



APR 46

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.995 of 1993

APPELLANTS/:
(Accused)
(In Jail)

1. Sohanram, son of Thakurram Gond, aged about 24 years, Resident of Rajpuri, Police Station Sitapur. (Surguja).
2. Alak Sai son of Jugruram Kujoor by caste Uraon, aged about 25 years, R/o Bisunpur Police Station Sitapur (Surguja).

Versus

RESPONDENT:

State of Madhya Pradesh (now State of Chhattisgarh) through Station House Officer Police Station Kansabel, Distt. Raigarh.

{Criminal appeal under Section 374 (2) of the Code of Criminal Procedure, 1973}

Present:

Miss Sharmila Singhai, counsel for the appellants.

Mr. Sushil Dubey, Govt. Advocate for the State/respondent.

Single Bench: Hon'ble Mr. T.P. Sharma, J

ORAL JUDGMENT
(30-7-2010)

1. Challenge in this appeal is to the judgment of conviction & order of sentence dated 30-9-1993 passed by the Additional Sessions Judge, Jashpurnagar in Sessions Trial No.65/91, whereby & whereunder learned Additional Sessions Judge after holding the appellants guilty for commission of offence under Sections 394 read with Section 397 & 307 of the I.P.C., sentenced each of them to undergo R.I. for seven years on both counts.
2. Conviction is impugned on the ground that without any iota of evidence relating to use of deadly weapons for commission of dacoity and absence of evidence of identification of the appellants, the trial Court has convicted & sentenced the appellants and thereby committed illegality.
3. Case of the prosecution, in brief, is that on 23-12-90 at about 4 p.m. when Phulkunwar (PW-1) was present in her house situate at village Ghoghar, Police Station Kansabel, the appellants came to her house and they introduced themselves as residents of villages Rajpuri & Bisunpur,

they demanded water and asked whether she resides alone to which she informed them that her son is residing at Ambikapur and thereafter, they went away. On the same day between 11 p.m. and 12 mid night, both the persons climbed the wall of the house of Phulkunwar (PW-1) and one person tried to press her neck. She identified them in the light of lamp (*dibri*). One person assaulted her with stick. She shouted for help on which Manprasad (PW-17) – her relative residing besides her house, came whom one accused shot fire with pistol and caused injury over his legs. The miscreants committed robbery of box containing saris, currency notes and other articles. They left one black colour bag, one chappal and one country made pistol. Neighbours had also seen the miscreants. Phulkunwar (PW-1) went to the Police Station and lodged F.I.R. vide Ex.P-1. Country made pistol, black bag, one chappal, one heavy wooden plank were seized from the spot vide Ex.P-2. Plain soil and bloodstained soil were recovered from the spot vide Exs.P-3 & P-4. 47 pieces of *charra* used by pistol shot and empty cartridges were seized from the spot vide Ex.P-5. Blood stained blouse of Phulkunwar (PW-1) was seized vide Ex.P-6. During the course of investigation, appellant Sohan was taken into custody, he made discloser statement of box & other articles vide Ex.P-7 and on the basis of his statement, one box containing some currency notes, some grains of rice and *udat* were sized from the forest vide Ex.P-8. Spot map was prepared vide Ex.P-9. Phulkunwar (PW-1) was examined by the doctor vide Ex.P-10 who found three injuries on her person. Manprasad (PW-17) was also examined by the doctor vide Exs.P-11 & P-12 who found gun shot injury on his person. Identification parade was conducted and both the accused were identified along with other accused persons by Phulkunwar (PW-1), Kunwar Ram, Shyam Bihari, Lachhan & Dhan Singh vide Ex.P-15. Articles were sent for chemical examination.

4. Statements of the witnesses were recorded under Section 161 of the Cr.P.C. and after completion of investigation, charge sheet was filed before the Judicial Magistrate First Class, Jashpurnagar, who in turn committed the case to the Court of Sessions, Raigadh, from where learned Additional Sessions Judge received the case on transfer for trial.
5. In order to prove the guilt of the appellants, the prosecution has examined as many as seventeen witnesses. The accused were examined under Section 313 of the Cr.P.C. in which they denied the

circumstances appearing against them and pleaded innocence & false implication.

6. After affording opportunity of hearing to the parties, learned Additional Sessions Judge convicted & sentenced the appellants as aforementioned.
7. I have heard learned counsel for the parties, perused the judgment and record of the trial Court.
8. Miss Sharmila Singhai, learned counsel for the appellants, vehemently argued that evidence of the prosecution witnesses are self-contradictory, on the one hand, the witnesses had deposed that appellant Sohan was familiar to Phulkunwar (PW-1) but she has not named the name of Sohan while lodging the F.I.R. and on the other hand, the witnesses depose that the appellants were unknown to the complainant and other witnesses. At the time of identification, police personnel were present which vitiates the evidence of test identification and in absence of other evidence relating to identification of the appellants/miscreants, conviction & sentences of the appellants are not sustainable under the law. Miss Sharmila Singhai placed reliance in the matter of **Pashora Singh and another v. State of Punjab (AIR 1993 SC 1256)** in which the Apex Court has held that in case of injury not sufficient for causing death in ordinary course of nature, conviction of the accused under Section 307 of the I.P.C. is not sustainable and would be altered to Section 326 of the I.P.C. Miss Sharmila Singhai further placed reliance in the matter of **Latel v. State of Madhya Pradesh (AIR 1994 SC 763)** in which the Apex Court has held that in absence of any evidence of participation in dacoity, the accused is entitled for acquittal. Miss Sharmila Singhai also placed reliance in the matter of **Dilawar Singh v. State of Delhi {(2007) 12 SCC 641}** in which the Apex Court has held that in order to convict a person under Section 307 of the I.P.C., only the person using and holding deadly weapon is liable to be convicted under Section 307 of the I.P.C.
9. On the other hand, Mr. Sushil Dubey, learned Govt. Advocate appearing on behalf of the State/respondent, vehemently opposed the appeal and submitted that in the present case, the prosecution witnesses had identified the appellants in dock identification which is substantial evidence and the evidence adduced on behalf of the prosecution is

sufficient for drawing inference that the appellants were the persons who had committed robbery by using deadly weapons. One appellant was having heavy wooden stick and second one was having country made pistol who has shot fire from the pistol upon Manprasad and caused grievous injury. The trial Court has rightly convicted & sentenced the appellants.

10. In order to appreciate the arguments advanced on behalf of the parties, I have examined the evidence adduced on behalf of the prosecution.

11. As regards the injury caused to Manprasad (PW-17) and its nature, as per the evidence of Phulkunwar (PW-1) & Manprasad (PW-17) after hearing the cries for help of Phulkunwar (PW-1), Manprasad (PW-17) – relative of Phulkunwar residing adjoining to her house, went to her house for help and while he was reaching near Phulkunwar, he sustained injury by fire arm over both legs and he became unconscious. As per the evidence of Y.K. Toppo (PW-7), he has examined Manprasad (PW-17) on 24-12-90 vide Ex.P-11 and found lacerated wound with burnt piece of carbon over 4" circular area of right leg and lacerated wound over 3 cm. circular area with carbon particle over left leg. Admittedly, the injuries were caused by fire arm while he was reaching to the house of Phulkunwar to save her. Instantaneously causing such injuries by dangerous weapon i.e. fire arm shows the intention of the person who has caused injury. Although the injuries were on leg and were not fatal, but the surrounding circumstances and injury by fire arm instantaneously, are sufficient for drawing inference that attempt to commit murder of Manprasad has been committed at the time of incident. In case of conviction under Section 307 of the I.P.C. even the injury is not necessary.

12. As regards complicity of the appellants in the crime in question, as per the evidence of Phulkunwar (PW-1) & Manprasad (PW-17), two persons were inside the house of Phulkunwar, both the persons had caught hold of Phulkunwar, one was pressing her neck and another was pressing her neck with heavy wooden plank (geda), they committed robbery of the property of Phulkunwar including clothes, currency notes & food articles and they took the same along with box. Defence has not cross-examined these witnesses on the point of use of geda by one person and pistol by another person at the time of commission of robbery in the

house of Phulkunwar (PW-1). Even otherwise, the aforesaid evidence is sufficient for drawing inference that two persons had committed robbery by using deadly weapons geda and country made pistol.

13. As per the defence of the appellants, they have not committed any robbery or have not caused any injury to Manprasad and they have been subjected to test identification, but before the test identification the witnesses have seen them while they were in police custody in presence of police and, therefore, any evidence of such test identification is of no use. In absence of identification of the appellants, conviction of the appellants for the aforesaid offence is not sustainable under the law.
14. Test identification has been conducted by the Executive Magistrate vide Ex.P-15 at Tahsil premises Bagicha and in the test identification Ex.P-15, witnesses Phulkunwar (PW-1), Kunwar Ram (PW-14), Shyam Bihari (PW-13), Lachhan (PW-12) & Dhan Singh (PW-9) had identified these persons.
15. Phulkunwar (PW-1) has deposed in para 3 of her evidence that she had identified the appellants on the basis that she had seen both the accused at the time of commission of offence. In para 6 of her cross-examination she has specifically deposed that the police has called her in the Police Station and shown the accused persons who were in custody then she identified both the accused persons in the Police Station. In para 7 she has further deposed that at the time of identification police personnel were present. In these circumstances, evidence of test identification loses its importance relating to Phulkunwar (PW-1).
16. Lachhan (PW-12) has also identified the accused persons. As per his evidence, on the date of incident during day time, he along with Kunwar & Ram Bihari were sitting in the shop of Anil Sharma then he saw that both the appellants were present in village Ghoghar, appellant Sohan used to visit the house of Phulkunwar, and second day he came to know that robbery has been committed in the house of Phulkunwar. He has identified both the accused, but in his cross-examination he has admitted that before such identification the accused were shown to him by the police.
17. Kunwar Ram (PW-14), who has also identified the accused persons, has also deposed that on the fateful day before such incident, at about 4 p.m. he had seen both the appellants while they were passing in front of the

house of Anil Sharma, at that time he was sitting with Lachhan & Shyam. In his cross-examination he has admitted that police officials were present at the time of identification.

18. Evidence of these witnesses relating to identification of accused in test identifications shows that either the accused were shown to them by the police or at the time of identification, police personnel were present which loses the evidentiary value of test identification. Identification of persons in the Court i.e. dock identification is a substantive piece of evidence. If the prosecution succeeds in proving dock identification then only on account of failure of test identification or any irregularity or illegality in the test identification, the evidentiary value of dock identification would not be affected.
19. In the present case, Phulkunwar (PW-1) has specifically stated in her evidence that she has identified the accused persons on the basis that she had seen both the accused at the time of commission of offence. She has specifically stated in para 1 of her evidence that on the fateful day during day time four persons came to her house, they demanded water and asked about her son to whom she told that her son will come on the day of poornima. Thereafter, at night two persons were found inside her house. She has specifically deposed that both the two appellants were present in her house and have committed robbery by using deadly weapons.
20. Dhan Singh (PW-9) has deposed in his evidence that just some hours before the incident he has seen both the accused, they were going towards village Ghoghar. Shankarram (PW-11) – son of Phulkunwar has deposed that he knew accused Sohan who is resident of Rajpuri where his sister had got married. Lachhan (PW-12) has also deposed that before the incident at about 4 p.m. he has seen both the accused persons in village Ghoghar. Shyam Bihari Chouhan (PW-13) has specifically deposed that at about 4 p.m. on the date of incident he along with other persons has seen both the appellants in village Ghoghar.
21. Definitely three witnesses namely Phulkunwar (PW-1), Lachhan (PW-12) & Kunwar Ram (PW-14) had seen the appellants in the police custody before test identification but the fact remains that the aforesaid witnesses had seen both the appellants before the commission of incident. Manprasad (PW-17) has specifically deposed that the two appellants

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were present in the house of Phulkunwar at the time of incident and out of two one has shot fire upon him. As per the evidence of Lachhan (PW-12), accused Sohan used to come to the house of Phulkunwar. Shankarram (PW-11) – son of Phulkunwar has specifically deposed in para 1 of his evidence that earlier, once accused Sohan had come to his house. This shows that Sohan who is resident of Rajpuri where the sister of Shankarram got married, had visited the house of Phulkunwar but he has not visited the house of Shankarram/Phulkunwar frequently. In these circumstances, it was not possible for Phulkunwar to tell the name of Sohan at the time of lodging the F.I.R. Evidence of Phulkunwar (PW-1) clearly shows that prior to commission of offence the accused had come to her house for ensuring the presence of any other person and thereafter, they committed robbery at night.

22. Evidence of the aforesaid witnesses is sufficient for drawing inference that on the date of incident just before few hours both the accused persons who were not residents of Ghoghar and residents of Rajpuri & Bisunpur were present in village Ghoghar. Manprasad (PW-17) & Shyam Bihari Chouhan (PW-13) who had not seen the accused in police custody have clearly stated presence of the appellants on the date of incident and at the time of incident which also finds corroboration from the evidence of other witnesses and the same is sufficient for drawing inference that both the appellants were the persons who had committed the offence of robbery by using deadly weapons.

23. In the matter of **Pashora Singh (supra)**, the Apex Court has held that gravity of offence can be inferred on the basis of injury and in absence of injury fatal to life, conviction can be altered to Section 326 of the I.P.C.. But in the present case, the surrounding circumstances in which the appellants had shot fire upon Manprasad show the grave intention to commit murder. The case of **Pashora Singh (supra)** is distinguishable on facts to that of the present case.

24. As held by the Apex Court in the matters of **Latel and Dilawar Singh (supra)**, the prosecution is required to prove that the accused were not merely holding deadly weapons, but have done something more in order to commit robbery. In the present case, one appellant was having heavy wooden plank and second was holding pistol, they were not merely holding deadly weapons, but they have used the same for causing injury

to Phulkunwar & Manprasad. The cases of **Latel and Dilawar Singh (supra)** are distinguishable on facts to that of the present case.

25. After appreciating the evidence available on record, learned Additional Sessions Judge has convicted & sentenced the appellants in the aforesaid manner. Conviction of the appellants is based on legal, clinching and credible evidence sustainable under the law.

26. In the present case, after ensuring the fact that at the time of commission of offence no male member would be present, the appellants herein have committed robbery by using deadly weapons causing serious injury including attempt to commit murder of Manprasad. The trial Court has awarded minimum sentences prescribed under the law. On close scrutiny of evidence, I do not find any illegality in conviction & sentences of the appellants.

27. Consequently, the appeal is devoid of merit, same is liable to be dismissed and it is hereby dismissed. The appellants are on bail, they shall surrender immediately before the Court of Additional Sessions Judge, Jashpurnagar/its successor-in-office for serving remaining sentences imposed upon them in Sessions Trial No.65/91.

Sd/-
T.P. Sharma
Judge