

## CALCUTTA HIGH COURT

Sk. Khabiruddin

Vs

Emperor

(Lodge ,J.)

08.06.1943

### JUDGMENT

#### **Lodge, J.**

1. This is an appeal against conviction and sentence on a charge of dacoity. The appellant Sk. Khabiruddin and three others were placed on their trial before the Sessions Judge of Midnapore on a charge of dacoity. The jury returned a unanimous verdict in respect of all four accused. They found two accused Sk. Hinu and Sk. Sham, not guilty, and they found the remaining two accused Sk. Khabiruddin and Sk. Abdul guilty of the offence of dacoity. The learned Sessions Judge accepted the unanimous verdict, acquitted the accused Sk. Hinu and Sk. Shamsher, convicted Sk. Khabiruddin and Sk. Abdul of the offence of dacoity, and sentenced each of them under Section 395, Penal Code, to suffer rigorous imprisonment for four years. Sk. Khabiruddin is the sole appellant in this appeal.

2. The case for the prosecution is as follows: There was a dacoity in the house of Amarendra Nath Roy of Satdubi within the jurisdiction of Keshpur Police Station at about 1 A. M. on Sunday 20th April 1942. The inmates were violently assaulted and valuable articles were stolen. Amarendra Nath Roy was roused from sleep by hearing the noise made by the dacoits. He got up and saw a number of people whispering together in his courtyard. He at first mistook them for members of the village defence party and sought their assistance. These men were & however among the dacoits and took part in the dacoity.

3. There is in that locality a village defence party consisting of 61 members. These 64 members are divided into four groups, each with 16 members. The four accused who were on their trial in this case all belonged to one of the groups - the group which had as its leader Sk. Abdul of Chechura. It was the turn of this group for night duty on the night of the dacoity, but only four of the sixteen members of the group reported for duty. Sk. Abdul found it impossible under the circumstances to carry out the duty imposed upon his group. He, therefore, visited the leaders of the other three groups and consulted them. They decided to visit the houses of all the absent members of the group headed by Sk. Abdul and call them to their duty. Accordingly, they went to the houses of the various members of Sk. Abdul's group. They found the four accused persons absent from home that night, as also two others of the group. They thereupon decided to keep a watch on the houses of these six members until the members returned home. Accordingly, a

watch was placed on the house of Sk. Khabiruddin and on the houses of the other five members. Khabiruddin was seen returning to his house sometime before dawn. He was challenged, but he turned and fled. Others were seized on their return to their respective homes. Later, Khabiruddin also returned home. The leader of his group went to Khabiruddin's home, called out Khabiruddin, arrested him, took him to the house of one Masun, where the other missing members had been taken. It is then alleged that these men confessed that they had taken part in the dacoity in the house of Amarendra Nath Roy. Khabiruddin confessed that he had concealed his share of the booty under the weeds of Pirpukur tank. Khabiruddin was taken to the tank and he produced from the water underneath the weeds a bundle containing stolen property. Stolen property was also recovered from other members of this group, who confessed that they had taken part in the dacoity.

4. Various criticisms have been made of the charge delivered by the learned Sessions Judge to the jury, and it has been said that there are misdirections in this charge which have occasioned an erroneous verdict by the jury. We have read through the charge with care and for the most part we consider that it is a fair and satisfactory charge. Unfortunately, as it appears to us, evidence which was not admissible under the Code of Criminal Procedure and under the Evidence Act, was allowed to be placed before the jury. The witnesses have deposed that a test identification of the property recovered from the accused persons was held in the presence of police officer and that various prosecution witnesses identified before that police officer the articles as articles stolen from Amarendra Nath Roy's house on the night of the dacoity. It is clear that any [identification of stolen property in the presence of a police officer during investigation was a statement made to a police officer during investigation, and is, therefore, within the scope of Section 162, Criminal P.C. The witnesses should not have been allowed to depose to the fact that they had identified " the stolen property in the presence of the police officer. There can be no doubt that this evidence was inadmissible. If this was the only inadmissible evidence I should have been inclined to hold that the accused were in no way prejudiced by the admission of this evidence, inasmuch as the definite case put to the identifying witnesses was that these properties, said by the prosecution to be stolen properties were produced from the house of Amarendra Nath Roy and were really his property and were not found in the possession of the accused persons. This was the definite case put both to P.W. 1 and p. w. 2 and in view of this definite case it seems reasonable to hold that the jury could not have been in any way prejudiced by the wrongful admission of evidence to the effect that P.Ws. 1 and 2 had identified these articles as their own articles before the police officer. But there is also another piece of evidence on the record which is also, obviously, inadmissible.

5. The property which is said to have been recovered from the possession of the accused persons was recovered, if at all, from their possession by the villagers before the police appeared upon the scene. It was made over to one Hamidulla for safe custody until the police should arrive and take charge of it. When the police arrived they took over the articles in the presence of twelve villagers and they drew up a list of the articles seized with a statement of the circumstances attending the seizure. This list has been described as a search list and is marked Ex. 2, and has been signed by as many as twelve villagers. Strictly speaking, it is not a search list. It is merely a memorandum drawn up by the police officer of the articles taken over by him from the custody of Hamidulla, but, it was treated as a search list and was placed before the jury as evidence in the case. Under the heading "remarks" occurs in that document the following paragraph: Sk. Khebir son of Sk. Darbari of Cheohura being absent from his home on the night before jester-night and

while his house was being guarded by Sk. Safiruddi, Mohiruddi and others of Cheehura the said Khabir returned home at dawn but ran away seeing persons at his door. And again when he returned home late in the day and was asked about the cause of his absence from home he admitted that he committed dacoity in the house of Amarendra Roy of Satdubi and produced the articles in presence of the persons named in the third column and others from inside the water weeds of Pir Pukur of Cheehura admitting those to be booty obtained in the dacoity.

6. This is a record by a police officer of a summary of statements made to him during investigation by persons whom he examined. These statements could not be proved other than as permitted under Section 162, Criminal P.C. This evidence should certainly not have been placed before the jury, and it is impossible to estimate what was the effect of this evidence on the minds of the jury. This document purports to have been drawn up on 21st of April very shortly after the dacoity and must have had considerable value as corroboration to prove that at a very early stage Khabiruddin made a confession, and to corroborate those witnesses who described the circumstances of Khabiruddin's arrest and the production by him of stolen property. It is impossible to say that this inadmissible evidence did not have considerable effect on the jury and on their verdict. In the circumstances the appeal must be allowed. The conviction and sentence passed on Sk. Khabiruddin must be set aside and the case remanded for retrial according to law. Pending the retrial, let the appellant be released on bail to the satisfaction of the District Magistrate.

**Das, J.**

7. I desire to state my opinion on one of the points argued before us. Mr. Mukherjee appearing on behalf of the appellant has contended that the trial in this case has been vitiated by the letting in of inadmissible evidence, namely, the evidence of identification of certain articles said to have been found or produced by the accused persons in the early hours of 20th April 1942, when the occurrence took place. It appears that the Sub-Inspector of Police who was in charge of the investigation held test identifications on two days, namely, 25th May 1942 and nth June 1942, when Amarendra Nath Roy, P.W. No. 1, at whose house the occurrence took place, and his sister-in-law Kanaklata, P.W. No. 2, identified Exs. 2 and 9 to 13 as the articles taken away from the house of Amarendra by the miscreants. At the trial Amarendra, Kanaklata, Ram Chandra Chakravarty, Shaikh Syed Ali and Kuma-resh Chandra Biswas, who was the officer in charge of Kespur Police Station, gave evidence of the fact of such identification. Mr. Mukherjea contended that such evidence was inadmissible under Section 162, Criminal P.C. and he relied on *Krishnachandra Dhenki v. Emperor and Krishna Kahar v. Emperor*<sup>1</sup>

8. In the first case, S.K. Ghose J. relying on certain earlier cases held that the statement, express or implied, which the complainant in that case must have made by way of identifying the petitioner at the thana was hit by the provisions of Section 162. Henderson J. was of the same view and stated that it seemed clear that the statement made by the complainant to the investigating officer to the effect that the petitioner was the person who had attempted to rob the complainant was inadmissible in evidence in view of the provisions of Section 162, Criminal P.C. In the second case, the Court consisting of McNair and Khundkar JJ. held that the identification of an accused in a test identification parade before a police officer during the investigation of an offence amounts to statements to the investigation officer within the meaning of Section 162, Criminal P.C. and the evidence of such identification is inadmissible. Turning

now to the facts of the present case, the prosecution case is that Amarendra Nath Roy and Kanaklata identified these articles at the test identifications held by the investigating officer. This identification must have been by so many words or by sign, namely, by pointing out the articles with fingers or by nodding of head. Pointing out by finger or nod of assent in answer to a question is just as much a verbal statement as a statement by word of mouth. Section 162, Criminal P.C. does not limit itself to statement of any particular kind. It embraces all kinds of statements made to a police officer in the course of an investigation. Therefore it is in terms excluded by Section 162.

9. Mr. Sanyal on behalf of the Crown relied on the ruling of M.C. Ghose, J., in *Lela Lalung v. Emperor*. In that case the learned Judge sought to distinguish the case in *Krishnachandra Dhenki v. Emperor*. First of all it was pointed out that in *Krishnachandra Dhenki v. Emperor* the identification was held at the thana whereas in the case before him it was in the village. The circumstance appears to me to be of no consequence whatsoever. Section 162 does not say that statements made at any particular place only shall be inadmissible. The learned Judge finally concluded that a statement made by a person to a police officer during investigation was hit by Section 162, but evidence of the fact of identification did not come within the prohibition of that section. With utmost respect to the learned Judge, I can see no distinction between the two things. The statement of the identifier constitutes the identification. Identification has no separate existence apart from the statement whereby the things are identified. Therefore when a person says that so and so identified certain things as his own he in effect states that so and so stated that the things were his. In my opinion, the evidence of the fact of identification is nothing but evidence of the statements which constitute the identification in a compendious and concise form. The two things appear to me to be the same. In this view of the matter I find myself in agreement with the decisions in the two cases I have mentioned, namely, *Krishnachandra Dhenki v. Emperor* and *Krishna Kahar v. Emperor* and in my opinion the learned Sessions Judge was in error in letting in the evidence of the identification. For this reason and for other reasons stated in the judgment just delivered by my learned brother, with which I respect, fully agree, I concur in the order made by him.

Cases Referred.