**ALLAHABAD HIGH COURT**

Ram Sanehi

Vs.

State (Allahabad)

Criminal Appeal No. 1654 of 1961, against order of First Addl. S.J. Etawah
(D.P. Uniyal and Gyanendra Kumar, JJ.)

14.09.1961. 05.09.1962

**JUDGMENT**

**Uniyal, J.**

1. Cr. A. No. 1654 of 1961 is by Ram Sanehi while Cr. A. No. 1795 of 1961 is by Sheo Rakhan and Ram Nath. The appellants were prosecuted on a charge of dacoity with murder under Section 396 Indian Penal Code and each of them was sentenced to imprisonment for life.

2. The case against the appellants was as follows : On the night between the 28th and 29th of Nov., 1960 some four or five miscreants committed dacoity at the house of Mani Ram in village Kachpura, within Police Circle Jaswantnagar, District Etawah. The presence of the miscreants was noticed by Smt. Laro, mother of Mani Ram. She immediately came out of the room and raised an alarm. The night in question was a moonlit one. Several persons of the locality came on the scene and are said to have recognized the dacoits when they came out of the house of Mani Ram after collecting their booty. One of the dacoits, namely, Ram Nath accused, belonged to a neighboring village which was at a distance of two or three furlongs from the house of the victim, and was recognized, by the witnesses. The other, dacoits were, however, not known to the witnesses from Before. An attempt was made by the villagers to chase the dacoits who managed to escape into the ravines. After the witnesses had covered a distance of half a furlong one of the dacoits opened fire, which hit Tundey who was fatally injured and died on the spot. Thereafter the villagers gave up the chase.

3. In the first information report which was made by Mani Ram at the police station on the morning of the 29th November, 1960 he named Ram Nath as being one of the

dacoits who had been recognized, by the witnesses. Hirday Narain Singh, Station Officer, Police Station Jaswantnagar, investigated the case and reached the village of occurrence at about 9.30 a.m. After holding inquest over the dead body of Tundey he recovered two live cartridges and one pair of shoes from the spot. He then made a search for Ram Nath accused who had been named in the report but could not arrest him. Proceedings under Sections 87 and 88 Criminal Procedure Code were then taken against Ram Nath and he was eventually arrested on 10-1-1961. Ram Sanehi accused was arrested on 9-12-1960 from village Lalkhor from the house of Sheo Rakhan accused. Sheo Rakhan accused was also present in the house but managed to slip away. From the possession of Ram Sanehi a dhoti (Ex. 1) was taken into custody by the police as being one of the items of looted property. Sheo Rakhan was also arrested subsequently on 5-1-1961.

4. The identification proceedings in respect of Ram Sanehi and Sheo Rakhan accused, who were not known to the witnesses from before, were held on 28-1-1961 before a Magistrate of the 1st Class. Ram Sanehi was correctly identified by three witnesses, namely, P. Ws. Mani Ram, Ram Din and Tej Pal. Sheo Rakhan accused was also identified by the aforesaid three witnesses without committing any mistake. The dhoti (Ex. 1) which had been recovered from the possession of Ram Sanehi was also put up for identification and was identified by two witnesses, namely, P. Ws. Mani Ram and Smt. Bitoli, without committing any mistake.

5. All the accused pleaded not guilty and denied their presence and participation in the dacoity. Ram Nath accused stated that he had been falsely implicated on account of enmity with Tula Ram P. W. Ram Sanehi accused pleaded that he was falsely implicated on account of partibandi consequently on the election of Pradhan in his village. He admitted the recovery of dhoti Ex. 1 from his person but stated that it belonged to him. He further stated that he belonged to a neighboring village which was at a distance of a half-a-mile and was known to the witnesses from before. Sheo Rakhan accused is a resident of village Lalkhor which is at a distance of 16 miles from the village of occurrence. He alleged that he was shown to the witnesses by the police after his arrest. Now of the accused adduced evidence in their defense.

6. The evidence against Ram Nath accused consists of his naming by six eye-witnesses. Admittedly he was known to the witnesses from before as he belonged to a village two or three furlongs off. He alleged that he had been falsely implicated in the

case on account of enmity with. P. W. Tula Ram and that the first information report was scribed in the village on 29-11-1960 after the arrival of the police and it was then that his name was incorporated in the report.

7. In his statement Mani Ram P. W. 1 deposed that at first only oral information had been given at the police station and that written report was scribed in the village after the arrival of the police. The above statement of Mani Ram, who was the author of the report, gave a jolt to the prosecution case and the prosecution, therefore sought to bring his statement made before the committing magistrate as substantive evidence under Section 288 Criminal Procedure Code.

8. It was contended on behalf of the prosecution that the statement of Mani Ram that the written report of the occurrence was scribed on the following morning after the arrival of the police appears to have been made under some confusion and that what he had said before the committing magistrate was the correct statement

9. We find ourselves unable to agree with the reasoning of the trial judge that Mani Ram made his statement before the Sessions Judge under a misapprehension. The statement was clear and categorical and left no room for any doubt as to its truth. The fact that Ram Nath accused belonged to a village which was only at a distance of two or three furlongs would indicate that he was not likely to participate in the dacoity without taking adequate precaution to conceal his identity. It was admitted by Tula Ram that his uncle Baley had implicated the accused in a theft case in which he was convicted and sentenced to 6 months rigorom imprisonment. Thus the allegation of the accused that there was enmity between him and the family of Tula Ram was fully established. It appears that Ram Nath accused was nominated as one of the dacoits in the report on account of that enmity. We find considerable difficulty in accepting the prosecution case as to his participation in the dacoity and we accordingly give him the benefit of doubt.

10. Ram Sanehi accused was also resident of a village which is at a distance of half-a-mile from the village of occurrence. His case was that he was known to the prosecution witnesses. Even the learned judge felt considerable doubt about his participation having regard to the fact that he was a neighbor and would not ordinarily take the risk of taking part in a dacoity with the imminent risk of being recognized by the witnesses. The learned judge, however, recorded his conviction on the ground that dhoti Ex. 1 had been recovered by the police from his person at the time of his arrest

and that the evidence showed that the said dhoti was one of the articles stolen in the course of the dacoity. The learned judge failed to notice that the dhoti in question was an ordinary one and had been claimed by the accused to belong to him. The two witnesses who identified the dhoti admitted that there was no distinctive mark in the dhoti and that it was a new one. We are, therefore, clearly of the view that the recovery of dhoti Ex. 1 from the person of Ram Sanehi accused was of no help to the prosecution and that the conviction of the accused could not be based on its recovery. We, therefore, give the benefit of doubt to this accused also and acquit him.

11. It now remains to consider the case of Sheo Rakhan accused who was a resident of village Lalkhor which is at a distance of about 16 miles from the village of occurrence. Admittedly the witnesses did not know him from before. The case of the accused was that he was shown to the witnesses at the police station but this he failed to substantiate. As stated above, the accused was correctly identified by three witnesses, namely, P. Ws. Mani Ram, Ram Din and Tej Pal, at the identification parade. It could not, therefore, be said that the witnesses knew him or had opportunity to see him.

12. The learned counsel for the appellants contended that the identification memo Ex. Ka-41 had not been legally proved and was, therefore, inadmissible as a corroborative piece of evidence. The argument proceeded thus : The identification memo is a record containing statements of witnesses. made to a Magistrate in the course of police investigation. By sub-section (2) of Section 164 such statements are to be recorded in accordance with the procedure prescribed for inquiries and trials under Ch. XXV Criminal Procedure Code. There is, however, no provision in the Code under which a Magistrate is bound to record such statements on oath; and indeed a Magistrate acting under Section 164 is not an officer performing a judicial function. Therefore a presumption attaching to a document which purports to be a record of evidence of witnesses would not arise in such a case.

13. To this contention it was answered that the court could draw a presumption in respect of statements made to a Magistrate under Section 164. The learned Additional Govt. Advocate laid emphasis on the terms of the latter part of Section 80 and suggested that the word 'statement' occurring there had reference to a statement made by a witness as distinguished from a 'confession' made by a prisoner or an accused person.

14. In order to appreciate the contentions advanced before us, it would be necessary to consider the true meaning and effect of Section 80 of the Evidence Act, which reads as follows:

> "Whenever any document is produced before any court purporting to be a record or memorandum of the evidence or any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law and purporting to be signed by any judge or magistrate or by any such officer as aforesaid, the court shall presume that the document is genuine."

15. It will be seen that Section 80 deals with two distinct and separate matters. The first part of the section relates to the evidence given by a witness in a judicial proceeding, while the latter part refers to a 'statement' or 'confession' made by a prisoner or an accused person and taken in accordance with law. The legislature had advisedly used two different words, viz., 'statement' and 'confession,' to indicate that the presumption was available both in respect of a statement and a confession validly made by a prisoner or an accused person.

16. This matter may be examined from another aspect. Suppose a prisoner makes a statement under Section 164 to a Magistrate in which he implicates himself and certain others in the crime. Such a statement would ordinarily amount to a confession. If, however, the prosecution tenders pardon to the prisoner in order to secure his evidence as an approver, his inculpatory statement would assume the character of a 'statement', and not a 'confession' taken by a Magistrate. Similarly the statement of an accused person taken by a Magistrate may be exculpatory and thus lose its character as a confession. In both these instances what was stated by a prisoner or an accused person to a Magistrate would have the character of a 'statement' and not of a 'confession'.

17. The use of the expression 'statement' or 'confession' in Section 80 in juxtaposition to a prisoner or an accused person, and the context in which those words occur, point to the conclusion that it was intended that a statement as well as a confession of a prisoner or an accused person duly taken by a Magistrate was to be presumed to be genuine.

18. In order that an identification memo may be regarded as a record of evidence of a witness, it must satisfy a double test. First, that it is a statement made by a witness in judicial proceeding or before an officer authorized by law to take such evidence (Sec. 3 Evidence Act); and secondly, that it is a statement which was made on oath or affirmation by a witness (sec. 5 Oaths Act). In *Nazir Ahmad v. King Emperor,* [1] it was pointed out by the Judicial Committee of the Privy Council that –

> "when a Magistrate records any confession he does so as a matter of duty and discretion and not of obligation."

and further that –

> "the Magistrate acting under Section 164 is not acting as a court."

19. The Bombay High Court in *Purshottam Ishvar Amin v. Emperor* [2] held that the statement recorded by a Magistrate in the course of police investigation under Section 164 is not evidence in a stage of a judicial proceeding.

20. The above observations go to reinforce the contention that an identification memo is not a record of evidence of a witness within the meaning of Section 80 and consequently does not prove itself.

21. On behalf of the State reliance was placed on certain observations made in *Asharfi v. State* [3] to the effect that the identification memo is a record of the statement taken under Section 164, and, as such, must be presumed to be genuine under Section 80 of the Evidence Act, and that it is not necessary to call the Magistrate in evidence as the memorandum under the terms of Section 80 is evidence of everything that it contains. With great respect to the learned Judges who decided the case of Asharfi AIR 1961 Allahabad 153 we are unable to accept the dictum laid down in that case. They did not consider, and it seems that it was not argued before them, that a presumption under Section 80 could only arise if the memorandum of identification amounted to 'evidence' within the meaning of Section 3 of the Evidence Act. No reasons were given by the learned Judges for the opinion expressed by them and, therefore, we are unable to accept it as laying down the correct law.

22. We are, therefore, of opinion that the identification memo in the present case was inadmissible in evidence and that the evidence of the three eye-witnesses who are said to have identified Sheo Rakhan accused in the presence of the Magistrate must be held to be unreliable and, therefore, wholly insufficient to prove the charge against the accused.

23. We have, therefore, come to the conclusion that these appeals must be allowed. The appellants are accordingly acquitted of the charge under Section 396 Indian Penal Code. They are in jail. They shall be set at liberty forthwith unless wanted in connection with some other matter.

Appeals allowed.

Cases Referred.

1. ILR 17 Lahore 629: AIR 1936 PC 253
2. ILR 45 Bom 834: (AIR 1921 Bombay 3) (FB)
3. AIR 1961 All153