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Division Bench (Criminal)

IN THE HIGH COURT OF M.P. AT JABALPUR.

Cr. A. No. 3040 of 98.

APPELLANT :

1. Ramraj alias Mucchchu aged about 77 yrs, s/o Dukhalaka, Satna, agriculturist, r/o Dodekala, P.S. Dharsiwa, Distt Raipur,
2. Punitram alias Motu aged about years, s/o Anjori Ahua, agriculturist, r/o Lodhipara, Kampa, P.S. Civil Lines Raipur, M.P.
3. Laxman aged about 43 yrs s/o Ranjit Satnami, agriculturist, r/o village Ku Kuhera, P.S. Mandir Hasoud, Distt Raipur
4. Radhe Goand, aged about 40 yrs. S/o Mandari Goand, Pan Thelawala, r/o Jank P.S. Tumgaon, Distt. Raipur, M.P.
5. Mangalsingh aged about 36 yrs s/o Phul Singh, Labourer, r/o Bichhiya, Distt. Mandla, M.P.
6. Laxman s/o Shobha Yadava, aged about 43 yrs. Gwala, r/o Lodhipara, Civil Line Raipur, M.P.
7. Dayaram s/o Nihabal Satnami Agriculturist, aged about 45 yrs, r/o Umariya, Bilaspur, M.P.

VERSUS

RESPONDENT:- State of M.P.

CRIMINAL APPEAL U/S 374 Cr.P.C.

1999/15/12/98
 Filed on
 by Shri. G. K. Ranjan, J. N.
 Advocate

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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 3040 of 1998

Ramraj alias Muchchhu and others

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

Criminal Appeal No. 2638 of 1998

Lakhan and others

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

JUDGMENT FOR CONSIDERATION

Sd/-
L.C. BHADOO
Judge

25-9-2006

HON'BLE MR. JUSTICE V.K. SHRIVASTAVA

Sd/-
V.K. Shrivastava
Judge

25-9-2006

POST FOR JUDGMENT ON 26TH SEPTEMBER, 2006

Sd/-
L.C. BHADOO
Judge

JUDGE

25th-9-2006

HIGH COURT OF CHHATTISGARH, BILASPUR

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State of Madhya Pradesh (now Chhattisgarh)

Criminal Appeal No.2638 of 1998

Lakhan and others

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

Present: -

Mr. Abhay Tiwari, Advocate:

For all the appellants in Cr. Appeal No.2638/98
and for appellants-Punitram alias Motu, Radhe
Gond & Laxman in Cr. Appeal No.3040/98.

Mr. R.K. Jain, Advocate:

For appellant-Ramraj alias Muchchhu in Cr.
Appeal No.3040/1998.

Mr. U.N.S. Deo, Addl. Public Prosecutor

with Mr. D.K. Gwalre, Dy. Govt. Advocate: For the State/respondent.

DIVISION BENCH: -

HON'BLE MR. L.C. BHADOO AND

HON'BLE MR. V.K. SHRIVASTAVA, JJ.

J U D G M E N T

(Delivered on 26th September, 2006)

The following judgment of the Court was delivered by L.C. Bhadoo, J:-

1. Criminal Appeal No.3040/98, filed by appellants-Ramraj alias Muchchhu, Punitram alias Motu, Radhe Gond & Dayaram and Criminal Appeal No.2638/98, filed by appellants-Lakhan, Mangal Singh and Laxman are being disposed of by this common judgment, as both these appeals are arising out of the same judgment passed in Sessions Trial No.144/91 by learned Additional Sessions Judge, Bemetra relating to the same incident dated 30.10.1990.

2. These appeals are directed against the judgment of conviction and order of sentence dated 17th October, 1998 passed by learned Additional Sessions Judge, Bemetra, District Durg in Sessions Trial No.144/91, whereby learned Additional Sessions Judge after holding accused/appellants, Ramraj alias Muchchhu, Puneetram alias Motu, Radhe Gond, Mangal Singh, Laxman, Dayaram and Lakhan, guilty for commission of offence under Sections 396 & 397 of the Indian Penal Code, sentenced each of the accused to undergo R.I. for life, to pay a fine of Rs.500/- and in default of payment of fine to further undergo R.I. for 6 months and R.I. for 7 years respectively. Both the sentences are directed to run concurrently. However, learned Additional Sessions Judge acquitted accused persons namely Khelandayal, Radhe alias Radheshyam & Ashwani from the aforesaid offences.
3. The case of prosecution, in brief, was that in the intervening night of 30th & 31st October, 1990 at about 11.30 p.m. when Meenaram along with his family members was sleeping in his house, he heard commotion in the village. On opening the doors, he saw that 9-10 persons standing in the street were abusing and talking to enter his house, on which he closed the doors. He & his wife ran away from the house towards the field. The accused persons carrying bomb, axe and other deadly weapons in their hands barged in his house and committed dacoity. They also entered the house, where his brothers namely Beniram, Khemkumar & Ghanshyam were residing alongwith their families. When Beniram & Khemkumar put resistance, the accused persons exploded jute string (bomb), as a result of which Beniram and Khemkumar sustained injuries and later on, Beniram succumbed to the injuries. Accused persons looted gold & silver ornaments, torch, wristwatches and cash amount from the house of Meenaram and his brothers. Accused persons also barged in the house of Bisheshar, father of Meenaram, which was in the threshing field and looted torch, air gun, axe, crowbars, tape recorder etc. Meenaram reported the matter in the same night

i.e. on 31.10.90 at 4.00 a.m. in the Police Station Berla, where Station House Officer Shri S.K.A. Naqvi (PW-26) registered the Crime No.125/90 under Sections 395, 396 & 397 of the IPC through F.I.R. Ex.P-20. He also registered the merg intimation No.21/90 (Ex.P-22) regarding death of Beniram, left for the scene of occurrence and prepared the site plan (Ex.P-1) of scene of occurrence. Halka Patwari was also asked to prepare the site plan of scene of occurrence, who prepared the site plan Ex.P-23. After giving notice (Ex.P-6A) to the Panchas, the Investigating Officer prepared the inquest report of the body of Beniram and sent the dead body for postmortem examination under Ex.P-23A. He also sent the injured Khemkumar for medical examination under Ex.P-24. Postmortem on the body of Beniram was conducted by Dr. M.C. Mehnot (PW-31), who prepared the postmortem report Ex.P-42 and noticed that there were blast burn (gun-powder) injuries on the chest, neck, left hand and face. There was blackening of skin, a lacerated wound on the left shoulder and chest in the size of 5" x 3" deep to the bone, muscles were damaged. Subclavian arteries were lacerated and there was a hole in the arteries. Left scapula and humerus bones were fractured. There was haemothorax on the left side of chest. All these injuries were ante mortem in nature and caused by blast. The doctor opined that cause of death was shock and haemorrhage on account of blast injury. Dr. K.Shrivastava (PW-7) after examination of injured Khemkumar, prepared the injury report Ex.P-15 and he also noticed burn injuries on the body of injured Khemkumar.

4. On 17.11.1990, while in police custody, accused Puneetram alias Motu gave memorandum (Ex.P-11) under Section 27 of the Evidence Act, accused Ramraj alias Muchchhu gave memorandum Ex.P-22, accused Radhe Gond gave memorandum Ex.P-23, accused Lakhon gave memorandum Ex.P-24, accused Mangal Singh gave memorandum Ex.P-25, accused Laxman gave memorandum Ex.P-26 and accused Dayaram gave memorandum Ex.P-27. In pursuance of these memorandums one torch was recovered at the instance of

accused Puneetram alias Motu under Ex.P-28; explosive powder jute string & copper wire were taken into possession at the instance of accused Ramraj alias Muchchhu under Ex.P-29. On production by one Vinod Kumar Agarwal a lump of gold weighing 6.900 milligram and one register were taken into possession under Ex.P-14. A lump of silver weighing 495 gms and lump of gold weighing 3gm 2 milligram were taken into possession under Ex.P-20. One bill receipt regarding sale of jewelry by accused Radhe was taken into possession under Ex.P-32. At the instance of accused Lakhan one ladies watch was taken into possession under Ex.P-33. One tape recorder and torch were recovered at the instance of accused Mangal Singh under Ex.P-35. One golden nose ring and bunch of keys were taken into possession at the instance of accused Laxman from his house under Ex.P-36. At the instance of accused Dayaram two live jute string bombs were taken into possession under Ex.P-39.

5. During investigation, test identification parade of accused persons was conducted by PW-32 Shri Anthony Tirkey, Executive Magistrate in which accused persons were identified by Babulal, Meenaram, Bishesar, Ghanshyam, Kansharam, Budhkumar, Paretan, Dindayal, Sukhiram, Pyaribai, Munnibai, Padumbai and identification memo Ex.P-16 was prepared. Identification of recovered articles i.e. wristwatch, torch, tape recorder, anklet, keys, golden nose ring was also conducted by the Executive Magistrate in which Bishesar, Meenaram, Padumbai, Pyaribai and Ghanshyam identified their articles and accordingly, identification memo Ex.P-17 was prepared. Identification of one pair of anklet was conducted by the Tehsildar in which Vishesar, Padumbai & Pyaribai identified the silver anklet and identification memo Ex.P-18 was prepared.
6. The investigating officer also seized the blood stained soil and plain soil from the place of occurrence under Ex.P-7. He also took into possession the particles of exploded bomb from the place of occurrence under Ex.P-8 and boxes under Ex.P-9 & Ex.P-11. He

took into possession two parts of door, which were cut by the accused persons with the axe and other pieces of broken door under Ex.P-12. Particles of bomb and two live bombs were sent for examination to Forensic Science Laboratory, Sagar, from where report Ex.P-41 was received.

7. After usual investigation, charge sheet was filed against ten accused persons including the present accused/appellants in the Court of learned Additional Chief Judicial Magistrate, Bemetra, who in turn committed the case to learned Sessions Judge, Durg from where learned Additional Sessions Judge, Bemetra received the case on transfer for trial. Learned Additional Sessions Judge after perusal of the record was of the opinion that prima facie offences under Sections 396 & 397 of the IPC were made out against the accused persons, therefore, charges were framed and explained to the accused persons. The accused persons denied the charges and pleaded for trial. The prosecution, in order to establish the charges against the accused persons, examined 32 witnesses. Learned Additional Sessions Judge recorded the statement of accused persons under Section 313 of the Cr.P.C. in which they denied the material appearing against them in the prosecution evidence and stated that they are innocent. They have further stated that their photograph was taken at the instance of Station House Officer and same was shown to the witnesses before their test identification parade.
8. Learned Additional Sessions Judge after hearing the arguments of learned counsel for respective parties, convicted & sentenced the accused/appellants as indicated in the earlier part of this judgment.
9. We have heard Mr. Abhay Tiwari & Mr. R.K. Jain, learned counsel for the accused/appellants and Mr. U.N.S. Deo, Additional Public Prosecutor with Mr. D.K. Gwalre, Dy. Govt. Advocate on behalf of the State/respondent.
10. Learned counsel for the accused/appellants have not disputed the homicidal death of Beniram, injuries sustained by Khemkumar as

also the factum of commission of dacoity in the house of Meenaram, Beniram & Bishesar in the intervening night of 30th & 31st October, 1990. They simply argued that the prosecution has utterly failed in connecting the accused/appellants with the dacoity in question. They argued that the S.H.O., Police Station Berla before test identification parade got the accused/appellants photographed and shown their photographs to the witnesses. They also argued that F.I.R. shows that the accused persons were wearing monkey cap & muffler and only their eyes & face were visible, therefore, in the circumstances, in pitch of dark night it was not possible for the witnesses to identify them. They also submitted that in the FIR, description & features of the body of accused persons or any other identification mark has not been mentioned, therefore, reliance cannot be placed on the identification memo Ex.P-16 as also on the evidence of prosecution witnesses regarding identification of the accused persons. As far as recovery of looted articles at the instance of accused persons is concerned, they argued that both the independent recovery witnesses have turned hostile; therefore, recovery was also not established. Moreover, the identification of articles by the witnesses before the Executive Magistrate was not conducted properly. The articles were not produced and got identified by the witnesses during trial, therefore, by the alleged recovery of articles, the accused persons cannot be connected with the dacoity in question. The test identification of accused persons & articles were conducted belatedly, therefore, reliance cannot be placed on Memos Ex.P-16, Ex.P-17 & Ex.P-18.

11. On the other hand, learned Additional Public Prosecutor for the State supported the judgment of the trial court.

12. As far as first argument of learned counsel for the appellants is concerned, PW-32, Anthony Tirkey, Executive Magistrate, has stated that on 2.12.1990 test identification parade of seven persons was conducted by him in which 29 persons were mixed

and the witnesses identified the accused persons. Apart from that, Padum Bai (PW-15) identified accused Puneetram alias Motu & Ramraj alias Muchchhu. He prepared the report Ex.P-16. In cross-examination, this witness has stated that there was no information to him regarding photograph of the accused persons. No specific question was put to the Executive Magistrate by the defence counsel that the accused persons were photographed before test identification parade and their photograph was shown to the witnesses. Perusal of identification memo Ex.P-16 shows that it has nowhere been mentioned that at the time of test identification parade the accused persons apprised the Executive Magistrate that before test identification parade, the S.H.O. got them photographed and their photograph was shown to the witnesses. Moreover, the Investigating Officer (PW-26) in his cross-examination denied that he got the accused persons photographed and their photograph was shown to the witnesses. Even though, photograph Ex.D-1 has been tendered into evidence and counsel for the accused/appellants argued that in this photograph the accused persons along with S.H.O. are visible, but merely on the basis of this argument and evidence available on record it cannot be held that the accused persons were photographed and thereafter, their photo was shown to the witnesses. In all fairness, when the photograph Ex.D-1 was tendered into evidence, it was the duty of defence counsel to confront the Investigating Officer (PW-26) with the photograph by asking him that in this photograph his photo is at such and such place and each of the accused person is at such and such place, without which mere tendering into evidence the photograph, it cannot be held that this photograph is of the accused persons and that the same was shown to the witnesses before test identification parade. It has also not been established that when this photograph was taken. In order to prove the date & time of photo, negative of photo as well as photographer must have been produced.

13. Test identification parade and memo is not the substantive piece of evidence, such tests are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. Simply based on the identification memo, accused persons cannot be connected with the crime unless during the course of trial the witnesses identifies the accused persons & articles in the court, that is the substantive piece of evidence. The test identification parade memo is prepared to ensure that the witnesses just after the occurrence identified the accused persons & articles in the test identification parade, same is admissible under Section 9 of the Evidence Act and which simply gives credence to substantive evidence of the witnesses, which they deposed before the court. As observed by the Hon'ble Apex Court in **Vaikuntam Chandrappa Vs. State of Andhra Pradesh** reported in AIR 1960 SC 1340 that *"the substantive evidence is the statement of a witness in Court and the purpose of test identification is to test that evidence, the safe rule being that the sworn testimony of the witness in Court as to the identity of the accused who is stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding. If there is no substantive evidence about the appellant having been one of the dacoits when P.W.10 saw them on January 28, 1963 then the T.I. parade as against him cannot be of any assistance to the prosecution"*. This principle was again reiterated by the Hon'ble Apex Court in the matter of **Hasib Vs. The State of Bihar** reported in AIR 1972 Supreme Court 283 and in the matter of **Matru alias Girish Chandra Vs. The State of U.P.** reported in AIR 1971 Supreme Court 1050.

14. Coupled with the identification memo, if we look into the evidence of witnesses who were examined in the court, PW-8 Bishesar, in whose house dacoity was committed, has stated that in the mid night about 12.00 when he opened the doors of his house, which was in the threshing field, in order to take out the

animals, he saw that 8-9 persons were standing at the distance of 10-12 steps from the door, one person asked him that you are awakening even in late night and thereafter he said that they will search his house. These persons caught him and also to another person namely Dindayal, who was in his house. He was wearing one watch, same was snatched by one of the accused. From the rooms of his house, the accused persons had looted crowbars, axe, lathis, air gun, tape recorder and torch. Nandu & Munnalal came and informed him about the dacoity in the house of Meenaram and Beniram. In the test identification parade, he had identified accused Ramraj, Dayaram, Puneetram & Radhe. He has also stated that accused Puneetram was abusing him. He has further stated that there was light in the house when the accused persons entered his house; at that time faces of the accused persons were not covered with the mask. He identified Dayaram saying him as Radhe. As per evidence of PW-20, Meenaram, his wife Pyari Bai and he ran away, but before running away he saw the accused persons in the street, they were abusing. He saw them in the street-light. PW-14 Munni Bai, wife of injured Khemkumar has deposed that 8 persons carrying club, axe, pistol and other deadly weapons entered their house after breaking open the door. The accused persons snatched wristwatch of Padum and one golden nose ring of her mother-in-law. At that time there was sufficient light, therefore, she was able to memorise the identity of accused persons in the light who are present in Court. She has stated in Para 3 that test identification parade was conducted in Durg Jail in that she identified the accused persons. Identification memo Ex.P-16 bears her signature at 'A to A' place. PW-15, Padumbai has stated in her evidence that 8-9 persons entered their house after breaking open the doors, they were carrying bomb, pistol, lathi. She has further stated that the accused persons snatched her wristwatch and golden nose ring of her mother-in-law. There was light in the house, therefore, she was able to memorise the identity of accused persons standing in the Court. Test identification parade was

conducted in Durg Jail, where identification memo (Ex.P-16) was prepared, which bears her signature at 'B to B' place. PW-18 Khemkumar, the injured witness, has stated that 8-9 persons entered the house. They assaulted him & his brother with the lathi, but they did not leave the place, thereafter, the accused persons exploded the bomb, as a result of which his younger brother Beniram sustained injuries and died. He also sustained injuries. Thereafter, the accused persons looted jewelry of his mother and other female members of the family. At that time, light was burning in the house, accused persons were wearing mask, but their eyes and mouth were visible. PW-19 Babulal indicating towards accused Khelandas has stated that except Khelandas, other accused persons standing in the court were present at the time of dacoity. In cross-examination of these witnesses, the defence has not been able to elicit any circumstance, which makes the evidence of these witnesses unreliable or untrustworthy regarding identification of the accused persons.

15. The incident took place in the intervening night of 30th & 31st October, 1990, the accused persons were arrested between 17th to 19th November, 1990, thereafter within a period of 15 days test identification parade was conducted i.e. on 2.12.1990. Therefore, from the date of commission of offence, the test identification parade was conducted within a period of 30 to 33 days and this time gap is not much whereby the identification can be held to be delayed.
16. Therefore, the evidence of above witnesses including the evidence of Executive Magistrate inspire confidence of the Court to hold that the witnesses were able to memorise the identity of accused persons during commission of crime in the light. Their Court evidence regarding identification of accused persons stand corroborated by the test identification parade memo Ex.P-16. There is no reason to disbelieve the evidence of these witnesses, implicit reliance can be placed on the evidence of these witnesses

and the trial court has rightly held that these witnesses were able to memorise the identity of accused persons while they were involved in commission of dacoity and murder of Beniram by exploding the jute string bomb.

17. As far as second point argued by learned counsel for the appellants that as per FIR, the accused persons were wearing monkey cap & muffler, therefore, it was not possible for the prosecution witnesses to identify them is concerned, in the first instance in the FIR it has been mentioned that the accused persons were wearing monkey cap & muffler, but it has not been mentioned that their faces were totally covered, therefore, the witnesses were not able to identify the accused persons. Moreover, in cross-examination of these witnesses the defence has not been able to elicit that the faces of accused persons were totally covered, therefore, they were not able to identify them. In their evidence they have stated that in the light they were able to memorise the identity of accused persons. As far as evidence of PW-18 Khemkumar in which he has stated that accused persons were wearing mask and only their eyes & face were visible is concerned, in the first instance he has stated that the faces of accused persons were opened, therefore, it cannot be said that they were not able to identify the accused persons. Even otherwise, witnesses have not stated that faces of accused persons were totally covered. Therefore, we do not find any substance in this argument of learned counsel for the accused/appellants.

18. As far as third argument advanced by learned counsel for the accused/appellants that description of accused persons or identifying marks, complexion or features of the body have not been indicated in the FIR, therefore, the identification of accused persons was not disclosed at the earliest, as such the evidence of the prosecution witnesses do not inspire confidence is concerned, it is true that any identification mark, complexion or feature of the body of accused persons have not been

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mentioned in the FIR, had that been mentioned in the FIR, then that would have been a ground for giving more credence to the evidence of witnesses, but such omission in the FIR becomes relevant and important only when other evidence adduced by the prosecution is not cogent & clear and the evidence adduced by the prosecution is shaky, then the above argument advanced by learned counsel for the accused/appellants becomes relevant and important, but when cogent and clear evidence has been adduced by the prosecution regarding identification of accused persons coupled with the recovery of looted articles from the accused persons, in that case the above omission loses its significance or importance. In the present case, as has been mentioned earlier that the witnesses have clearly stated that they were able to memorise the identity of accused persons in the light, moreover, the looted articles have been recovered at the instance of the accused persons, as such on the basis of above omission in the FIR, the prosecution case cannot be thrown away.

19. Now coming to the point of identification of looted articles and its recovery at the instance of accused persons. It is true that in this case independent recovery witnesses namely Dhanendra Kumar Sahu (PW-11) & Shankarlal (PW-29) have turned hostile, therefore, only the evidence of Investigating Officer PW-26 Shri Naqvi remains. There is no law that if the independent recovery witnesses turn hostile in that case the recovery of articles based on the evidence of the Investigating Officer cannot be believed, unless the defence through cross examination brings on record some disturbing features showing that the evidence of Investigating Officer does not inspire the confidence on account of certain omissions, contradictions or that implicit reliance cannot be placed on the evidence of Investigating Officer on account of proved bias, animosity or false implication. In such a case, the Court is required to scrutinize the evidence of Investigating Officer with care and circumspection, in order to decide the veracity of evidence of

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Investigating Officer. In this case, as mentioned earlier, PW-26 S.K.A. Naqvi, Investigating Officer has categorically stated that while in police custody on 17.11.1990 accused Puneetram alias Motu gave memorandum Ex.P-11 under Section 27 of the Evidence Act and in pursuance of that under seizure memo Ex.P-28 one green colour torch was recovered from his residence, which bears his signature at 'A to A' place. Said torch has been identified by PW-8 Bishesar as Article-E in the identification parade conducted by PW-32 Executive Magistrate Shri Anthony Tirkey. In memo of identification (Ex.P-17) as Item No.1 battery is included and the Executive Magistrate has stated that the said torch was identified by Bishesar. In the cross-examination of the Investigating Officer the defence has not been able to elicit anything to show that recovery was not effected at the instance of the accused Puneetram and a fake recovery memo was prepared. Even in Court evidence also Bishesar (PW-8) has said that torch, Article-E, was looted.

Similarly, the Investigating Officer (PW-26) has stated that accused Ramraj while in police custody gave memorandum (Ex. P-22) and in pursuance of that he got recovered the black ballistic powder weighing 1 kg, black colour wick, one jute string about three hands in length and copper wire under Ex.P-29. He has further stated that on being produced by one Dharamchand (PW-9) one lump of silver weighing 495 gms, another lump weighing about 112 gms, a lump of gold weighing 3gm 2 milligram and one register were taken into possession under Ex.P-20. PW-9 Dharamchand has categorically stated that on 3.11.1990 accused Ramraj brought one anklet of silver, one *Hariya* weighing 115 grams and five golden pearls for sale, he purchased the said jewelries from the accused present in the court and entered the same in the register (Ex.P-21). Lump made out of said jewelries was taken into possession by the police under Ex.P-20. Therefore, in view of the above evidence of PW-26 Investigating Officer that material for preparation of bomb and bomb powder

were recovered from accused Ramraj and the gold & silver ornaments, which he looted in the dacoity, were sold by him on 3.11.1990 to said Dharamchand (PW-9), same were also taken into possession under Ex.P-20. Dharamchand has categorically stated that accused Ramraj brought these ornaments to him, he purchased the same and made entries in the register. There was no reason before Dharamchand to implicate the accused in a false case. One golden lump was recovered from PW-6 Vinod Kumar to whom accused Ramraj sold the same on 3.11.1990 and same was taken into possession under Ex.P-14A. Vinod Kumar has stated that he made entries in the register. Therefore, in view of the evidence of PW-6, Vinod Kumar & PW-9, Dharamchand to whom accused Ramraj sold golden & silver ornaments and also the recovery of bomb particles including the ballast powder from the accused Ramraj under Ex.P-29, it is established that accused Ramraj was involved in commission of dacoity in question.

The Investigating Officer (PW-26) has further stated that accused Radhe Gond gave memorandum Ex.P-23 and in pursuance of that under Ex.P-30 one golden lump and one bill book was recovered. From Vimalchand (PW-12) one golden lump weighing about 1gram 700 milligram was taken into possession under Ex.P-31. On being production of one receipt by accused Radhe Gond of Nemichand Parasmal Jain dated 2.11.1990, Bill No.4 was taken into possession under seizure memo Ex.P32. The Investigating Officer has not been cross-examined on this aspect that these recoveries were fake, therefore, there is no reason to disbelieve the above recoveries at the instance of accused Radhe, which has been established by PW-12 Vimalchand.

The Investigating Officer (PW-26) has also stated that accused Lakhani gave memorandum Ex.P-24 regarding ladies watch and under Ex.P-33 ladies watch was taken into possession on production by the accused from his house. PW-15 Padum Bai has stated that accused persons snatched the watch from her. She has further stated that she identified the watch before the

Executive Magistrate under Memo Ex.P-17. PW-8 Bishesar in Para-8 of his evidence has stated that Article 'C' watch was identified by him also. Therefore, the ladies watch was recovered from accused Lakhan by PW-26 at the instance of accused from his residence and the same was identified by PW-8 & PW-15. Therefore, based on the recovery of watch from accused Lakhan, the involvement of accused Lakhan in dacoity is established.

PW-26 has further stated that accused Mangal Singh while in police custody gave memorandum Ex.P-25 regarding the tape recorder that the same has been concealed in his house and in pursuance of that under seizure memo Ex.P-35 one tape recorder, cycle & torch were taken into possession from his house. Tape recorder Article 'F' was identified by PW-8 Bishesar. In para-2 of his evidence, he has stated that the said tape recorder was looted from his house. Complainant Meenaram (PW-2) has also stated that he identified the articles and identification memo Ex.P-17 bears his signatures. Therefore, the tape recorder which was looted in the dacoity was of PW-8 Bishesar, who had identified it under Memo Ex.P-17 and also in the Court, as such, the involvement of accused Lakhan in dacoity is established.

Shri S.K.A. Naqvi (PW-26) has stated that accused Laxman while in police custody gave memorandum Ex.P-26 regarding one golden nose ring & keys and in pursuance of that on 18.11.1990 he got recovered one golden nose ring and keys under Ex.P-36. Golden nose ring has been identified by PW-8 Bishesar before the Tehsildar and PW-8 has stated that Article 'D' golden nose ring was identified by him, therefore, the recovery of keys and golden nose ring at the instance of accused Laxman and same were looted during the dacoity is established, as PW-8 has identified the golden nose ring and PW-15 has stated that one golden nose ring of her mother-in-law was looted by the accused persons. PW-14 Munni Bai has also stated that one golden nose ring of her mother-in-law was looted by the accused persons.

PW-26 Investigating Officer has stated that on 23.11.1990 accused Dayaram gave memorandum Ex.P-27 and at the instance of accused Dayaram two live bombs made of jute string were recovered under Ex.P-36 and under Ex.P-8 the pieces of exploded bomb jute string, pieces of stones & broken glasses on which smell of ballistic powder was emanating were recovered from the place of occurrence and similar kind of two live bombs were recovered from the possession of accused Dayaram under his memorandum Ex.P-27.

20. Section 114 of the Evidence Act envisages that *"the court may, presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case"*. Illustration (a) of Section 114 says *"if any person is found in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession"*.

21. The Hon'ble Apex Court in the matter of Nawabuddin alias Nawab Vs. State of Delhi reported in AIR 2001 Supreme Court 979 held that *"the accused persons from whom the recoveries were made, consequent upon their disclosure statements, did not offer any explanation regarding their possession of the stolen properties. Thus, by drawing a presumption under Section 114 of the Evidence Act it can safely be held that the accused persons were at least guilty of the offence of robbery. Similarly, recent and unexplained possession of stolen properties could be taken to be presumptive evidence of the charge of murder as well"*. In the matter of Lachhman Ram, etc. etc. Vs. State of Orissa reported in AIR 1985 Supreme Court 486 the Hon'ble Apex Court has held that *"the recovery of stolen articles at the instance of the accused were made very soon after the occurrence, therefore, accused are liable to be convicted under Section 395 of the I.P.C. with the aid of Section 114 of the*

Evidence Act". In the matter of A. Deivendran Vs. State of Tamil Nadu reported in AIR 1998 Supreme Court 2821, in para-20 the Hon'ble Apex Court held that:

"a presumption under Section 114 illustration (a) of the Evidence Act should be drawn in a given situation is a matter which depends on the evidence and the circumstances of the cases. The nature of stolen articles, the nature of its identification by the owner, the place and the circumstances of its recovery, the intervening period between the date of occurrence and the date of recovery, the explanation of the persons concerned from whom the recovery is made are all facts which are to be taken into consideration in arriving at a decision."

In the matter of Ronny alias Ronald James Alwaris etc, Vs. State of Maharashtra reported in AIR 1998 Supreme Court 1251 in para-31 the Hon'ble Apex Court held that:

"recovery of articles belonging to the deceased family from the possession of the accused soon after the incident, --- possession remained unexplained by the accused, so the presumption under illustration (a) of Section 114 of the Evidence Act will be attracted.---- Murder and robbery of the articles found to be part of the same transaction and thus, it can be concluded that the accused and no one else had committed the murders and robbery."

22. Therefore, in the light of Illustration (a) of Section 114 of the Evidence Act and above judgments of the Hon'ble Apex Court, it can safely be held on the basis of recoveries of articles at the instance of the accused persons, which were looted in the dacoity or which were used in commission of dacoity, that the seven accused/appellants were the culprits of dacoity because recoveries of looted articles were made within a period of 19

days of commission of dacoity and the accused persons have not been able to explain the recent possession of these articles.

23. As far as the point argued by learned counsel for the accused/appellants that identification of articles were not conducted properly by the Executive Magistrate is concerned, in the cross-examination of the Executive Magistrate, the defence has not been able to bring out any circumstance on record based on which the identification of articles can be successfully assailed. Recovered articles were of Bishesar (PW-8), Meenaram (PW-20) & Khemkumar (PW-18) and their family members and they have identified their articles before the Executive Magistrate. Even, PW-8 Bishesar has identified the articles in the Court⁴ also. Moreover, few articles were sold by accused Ramraj & Radhe to Vinod Kumar (PW-6), Dharamchand (PW-9), & Vimalchand (PW-12) and a lump made of ornaments along with record regarding its sale to the Jewelers were recovered from them at the instance of accused Ramraj & Radhe, therefore, there is no substance in the argument of learned counsel for the accused/appellants that identification parade of articles was not conducted properly. The witnesses were able to identify the articles because the same were being used by them regularly and moreover, same were identified within a period of 33 days from the date of offence. The articles were identified even in the Court by PW-8 Bishesar. Based on the identification of accused persons by PW-8, Bishesar, PW-20 Meenaram, PW-14 Munnibai, PW-15 Padmu Bai in the court as well as in the test identification parade, as per test identification parade memo Ex.P-16 that these persons were involved in commission of dacoity and also based on the recovery and identification of articles, which were used in commission of dacoity as well as looted in the dacoity, the prosecution has successfully established the involvement of the accused/appellants in commission of dacoity in the house of Meenaram (PW-20), Beniram & Bishesar (PW-8). It is also established that during commission of dacoity, the dacoits

committed murder of Beniram by exploding bomb and on account of bomb explosion death of Beniram was caused and Khemkumar received injuries.

24. As far as conviction of accused/appellants under Section 396 of the IPC is concerned, under Section 396 if any one of the dacoits "commits murder in so committing dacoity" every one of the dacoits is liable to be punished either with death or imprisonment for life or rigorous imprisonment for a term, which extend to 10 years. If a dacoit in the progress of, and in pursuance of, the commission of a dacoity commits a murder, all of his companions, who are participating in the commission of the same dacoity may be convicted under this section, although they may have no participation in the murder beyond the fact of participation in dacoity. It is not necessary that the murder should have been within the contemplation of all or some of them when the dacoity was planned, nor is it necessary that they should have actually taken part in, or abetted, its commission. Indeed they may not have been present at the scene of murder, or may not have known even that murder was going to be, or had in fact been, committed. But nonetheless they all will be liable for enhanced punishment, provided a person is in fact murdered by one of the members of the gang in commission of the dacoity. As per the facts of present case, a member of gang of dacoits exploded bomb and on account of bomb injuries sustained by Beniram, he died and they committed dacoity in the house of Beniram, Bishesar & Meenaram, therefore, they have been rightly convicted under Section 396 of the IPC. Looking to the manner in which the accused/appellants had committed dacoity and also seriousness of crime, we are of the considered opinion that the accused/appellants do not deserve any leniency and they have rightly been sentenced to undergo rigorous imprisonment for life. Apart from that perusal of impugned judgment reveals that accused persons were involved in similar type of dacoity, they

faced Sessions Trial No.239/91 and in that case also they were sentenced to undergo rigorous imprisonment for 7 years.

25. As far as conviction of accused/appellants under Section 397 of the IPC is concerned, Section 397 is not a substantive offence, but Section 397 is enabling provision which provides that if while committing robbery or dacoity, the offender uses any deadly weapon or causes grievous hurt to any person, the attempts to cause death or grievous hurts to any person, the imprisonment with which such offender shall be punished shall not be less than seven years. Therefore, in a case where robbery or dacoity is committed by the offender and in that robbery or dacoity ingredients of Section 397 are satisfied, in that case only with the aid of Section 397 of IPC the minimum sentence of 7 years has to be imposed upon the offender. The offender cannot be convicted and punished under Section 397 independently.

26. In the result, the appeals of accused/appellants partly succeed, their conviction and sentence under Section 397 of the IPC are set aside, however, the conviction and sentence imposed upon the accused/appellants under Section 396 of the IPC are maintained and to that extent the appeals of accused/appellants stand dismissed. Bail order of accused Puneetram alias Motu and Laxman, who are in jail inspite of grant of bail, are cancelled. Bail bonds of accused Ramraj alias Muchchhu, Laskhan, Radhe Gond, Mangal Singh and Dayaram also stand cancelled and they are directed to surrender immediately before the trial court to serve the remaining sentence.

Sd/-
L.C.BHADOO
Judge

26-9-2006

Sd/-
V.K. Shrivatava
Judge

26-9-2006

Roshan/-