

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 694 of 2009

- Ram Chandra Dubey alias alias Guddu S/o Devi Prasad, aged about 23 years, R/o Village Anrokha, P.S. Pratappur, District Surguja (CG).

---- Appellant

In Jail

Versus

- State of CG, Through Police Station - Pratappur District Surguja (CG)

---- Respondent

For appellant : Shri Vinay Pandey, Advocate.
For Respondent/State : Shri V. Goverdhan, P.L.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Inder Singh Uboweja

Judgment On Board by Justice Pritinker Diwaker

29/09/2015:

This appeal arises out of the judgment of conviction and order of sentence dated 16.9.2009 passed by the Additional Sessions Judge (FTC), Pratappur, Distt. Surguja in S.T.No.250/07 convicting the accused/appellant under Sections 396 of IPC and sentencing him to undergo imprisonment for life, to pay a fine of Rs.1000/- and in default thereof to suffer additional R.I. for two months.

02. Brief facts of the case are that on 31.12.2006 deceased Raju Yadav and his cousin Jagdish Yadav were transporting some articles from Korba to Delhi. On the way near one Ashok Line Dhaba they stopped the truck, at about 10 pm when deceased Raju Yadav and Jagdish Yadav were about to sleep, deceased Raju Yadav sustained

gunshot injury in his abdomen. It is alleged that the said gunshot injury was caused by co-accused Chhatrapal (since deceased). Further case of the prosecution is that the deceased was subjected to gunshot injury as number of dacoits had gathered there and were threatening to take money from the truck. It is said that after committing dacoity six dacoits fled from the spot. Injured Raju Yadav was taken to Wadrafnagar Hospital but he was declared brought dead. On 1.1.2007 unnumbered merg (Ex.P/22) and unnumbered Dehalti Nalishi (Ex.P/23) were recorded at P.S. Pratappur, Camp Wadrafnagar, and thereafter numbered merg (Ex.P/18) was recorded at P.S. Pratappur, Distt. Surajpur and then FIR (Ex.P/17) was registered at the instance of Jagdish Yadav (PW-19) against 10-15 unknown persons under Sections 302, 395, 396 of IPC and Sections 25 & 27 of the Arms Act. Inquest over the body of the deceased was prepared vide Ex.P/25. Postmortem on the body of the deceased was conducted by PW-3 Dr.R.B. Prajapati, vide Ex.P/3 wherein he noticed rupture of lung, liver, stomach, fracture of ribs caused by firearm and opined that the cause of death was excessive bleeding due to shock and the death was homicidal in nature. The appellant was arrested on 22.1.2007 whereas co-accused Chhatrapal and Teju were arrested on 5.1.2007. On 22.1.2007 memorandum of the accused/appellant was recorded vide Ex.P/9 in presence of PW-6 Mohd. Aajam and PW-8 Sushant Kumar Paikra. Based on the memorandum of the accused/appellant seizure Ex/12 of Rs.500/- was effected. Identification parade was conducted on 22.1.2007 by PW-20 Jageram, Tehsildar, vide Ex.P/2 in which PW-11 Anil Pandey, Dhaba owner, identified the accused/appellant. Other co-accused namely Chhatrapal and Teju were also identified vide Ex.P/6

by Anil Pandey (PW-11) and Uttam Chand (PW-12). After investigation charge sheet was filed against the accused/appellant and two other convicted accused persons namely Chhatrapal and Teju under Sections 395, 396 of IPC and Sections 25 & 27 of the Arms Act before the concerned jurisdictional Magistrate whereas in relation to three other juvenile co-accused trial was conducted before the Juvenile Board and charges were framed accordingly against them.

03. So as to hold the accused persons guilty, the prosecution examined as many as 20 witnesses. Statements of the accused persons were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication.

04. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the accused/appellant under Section 396 of IPC whereas other two accused persons were held guilty under Sections 396 of IPC and Sections 25 & 27 of the Arms Act also.

05. Convicted co-accused Teju had preferred a criminal appeal i.e. Cr.A.No.102/10, however, the said appeal stood abated on 30.8.2013 after death of Teju. Similarly, Cr.A.No.731/09 preferred by co-accused Chhatrapal also stood abated on 3.9.2013 after his death.

06. Learned counsel for the appellant submits as under:

(i) that the accused/appellant has been convicted solely on the basis of his so-called identification by PW-11 Anil Pandey in the identification

parade (Ex.P/2) held by PW-20 Jageram, Tehsildar. The identification parade itself is doubtful in view of statement of PW-11.

(ii) for identification parade the appellant was brought without covering his face by the police and thus it creates doubt on the said identification.

(iii) that the incident had taken place in the dark night at a place where there was no electric connection and hence the question of identification of the accused/appellant does not arise.

(iv) that on the basis of disclosure statement of the appellant Rs.500/- is alleged to have been seized but the said amount is such which can be recovered from anyone and hence the appellant cannot be connected with the crime in question on that basis.

07. On the other hand, supporting the impugned judgment it has been argued by the State counsel as under:

(i) that present is a case where dacoity was committed by the accused persons in a daring manner attacking deceased Raju Yadav, a poor person sleeping in his truck. In such an incident the witnesses hardly get an opportunity to describe the incident in an elaborate manner and therefore, minor contradictions in the statement of PW-11 Anil Pandey are required to be ignored.

(ii) that apart from test identification (Ex.P/2), in the Court also PW-11 identified the accused/appellant and there is no reason for this Court to disbelieve the dock identification.

(iii) that though statement of the co-accused cannot be read against the appellant but the fact remains that the co-accused persons in their memorandums have also categorically stated about involvement of the

accused/appellant in crime in question.

08. Heard counsel for the respective parties and perused the material on record.

09. PW-1 Prabhunarayan Singh, Patwari, prepared the spot map Ex.P/1. PW-2 Vishnu Giri, a witness to test identification parade Ex.P/2 has been declared hostile. He has stated that he was asked by the police to sign some documents. He has further stated that in his presence no identification was done by Anil Pandey PW-11. PW-3 Dr. R.B. Prajapati conducted postmortem on the body of the deceased Raju Yadav vide Ex.P/3 and noticed following injuries:

“59 small firearm entry wounds in front of right side of chest and lateral aspect of right side of chest and right side of scapular area and right shoulder joint. Among 59 wounds a large wound 2 cm x 2 cm. No exit wound seen. 33 entry wounds crossed skin, subcutaneous tissue and deeper structure and 27 entry wounds were superficial and pellets were not found over body. Bleeding through wounds present and clothing smudged with blood. Rigor mortis present in all limbs.”

In his opinion the cause of death was shock due to hemorrhage resulting from rupture of lung, liver, stomach and fracture of ribs caused by firearm discharge injuries.

10. PW-4 Bhuneshwar Kerketta, Police Constable, helped in the investigation. PW-5 Kunjbihari Jaiswal conducted test identification of co-accused persons vide Ex.P/6. PW-6 Mohd. Aajam and PW-8 Sushant Kumar Paikra who are witnesses of memorandum of the accused/appellant (Ex.P/9) and seizure (Ex.P/12) turned hostile and

did not support the prosecution case. PW-7 O.P. Singh has dealt the file regarding sanction for prosecution of the co-accused persons under the Arms Act. PW-9 Indrajeet a witness of test identification (Ex.P/2) has been declared hostile. PW-10 Dhaneshwar, Constable, helped in the investigation.

11. PW-11 Anil Pandey, Dhaba Owner, has stated that he knew the accused/appellant. On the date of incident at about 10.30 pm he was sitting in his hotel, six persons came there, out of them two were carrying 12 bore, one rifle, one stain-gun, they asked him to keep quiet and fired in his hotel. At that time around 25 trucks were standing near his hotel, some of them were taking their meals, they were picked by the accused persons and were looted and abused. He has stated that those persons who refused to give amount were also beaten by the accused persons and they also fired aiming the truck and one person who was sleeping inside the truck did not open the door as a result of which some of the accused persons fired at him and he sustained injury. He has stated that at that moment one small vehicle came from other side and when the accused persons were taking a side, then only he could realize that they were dacoits, otherwise prior to that he was under the impression that they were member of the naxallite party and in the said area dominion of naxallites is there. He has stated that after mustering some courage he raised cries as a result of which some persons gathered there and by that time the accused persons fled from the spot. He noticed that the person who was inside the truck had sustained injury and died. He was taken to Wadrafnagar hospital. He has further stated that after lodging of report, the police party came to

the spot and spot map was prepared. From the spot cartridges were seized vide Ex.P/14. He is a witness of test identification parade Ex.P/6 by which the other accused persons were identified. He is also a witness of identification parade Ex.P/2 held in relation to the accused/appellant. He has stated that this identification parade was conducted subsequent to earlier one as the accused/appellant was arrested later. This witness has been declared hostile. In para-8 he has stated that identification of the accused/appellant was conducted by Tehsildar vide Ex.P/2. He has admitted that on the date of incident 3-4 gas burners were burning and there is no electric connection in his hotel. In para-13 he has categorically stated that he had informed the police that he did not identify the accused persons. In para-16 he has stated that at the time of conduction of test identification parade (Ex.P/2) police personnel were present and it is they who informed him that the accused/appellant was also involved in the incident. He has stated that before the said identification parade he did not know the accused/appellant.

12. PW-12 Uttamchand is a witness of identification parade (Ex.P/6) in relation to other two accused persons. He has stated that at the time of recording his statement under Section 161 Cr.P.C. he did not disclose the name of any of the accused persons and had merely stated that he would identify them on seeing. It is relevant to note here that before this witness no identification parade was held. In para-16 he has stated that he had not informed the police as to who fired the gunshot. PW-13 Theyodor Lakda, armourer, has not stated anything against the accused/appellant. PW-14 Rajendra Singh, Head Constable, recorded

FIR and mere intimation. PW-18 William Toppo is the investigating officer. PW-19 Jagdish Yadav has described as to the manner in which the incident had taken place. However, in para-2 he has stated that as he was inside the vehicle he could not see anyone. PW-20 Jageram, Tehsildar, who conducted test identification parade Ex.P/2 has supported the prosecution case. He has stated that the accused/appellant was brought by the police with his face covered.

13. Close scrutiny of the evidence makes it clear that the accused/appellant has been convicted solely on the basis of his identification (Ex.P/2) done by PW-11 Anil Pandey. However, if the statement of Anil Pandey is seen, he has categorically stated that at the time of conducting test identification parade police personnel were present, it is the police personnel who informed him that the accused/appellant was also involved in the incident. He has stated that before the said identification parade he did not know the accused/appellant. He has also stated that the person who was brought for identification was not brought with covered face. This witness has further admitted the fact that there was no electric connection in his hotel and at the time of incident 3-4 gas burners were burning. As per prosecution case itself the incident had not taken place inside the Dhaba but it had taken place in a truck standing near Dhaba along with 25 other trucks. Considering this aspect of the case, identification of the accused/appellant at the instance of PW-11 Anil Pandey becomes doubtful. This apart, PW-2 Vishnugiri and PW-9 Indrajeet who are witnesses to test identification have also not supported the prosecution case. PW-20 Jageram, Tehsildar, who

conducted TIP has stated that the accused/appellant was brought with covered face whereas according to PW-11 Anil Pandey the accused/appellant was not brought with covered face. Thus, taking the totality of the case, the test identification parade of the accused/appellant does not inspire confidence of the Court and therefore, merely on the basis of such TIP it will not be safe for us to uphold the conviction of the accused/appellant.

14. So far as dock identification of the accused/appellant is concerned, when the incident had occurred in the dark night at a place where there was not sufficient light, the question of seeing the accused/appellant by PW-11 Anil Pandey does not arise. PW-11 Anil Pandey in para-1 of his deposition has stated that during the incident when one small vehicle came from other side, then in the light of that vehicle only he realized that the accused persons are dacoits otherwise he was under the impression that they were naxalite, meaning thereby that light was not sufficient at the place of occurrence to identify someone.

15. As regards memorandum of the accused/appellant (Ex.P/9), PW-6 Mohd. Aajam and PW-8 Sushant Kumar Paikra have not supported the prosecution case. Likewise, seizure (Ex.P/12) by which Rs.500/- was seized from the possession of the accused/appellant is also of no help to the prosecution and the same cannot be used against the appellant because the prosecution has not established the fact that the notes seized from the accused/appellant were the same which were looted in the incident.

16. On the basis of aforesaid analysis, we are of the considered

opinion that the prosecution has utterly failed to prove guilt of the accused/appellant beyond all reasonable doubt. The trial Court was not justified in holding the appellant guilty under Section 396 of IPC on the basis of evidence adduced by the prosecution. Being so, the judgment impugned, insofar as it relates to the accused/appellant, is liable to be set aside and the appellant is entitled for acquittal of the charge under Section 396 of IPC by extending him benefit of doubt.

17. In the result, the appeal is allowed. Conviction and sentence of the accused/appellant under Section 396 of IPC are set aside. He is acquitted of the said charge by giving him benefit of doubt. He is reported to be in jail, therefore, he be set free forthwith if not required in any other case.

Sd/

(Pritinker Diwaker)

Judge

Sd/

(I.S.Uboweja)

Judge