a receiver of the property stolen or a person harbouring a gang is necessarily ft member of the gang within the meaning of Section 400'.

I would emphasise the word 'necessarily' occurring in the above passage. A habitual receiver of stolen property from a gang of dacoits of thieves knowing them to be such a gang would be guilty under Section 413, T. P. C., and may not be held to belong to a gang either for the purpose of Section 400 or Section 401. Similarly, a person who harbours a gang of dacoits on a few isolated instances may be guilty under Section 216A, I. P. C., but not under Section 400, I. P. C. But it is significant that unlike Section 413, I. P. C., there is no section in the Indian Penal Code for punishing a mere habitual harbourer of a gang of habitual dacoits.

Section 213A, I. P. C., seems to be limited to those cases where there are isolated instances of harbouring by an accused. It seems, therefore, a fair inference that a habitual harbourer of a gang of dacoits knowing them to be habitually committing dacoity may in some circumstances be held to belong to that gang. The question ultimately depends on whether from all the proved facts and circumstances it may be reasonably held that he identified himself so much with the object of the gang and facilitated them in the commission of the offences as to become a member of the gang.

For this purpose his intimate association with the gang before the commission of dacoities, his subsequent association with them after the commission of the offence, the facilities given by him in disposing of the looted property and in screening the dacoits would all be relevant pieces of evidence along with other evidence of his past activities.

9. This leads to the next question as to how far evidence of previous conviction is admissible to prove habit. As 'habit' is an essential ingredient of an offence under Section 400, I. P. C., evidence of bad character of an accused would be relevant by virtue of Explanations 1 and 2 to Section 54 of the Evidence Act, previous conviction would also be relevant as evidence of bad character.

But there seems to be some divergence of opinion as to whether evidence of previous conviction of the offence of dacoity alone would be relevant for an offence under Section 400, I. P. C., or else whether evidence of previous conviction of any other offence such as theft or burglary or the fact that a person was bound down under Section 109 or 110 Cr. P. C. would also be relevant.

In *Empress v. Naba Kumar Patnaik*, 1 Cal WN 146 (F) evidence of previous commission or conviction of the offence of dacoity was held to be admissible. In *Public Prosecutor v. Bongiri Pattigadu* 32 Mad 179 (G) some doubt was thrown about the admissibility of evidence regarding the commission of crimes other than dacoity. In *Emperor v. Sher Mahomed*, 1923 Bom 71 (AIR V 10) (H) a single Judge held that in a case under Section 400, I. P. C., evidence of previous conviction on a charge of theft or of an order under Section 109 or Section 110, Cr. P. C., was inadmissible.

But in *Bonai v. King-Emperor*, 38 Cal 408 (I) where a person was charged under Section 401, I. P. C., it was held that evidence of previous conviction whether for offences against property or for bad livelihood was admissible not as evidence of character but as evidence of habit. The learned Judges observed that conviction for bad livelihood would be more cogent evidence of habit than isolated acts of theft.

Kader Sundar v. Emperor, 13 Ind Cas 279 (Cal) (J) another Division Bench of the Calcutta High Court held that for a charge under Section 400, I. P. C., the past history of the accused including his conviction for an offence of theft or of his having been bound down under Section 110, Cr. P. C, would be relevant. In *Kasem Ali v. Emperor*, 1920 Cal 87 (AIR V 7) (K) such previous conviction was pointed out to be some evidence of association.

In *Ledu Molla v. Emperor*, 1925 Cal 872 (AIR V 12) (L) it was held following the earlier *Calcutta* view 38 Cal 408 (I) that the fact that the accused was bound down under s. 110, Cr. P. C., was admissible for the purpose of proving habit as well as association. 38 Cal 408 (I) was followed in a Bombay decision reported in *Motiram Hari v. Emperor* 1925 Bom 195 (AIR V 12) (M). The Oudh Chief Court has consistently held *Beni Madho v. Emperor*. 1933 Oudh 355 (AIR V 20) (N) 1925 Oudh 144 (2) (AIR V 12) (E) and *Khilawan v. Emperor*, 1928 Oudh 430 (AIR V 15) (O) that evidence of previous conviction whether in respect of an offence of dacoity or of any other offence such as theft or burglary and the fact that the person was bound down under Section 109 or Section 110, Cr. P. C., would be admissible.

10. Thus, the majority view seems to be that in a trial for an offence under Section 400, I. P. C., evidence of previous conviction may be admissible for the purpose of proving habit and association. It is indeed difficult to dissociate habit from character. In *Oxford Dictionary* the expression 'habit' has been explained as follows :

'The way in which a person is mentally or morally constituted; the sum of the mental and moral qualities; mental constitution, disposition, character.'

For proving a charge under Section 400, I. P. C., it must be established (1) that there was a gang associated for the purpose of habitually committing dacoity and (2) that the accused 'belonged' to the gang, that is to say, the association of the accused with the gang was not casual but was intended to be habitual. Hence, 'habit' is a fact in issue to be proved for the purpose of establishing both the aforesaid ingredients of the offence.

As habit is equivalent to character, it may be reasonably said that character of an accused is itself a fact in issue for proving a charge under Section 400, I. P. C. Thus Explanations 1 and 2 to Section 54, Evidence Act, are attracted and previous convictions not only in respect of dacoities but also in respect of other offences such as theft, burglary and offences under Section 109 or Section 110, Cr. P. C., may be admissible.

If a habitual thief is found in the company of a gang of dacoits and it is further established that he knew that the said gang was habitually committing dacoity it may be reasonably inferred that his association with them was not casual but that he joined the gang for the purpose of habitually committing dacoity unless there are other circumstances connected with his association with the gang which would support a contrary view. Apart from the evidence of habit and character, these previous convictions may also be admissible for the purpose of proving association of a group of individuals.

11. The evidence of approver Upendra Dik-hit (P. W. 2) is the pivot on which the entire prosecution case rests and it is, therefore, necessary to state briefly how far his evidence can be accepted against the accused persons in a case of this type. The general rule that the evidence of an accomplice should not be accepted unless there is adequate corroboration in material particulars not only in respect of the commission of the crime but also in respect of the participation of each of the accused in the commission of that crime is too well-known.

It is also well settled that 'the corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime: see *Rex v. Baskerville*, 1916-2 KB 658 (667) (P). In that decision their Lordships cited with approval *Regina v. Birkett*, (1839) 173 ER 694 (Q) where on a charge of stealing two sheep the evidence of the accomplice about the participation of the accused in the commission of theft was held to be adequately corroborated by the recovery of a quantity of mutton in the house of the accused which corresponded in size with parts of the stolen sheep.

Doubtless, mere recovery of mutton of that size from the house of the accused would not by itself reasonably establish his guilt. But it was held to be sufficient to corroborate the evidence of the accomplice, Hence it seems well settled that the corroborative evidence that is required for accepting the testimony of an accomplice need not by itself conclusively establish his guilt. It is sufficient if it is a piece of circumstantial evidence which tends to connect the accused with the crime with which he is charged. This principle was reiterated by the Supreme Court in *Ramesh-war Kalyan Singh v. State of Rajasthan*, 1952 SC 54 (AIR V 39)

(R) in the following words :

'Independent evidence must not only make it safe to believe that crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime. This does not mean that the corroboration as to identity must extend to all the circumstances necessary to identify the accused with the offence.

The same principle was reiterated in *Ambika Charan v. Emperor*, 1931 Cal 697 (AIR V 18) (S) by Rankin C. J. in the following words :

'Corroboration need not be sufficient by itself to prove the guilt of the man. It is sufficient if in some circumstances there is independent implication We have, I think, to look carefully at the evidence to see if there is independent evidence implicating each one of these other accused which would enable us to rely upon the general truth of the approver's evidence.....'

As to what would be a 'material particular' would obviously depend on the facts of each case. In a gang case under Section 400, I. P. C., direct evidence of association of a particular accused with the gang can ordinarily be given only by an approver see *Chhaprolia v. Emperor*, 1924 Lah 235 (AIR V 11) (T).

Other witnesses will only speak of association on occasions immediately preceding the commission of dacoities or soon after the commission of dacoities, other suspicious movements of each of the accused, recovery of stolen property in a few instances and the suspicious absence of a particular accused from his house at or about the time when the offences were committed. It will be very rarely indeed that direct evidence of the victims of the dacoity identifying a particular accused amongst the dacoits would be forthcoming.

12. In respect of some of the accused the prosecution has also relied on the confessions of the co-accused persons for the purpose of supporting the story as put forward by the approver. It is unnecessary to discuss at length the law on the subject in view of the recent pronouncement of the Supreme Court in *Kashmira*

Singh v. State of Madhya Pradesh, 1952 SO 159 (AIR V 39) (U) where it was pointed out that such confessions cannot be used as evidence at all but they can be used only for the limited purpose of 'lending assurance' if there is other evidence which, if believed, would support the conviction of an accused.

Accused Haradhan Mubherji, Gour Chandra Dutta and Kali Charan Patnaik made Judicial confessions before a Magistrate though they retracted from those confessions during trial. During the course of argument it was urged on behalf of the appellants that confessions or admissions should be taken as a whole or rejected as a whole and that those portions which are inculpatory alone should not be used against them while rejecting the residue which may be exculpatory.

In support of this argument reliance was placed on Hanumant Govind Nargundkar v. State of Madhya Pradesh, 1952 SC 343 (AIR V 39) (V). But if that decision be carefully examined it will be clear that the principle is not so wide as was urged by the learned Advocate for the appellants. As pointed out in Balmakun v. Emperor, 1931 All 1 (AIR V 18) (PB) (W) where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible.

This view has been followed in Noukar Mbule-dino v. Emperor, 1937 Sind 212 (AIR V 24) (X). In 1952 SC 343 (AIR V 39) (V) a handwriting expert was examined to corroborate the statement of the accused under Section 342, Cr. P. C. But that expert's evidence was held to be inadmissible. Hence, there was no evidence to corroborate any portion of the statement of the accused under Section 342, Cr. P. C., and under those circumstances their Lordships held that the statement cannot be split up and part of it alone used against the accused.

In a later Supreme Court decision reported in Vijendrajit Ayodhya Prasad v. State of Bombay, 1953 SC 247 (AIR V 40) (Y) where some of the facts contained in a statement under Section 342, Cr. P. C., were proved to be untrue by prosecution evidence, their Lordships rejected those facts and took into consideration other facts admitted in that statement. Hence, a Court would be entitled to reject those

portions of the confessions or admissions of the accused persons which have been proved to be false by prosecution evidence while accepting the residue.

13. Turning to the facts of the case, the first question for decision is whether the prosecution has established the existence of a gang of persons associated for the purpose of habitually committing dacoity. The learned lower Court rightly disbelieved the approver's story of a conspiracy on a Sunday in Balasore jail in 1950 where all the conspirators decided that after their release from jail they should take to dacoity as a profession and live by it.

Such a conspiracy was not put forward by the approver in his judicial confessions and moreover the probable date on which such a conspiracy could possibly have been hatched does not fit in with the approver's own evidence about the presence of some of the accused persons in Balasore jail. But the failure of the prosecution to prove a specific conspiracy on a particular date on the part of the accused persons to live by dacoity does not necessarily show that the existence of a gang is disproved.

On the other hand, it is well established by the evidence of the Jailor of Balasore District Jail (P. W. 120) that appellant Pnananath Patnalk was detained in Balasore jail from 14-2-47 to 26-1-50 in a proceeding under Section 110, Cr. P. C. Appellant Nalinikanta Das was also in Balasore jail from 4-1-46 to 13-6-49 on a charge under Section 395 I. P. C. Sk. Koresh was also in the same Jail from 4-1-46 to 11-3-50 on a charge under Section 395 I. P. C. Approver Upendra Dikhit (P. W. 2) was also in Balasore Jail from 29-12-48 to 7-2-49 and again from 8-3-49 to 19-11-49. Balasore District Jail is a small jail with a population of about 200 prisoners and undertrials.

Thus when these four persons were kept in that jail in close association for several months there were ample opportunities for them to meet and discuss their future depredations after their release from jail. All these persons have got several previous convictions, to their credit. Thus, Pranatanath Patnaik has two previous convictions under Sections 411, 457 and 380, I. P. C., another under Section 109, Cr. P. c. and also a previous conviction under Section 395, I. P. C. Sk. Koresh has two previous convictions under Section 395, I. P. C. -- one on 6-12-43 and another

on 28-9-1946. Nalinikanta Das has a previous conviction under Section 380, I.P.C. and another conviction under Section 395, I.P.C. jointly with Sk. Koresh. Approver Upendra Dikhit's antecedents are equally bad. Thus, when these four notorious ex-convicts were kept in close association in Balasore District Jail for several months in 1949 it would be reasonable to infer that they utilised the opportunity to form themselves into a gang of dacoits and resume depredations soon after their release from Jail.

According to the approver, appellant Pranath Patnaik took part in all burglaries and dacoities except the last one (item 31). Appellant Sk. Koresh took part in one burglary (item 15) and seven dacoities (items 12, 13, 14, 16, 17, 21 and 23). Appellant Nalinikanta Das, according to the approver, participated in ten dacoities (items 11, 12, 13, 14, 16, 17, 21, 23, 26 and 28) and one burglary (item 15). As the appeals of these persons were not pressed it is unnecessary for me to discuss at great length the other pieces of corroborative evidence adduced by the prosecution to support the evidence of the approver.

It is sufficient to say that there is adequate independent corroboration. Hence, when people of such bad antecedents are proved to have been kept in jail for several months in 1949 and when subsequent to their release they are proved to have participated jointly in several dacoities in 1950 and 1952 it will be reasonable to infer that they operated as a gang engaged in habitually committing dacoity. Pranath was in jail from 15-8-50 to 20-12-51. Nalinikanta Das was in Jail from 15-8-50 to 8-12-51. Sk. Koresh was also in jail from 15-8-50 to 8-12-51.

Approver Upendra Dikhit (P. W. 2) was in jail from 15-8-50 to 20-12-51. Thus practically for the whole of the year 1951 except the month of December these four persons were in jail and the number of dacoities in Balasore district during that year came down to two only; whereas there were seven dacoities and one burglary in 1950 and twelve dacoities in 1952 when these persons were at large.

Taking all these facts and circumstances into consideration it must be held that there was a gang under the leadership of these four persons, namely, Pranath Patnaik, Nalinikanta Das, Sk. Koresh and approver Upendra Dikhit, associated for the purpose of habitually committing dacoity in the district of Balasore and adjacent

areas of Cuttack district. Pranath Patilaik belongs to the district of Puri and had formerly worked as Moharir of a lawyer. Apparently, he was the brain of the whole gang. Sk. Koresh belongs to village Parikhi close to Balasore Town.

Several of the other accused persons belong to village Parikhi and its vicinity and they appear to have been drawn into the gang through Sk. Koresli's efforts. Nalinikanta Das belongs to some village in Midnapur district and he seems to be mainly instrumental in recruiting some persons from Bengal such as Tarak Chandra Banerji, Gour Chandra Dutta, Amulya Chandra Das etc.

Approver Upendra Dikhit belongs to some village in Balasore District. Most of the dacoities were committed in that district and one of them was committed in the house of his own relation.

14. The next question for consideration is whether as against the remaining appellants the prosecution has established beyond reasonable doubt that they 'belonged' to such a gang. The case against each of them will be dealt with separately.

(His Lordship dealt with the cases of some of the appellants and proceeded :)

15-21. Appellant Srikanta Mohapatra : This appellant belongs to Balasore town. On 8-6-50 this appellant was convicted by a Magistrate of Jajpur for an offence under Section 457/380, I. P. C. and sentenced to imprisonment for some months. According to the approver, he formed an association with this appellant at Jajpur in the early part of 1950. The other members of the gang, namely, Pranath, Nalini and Koresh also met him after their release from jail and they all after previous consultation committed dacoity at Erandi, P. S. Bhadrak (item 17) on 14-8-50.

On the next day they all went to the house of one Sadananda Misra near Jajpur town for the purpose of disposing of the stolen property. But they were arrested there by the police and much of the looted property was also recovered. The approver has also spoken about his participation in the dacoity at Jagannathprasad (item 10) on 12-2-50.

22. With a view to corroborate the approver's evidence the prosecution has relied on (i) the evidence of Jajpur association as proved by several residents of Jajpur and the arrest of this appellant with the other members of the gang and (ii) the recovery of stolen property from Sadananda Misra's house on 15-8-50. Moreover this appellant was in Balasore jail from 14-6-49 to 16-7-49 and had thus an opportunity to know the leading members of the gang. For proving Jajpur association with the gang the witnesses are P. Ws. 118, 121, 122 and 205.

P. W. 118 is a pleader's clerk at Jajpur. He spoke about this appellant's presence at Jaipur while the burglary case was pending against him. His evidence however, is not material for proving this appellant's association with the gang. P. W. 121 who is a priest of Jajpur has also spoken about this appellant's presence there and further stated that a Brahmin whom they called Upa Nana came there and they all went out together. This Upa Nana is none else but approver Upendra Dikhit.

But as this witness could not identify Upa Nana, his evidence on the question of association is weak. The same observations apply to the evidence of P. W. 122. The evidence of P. W. 205 also does not prove the association of this appellant with the leading members of the gang. It only establishes his presence at Jajpur which is admitted.

23. The approver's evidence about the participation of this appellant in Jagannathprasad dacoity on 12-2-50 is corroborated by that of the victim of that dacoity, namely, Nabakishore Mohapatra (P. W. 123). This witness identified appellant Srikanta Mohapatra as one of the dacoits during a test identification parade held by P. W. 128 on 19-4-50 (see Ext. 157). But when examined in the Court of Sessions this witness frankly stated that he could not identify him in Court though he admitted that he was able to identify him in T. I. Parade.

The learned Advocate General contended that even though this witness was not able to identify appellant Srikanta Mohapatra in the Court of Sessions his identification of this appellant in the T. I. parade as deposed to by him in the Court of Sessions would be substantive evidence of identification and in support of this contention he relied on *Abdul Wahab v. Emperor*, 1925 All 223 (AIR V 12) (Z) which has been followed in *Ram-prasad v. Emperor*, 1927 Oudh 369 (2) (AIR V

14) (Z1).

Mr. Pal on behalf of the appellant, however, contended that the substantive evidence of identification is that given in the Court of Sessions or in the Court of the committing Magistrate admitted under Section 288, Cr. P. C. The identification of an accused in a T.I. parade would be merely corroborative evidence and if there is no substantive evidence of identification, corroborative evidence by itself cannot be the basis of conviction.

In the aforesaid Allahabad and Oudh decisions it was pointed out that if the witness stated in Court on oath that he identified a particular accused in a previous T. I. parade though he was not able to identify him during trial that would be substantive evidence of identification also though somewhat weak. I am inclined to accept Mr. Pal's contention. It is the identification of an accused by a witness in the Court of Sessions or before the committing Magistrate in the presence of the accused that can be substantive evidence of identification. If that is wanting in a case the mere fact that in a previous T. I. parade he was able to identify him and he admitted this fact during his deposition in Court would not make it substantive evidence.

It is, however, unnecessary to discuss this point further. Even in the Allahabad case it was recognised that such a piece of evidence would be very weak. P. W. 123 was not able to identify this appellant as one of the dacoits when he deposed in the Court of Sessions. Hence, I would hold that there is no adequate corroboration of the evidence of approver so far as Jajpur association of this appellant with the gang or his participation in Jagannathprasad dacoity (item 10) is concerned.

24. But as regards his participation in Erandi dacoity on 14-8-50 (item 17), the strongest corroboration is found in his arrest near the house of Sadananda Misra by the police on the very next day. This fact is well proved by the evidence of the police officer (P. W. 27) who on receipt of previous intimation surrounded the house on 14-8-50 at about 5 P. M. Some of the accused persons on receipt of an alarm from Sk. Saidu ran away from the place. This appellant was one of those who tried to escape from the house through the south-east corner of the fence; but

he was taken into custody by constable Birabar Singh.

The other members of the gang such as Prananath, Upendra and Nalini were arrested either in the house or nearabout the house and several valuable ornaments were recovered from that house. This appellant was injured by the thorny fence when he tried to escape and the medical evidence of Dr. Bose tendered in the Court of Sessions under Section 509, Cr. P. C. amply corroborates the evidence of the police officer (P. W. 27) about the circumstances under which this appellant was arrested. The appellant's explanation for the injuries found on him was rightly rejected as fantastic.

According to the approver it was this appellant and his companion Sk. Saidu who suggested the commission of dacoity at Jagannathprasad and participated in it. They all subsequently participated in Erandi dacoity (item 17) on 14-8-50 and were arrested at Sadananda Misra's house on the next day by the police.

The circumstances under which this appellant was arrested at Sadananda's place afford the strongest corroboration of the evidence of the approver. His past conviction under Section 457/380, I. P. C. (already referred to) also does not show that he could be a mere casual associate of the gang for the purpose of committing one dacoity. He is a resident of Balasore and had no business to be at the house of Sadananda Misra at Jajpur in the company of notorious dacoits with stolen property. I think the approver's evidence coupled with the past record of this appellant and the circumstances under which he was arrested at Sadananda Misra's house would suffice to show that he belonged to the gang.

(His Lordship dealt with the cases of some other appellants and proceeded :)

25-46. Abhimanyu Sahu : -- This accused belongs to village Parikhi. According to the approver, during his stay at Parikhi from December 1951 to April 1952 he stayed in the house of this accused and used to meet Prananath, Nalini and Koresh frequently. Even in 1950 this accused used to help the other members of the gang in securing sureties when bail orders were passed in their favour.

The approver's evidence about Parikhi association of this accused is amply corroborated by the evidence of P. Ws. 30, 32, 34, 36, 41, 43 and 45. P. W. 30 spoke about this accused falsely claiming approver Upendra Dikhit as his relation. As they belonged to different castes there could possibly be no relationship between the two. P. W. 32 has spoken about the other leading members of the gang such as Prananath, Nalini, Koresh and others frequently going from or coming to this accused's house at Parikhi.

P. W. 41 was informed by this accused that approver Upendra Dikhit was working in his granary. Their evidence is corroborated by the diaries of police constables of Parikhi as deposed to by P. Ws. 48 and 51, which show that Koresh and Nalini were seen on many occasions at the house of this accused.

The learned Sessions Judge thought that the entire prosecution evidence against this accused would only show that he was harbouring a gang of dacoits and that he did not actively aid or assist them in the commission of any offence and therefore he would not be guilty under Section 400, I. P. C. I am however, unable to accept this view. It is true, as rightly pointed out, in *Gaya Din v. Emperor*, 7 Ind Cas 1006 (Oudh) (Z2) that a mere harbourer or receiver of stolen property obtained from the dacoits may not be said to belong to the gang.

But the question for consideration is whether on the evidence of the approver it can be held that this accused was a mere harbourer of dacoits. According to the approver this accused was fully aware of the activities of the gang and was actively helping it in arranging bailors. The leading members of the gang were meeting at this house at Parikhi.

Soon after the commission of Erandi dacoity on 14-8-50 (item 17) this accused along with appellant Babaji Mohanty joined the gang while it was retreating with booty and this accused walked with the party for some miles and then was given* two or three tolas of gold by Sk. Koresh to be handed over to his brother. The approver also gave this accused some silver and cash as he (accused) had stood surety for him.

Appellants Nalini and Prananath also gave this accused a gold ring and a fountain pen saying that he was their well-wisher and was helping them with money when entangled in cases. The approver further stated that he stayed in the house of this accused at the suggestion of Sk. Koresh so that the two may be close to each other and could easily go out on dacoities. On another occasion, soon after the commission of dacoity when an alarm was raised the approver accompanied by this accused concealed himself in the second house of this accused at Kanika for three or four days. This accused was fully informed of the entire activities of the gang.

Hence if the approver's evidence is believed this accused was not a mere harbourer or receiver of stolen property but was actively helping the gang in its nefarious activities by keeping one of its leaders, namely, the approver, as a guest in his house at Parikhi for several days and thereby facilitating the planning of several dacoities with the help of other leading members of the gang and also helping them financially and otherwise whenever they were involved in cases.

The approver's evidence about the present of a fountain pen and a gold ring to this accused by appellants Nalini and Prananath is partially corroborated by the recovery of a fountain pen and a gold ring marked DHS from the house of P. W. 39 as deposed to by that witness and P. W. 40. The police officer (P. W. 112) who seized those articles has also given evidence about the circumstances under which a box was found at P. W. 39's house concealed in a cowdung heap and it contained a gold ring and a fountain pen.

Parikhi association of this accused as proved; by the approver is fully supported by the other Parikhi witnesses. It is true that the detailed activities of this accused as spoken to by the approver have not been corroborated by independent sources. But in view of independent corroboration regarding his intimate association with the gang at Parikhi I see no reason to disbelieve the approver's evidence about the various specific instances of help given by this accused to the gang. His evidence shows that this accused was a guide, philosopher and a friend of the gang and he actively aided and abetted the members of the gang in their depredations by placing his house at their disposal, readily coming to their aid

whenever they were involved in cases, advancing money for their litigation and also received valuable presents from them.

The mere fact that he did not participate in the commission of even one dacoity or else that he did not share in the booty except by way of presents would not materially affect the position. In disagreement with the learned Sessions Judge I would hold that he also belonged to the gang.

47. Kali Charan Moharana : This accused : also belongs to Parikhi. But the approver has not included him amongst his Parikhi associates. though some of the Parikhi witnesses (P. Ws. 32, 41 and 45) spoke about his close association with appellants Pranath, Nalini and Koresh. The victim of Malisahi dacoity (item 27) (P. W. 90) identified this accused as one of the dacoits. But it does not appear that this witness was asked to identify him in a T. I. parade. Hence, his belated identification in Court has not much value.

The prosecution, however, relies mainly on the recovery of certain articles stolen in that dacoity from the house of this accused as proved by P.W: 98. But the search witness (P.W. 98) has not identified in Court the articles that were seized from the house of this accused during search: nor has the S. I. of police, Basta P. S. (P. W. 107) who seized those articles as per seizure list (ext. 65) identified the same. It is true that this accused in his examination under Section 342, Cr. P. C. admitted the seizure of these articles from his house.

But the learned Sessions Judge should not have specifically asked him about the recovery of these articles from his house in the absence of any evidence on record to show that there was such a recovery. As pointed out in *Subba Rao v. Venkata Chalapathi Aiyer*, 1938 Mad 904 (AIR V 25) (Z3) and *In re, Grandhe Sarabhayya*, 1943 Mad 408 (AIR V 30) (Z4) the examination of an accused under Section 342, Cr. P. C. is made with a view to give him an opportunity to explain the incriminating circumstances appearing against him in the prosecution evidence.

Hence, when the prosecution has not led evidence to show that certain specified articles were recovered from the house of the accused it will not be proper for the Court to ask the accused whether the articles were so recovered and to account

for their presence in his house, Such a question is misleading and even if the accused in his answer to that question admits the recovery of the articles that answer cannot be taken into consideration as substantive evidence of the recovery of those articles.

Doubtless, as permitted by Section 342 (1), Cr. P. C. the Court may, after giving the accused an opportunity to explain the incriminating circumstances against him, question him 'generally' on the case and if in answer to that general question the accused speaks about the recovery of those articles and his explanation to account for their possession the Court may be entitled to take these answers into consideration.

But if the answer of an accused about the identity of the articles, recovered from his house is based on a misleading question put by the Court that answer should be ignored. Apparently, the prosecution through oversight failed to question the search witness (P. W. 98) and the police officer who conducted the search (P. W. 107) to identify in Court those articles that were seized from the house of this accused.

48. Hence, excepting for belated identification in Court by P. W. 98 there is no other piece of evidence to connect the accused with the commission of any dacoity. His association at Parikhi with the leading members of the gang is too slender a circumstance to justify an inference that he also belonged to the gang. The learned Sessions Judge was justified in holding that the charge against him was not proved.

49. Coming to the question of adequacy of the sentences passed by the learned Sessions Judge, I should point out that many of the guilty persons have been dealt with very leniently. Offences like dacoity have to be put down sternly by passing deterrent sentences on those found guilty. A sentence of two, three or four years' rigorous Imprisonment is grossly inadequate, especially in a gang case under Section 400, I. P. C., which is far more heinous than a case of simple dacoity under Section 395, I. P. C. Here, we are dealing with persons who are not casual dacoits but professional men who have a tendency to revert to this type of crime soon after their release from imprisonment.

The learned Sessions Judge rightly passed the maximum sentence on appellants Prananath Pat-naik, Nalinikanta Das and Sk. Koresh. But appellants Nakul Jena and Amulya Chandra Das also appear to be equally ring-leaders of the gang. For the rest, minimum sentence of seven years' rigorous imprisonment would ordinarily have been justified. But as the petition for enhancement of the sentence has been filed only in respect of Amulya Chandra Das and Gour Chandra Dutta, our hands are somewhat tied.

50. In the result, the appeals of the convicted persons are dismissed. The revision petition filed by the State Government for enhancement of the sentence passed on Amulya Chandra Das is allowed and his sentence is enhanced to ten years' rigorous imprisonment. Similarly, the revision petition for enhancement of the sentence passed on Gour Chandra Dutta is allowed and the sentence passed on him is enhanced to five years' rigorous imprisonment.

I am dealing with him somewhat leniently as he is a young man of twenty-three years. The Govt. Appeal against the acquittal of Abnimanyu Sahu is allowed, the order of acquittal passed by the learned Sessions Judge is set and he is convicted of the offence under Section 400, I. P. C. and sentenced to seven years' rigorous imprisonment. The order of acquittal of Paramananda Behera and Kali Charan Maharana is maintained and the Govt. appeal against their acquittal is dismissed.

Mohapatra, J.

51. I agree.

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