

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 1180 of 1998**Judgment reserved on: 04.11.2016Judgment delivered on: 30 .11.2016

Sunderlal, Aged about 28 years, S/o Shri Tirik Ram, R/o Village Podidalha,
Police Station Akaltara, Tahsil Janjgir, District Bilaspur.

---- Appellant**versus**

State of Madhya Pradesh (Now Chhattisgarh) Through the Police Station
Akaltara, Tahsil Janjgir, District Bilaspur.

---- Respondent**And****Criminal Appeal No. 1245 of 1998**

Santosh Kumar S/o. Ram Lal, Aged about 30 years, Resident of Village
Machhua, P.S. Akaltara, Tahsil Janjgir, District Bilaspur (M.P.) (Now C.G.)

Versus

State of Madhya Pradesh (Now Chhattisgarh)

---- Respondent

For Appellant(s)	:-	Shri Parag Kotecha & Shri C.K. Kesharwani, Advocates
For Respondent/State	:-	Mr. Sanjeev Pandey, Govt. Advocate.

SB: Hon'ble Shri Justice Anil Kumar Shukla**C A V Judgement**

1. Since Cr.A.No.1180 of 1998 filed by Sunderlal and Cr.A.No.1245 of 1998 filed by Santosh Kumar arise out of a common judgement dated 25-04-1998 passed by the Additional Sessions Judge, Janjgir in Sessions Trial No.126/1994, therefore, they are being disposed of by this common judgement.

2. Challenge in these appeals is to the judgement of conviction and order of sentence dated 25-04-1998 passed by the Additional Sessions Judge, Janjgir, District Bilaspur in Sessions Trial No. 126/1994 whereby & whereunder learned trial Judge after holding the accused/appellants guilty for the offence, convicted each of them under Sections 395 & 397 of the IPC and sentenced them to undergo rigorous imprisonment for seven years & to pay fine of Rs.1000/-, in default of payment of fine, to further undergo simple imprisonment for one year under Section 395 IPC and sentenced to undergo RI for seven years and to pay fine of Rs.500/, in default of payment of fine to further undergo simple imprisonment for six months under Section 397 of the IPC, and appellant Sunderlal has been convicted for offence punishable under Section 6/9 (b) of the Indian Explosive Act and sentenced to undergo RI for two years and to pay fine of Rs.500/-, in default of payment of fine to further undergo SI for six months, with a direction to run all the sentences concurrently.

3. The impugned judgement is challenged on the ground that without any evidence regarding identification, memorandum, seizure and eyewitness, learned trial Court has convicted and sentenced the appellants in the aforesaid manner.

4. Case of the prosecution, in brief, is that in the intervening night of 10/11-02-1993 at Village Madhua, the accused persons covering their faces, holding dead weapons entered the house of Hetram from back side door of the house and assaulted Devkibai and Yashwant with knife, looted Rs.17,000/-, gold & silver ornaments and silver coins. Near pond, they distributed the cash among them but looted ornaments (gold & silver) were kept with Sunder & Santosh for distribution. On the same day, at 2:15 a.m., complainant Hetram Singh lodged report (Ex. P-1). Assistant Sub Inspector Rameshchandra Verma reached the place of occurrence at about 3.30 a.m. and investigated the

matter. Spot map was prepared vide Ex. P-4 and the articles were seized vide Ex. P-10 to P-15. Thereafter Devkibai and Yashwant were sent for medical examination.

5. After completion of the investigation, charge sheet was filed before the Judicial Magistrate First Class, Janjgir, who, in turn, committed the case to the Court of Session. Learned Additional Sessions Judge received the case on transfer and conducted the trial. Both the appellants were charged for the offence under Sections 395, 397 of the IPC and appellant Sundarlal has been charged under Section 6/9 (b) of the Indian Explosive Act and the appellants have been convicted and sentenced as mentioned above.

6. In order to prove the guilt of the accused, the prosecution examined as many as 10 witnesses. Statements of the accused were recorded under Section 313 of the Code of Criminal Procedure, 1973 (in short 'the Cr.P.C.'), wherein they denied the circumstances appearing against them, pleaded innocence and false implication in the crime in question.

7. After affording opportunity of hearing and leading evidence to the parties, learned trial Court giving benefit of doubt and acquitted the co-accused persons namely, Atmaram, Devkumar, Madhuram and Girdhari of the charges framed against them.

8. I have heard learned counsel for the parties, perused the judgement impugned and record of the Court below.

9. Learned counsel appearing for the appellants would submit that the prosecution has failed to prove the ingredients of Section 395 and 397 of IPC. He would further submit that the appellants have not been identified by complainant – Hetram nor by the prosecution witnesses. After taking the appellants in custody, the identification parade has not been done by the

prosecution. The seizure and memorandum were done after eight months of the incident. The evidence of PW-6, Krishna Kumar is not trustworthy and the articles were not seized from the exclusive possession of the appellants. In the same set of facts, other co-accused persons were acquitted by the trial Court, therefore, the appellants deserve to be acquitted.

10. Learned Counsel for the State/respondent, supporting the impugned judgement, submitted that the conviction and sentence awarded by the learned Additional Sessions Judge do not warrant any interference by this Court.

11. In these appeals, the questions which arise for consideration are :

- (1) Whether the loot was committed by all the six accused persons in the house of complainant Hetram.
- (2) Whether the appellants/accused persons had used deadly weapon (knife) at the time of incident.
- (3) Whether the accused/appellant Sunderlal had kept explosive substance in his possession.
- (4) Whether the judgement of conviction and order of sentence passed by the Court below deserves to be set aside.

12. (PW-1) Devki, (PW-2) Hetram and his son (PW-3) Yashwant were present at home, at the time of incident. The incident took place at about 11-00 to 12-00 hours in the night. (PW-3) Yashwant was woke up by two persons and they caused injury on his fingers with knife. They asked him to take them to his father on which he took them to his father whereupon, two, three persons woke up Hetram (PW-2). As per the witnesses, all the accused persons had worn black clothes and covered their faces, therefore, they could not identify the accused. They were aged about 20-22 years. On threatening,

Hetram, he opened the almirah and gave Rs.1500/- and Rs.15,500/- from the locker to dacoits. Three persons were watching in the courtyard. In the meanwhile, Devkibai (PW-1) woke up, then her ornaments, girdle of waist (Kardhan), Anklet, silver bangle and nose pin were got removed and taken by them. Thereafter, the accused persons collected them and fled from the back side of the house where another person was standing.

13. At the time of incident, (PW-1) Devkibai, (PW-2) Hetram and (PW-3) Yashwant have not identified any of the accused. After the incident, the accused Atmaram, Devkumar, Madhuram, Girdhari (all acquitted by the trial Court) were arrested on 09-10-1993, Sunder and Santosh were arrested on 18-10-1993. They were interrogated in which Sunder's memorandum statement is Ex. P-17 and Santosh's memorandum statement is Ex. P-19. Thereafter, on the basis of memorandum of Sunder, vide Ex. P-18 seizure of one old girdle, 2 Nos. silver ankle, 2 Nos. silver coin was made near Podi Dalha Khamia Talab, Pethu Talab. Similarly on the basis of memorandum of Santosh (Ex. P-20, one golden nose pin, silver bangle, two silver coins, 2 Nos. Sutli Bombs were seized from his kolabadi. The statement of one of the witnesses Sukhdeo Singh could not be recorded. Whereas, statement of Krishna Kumar (PW-6) was recorded in the Court, who initially stated his profession as Contractor but in para 6 of his cross-examination, he disclosed himself as Journalist (Patrakar) and due to press work, he had been to Police Station (Thana). This witness has stated in his evidence that due to old case, he could not remember but while trying to remind him, on the memorandum of Sunder, he narrated that the ornaments were buried in the ground of Pethu Talab and disclosed about keeping the pistol under the seat of Rajdoot motorcycle. Here, it would be appropriate to make it clear that neither the pistol was used in the crime in question nor it was seized. The witness has certified his signature on paper

(Ex. P-17). Thereafter, he narrated about the seizure of Girdle, silver bangle, silver coins, as per Ex. P-18 from Pethu Talab Podi Dalha.

14. While trying to remind (PW-6) Krishna Kumar, he has disclosed about Santosh that ornaments were buried behind the pump. This statement is Ex.P-19. He also narrated about the seizure of golden nose pin, two silver bangles, two silver coins and sutli bomb. Vide seizure (Ex. P-20), the witness has stated that Pethu Talab has common pathway where he kept the ornaments behind the pump at Kolabadi which is also common pathway.

15. On perusal of the memorandums (Ex. P-17 & P-19) and the seizure memorandums (Ex. P-18 & P-20), it is clear that (a) the seizure witness belongs to press who used to go to police station for the press work (b) the seizure was made from open place (c) the seizure was made after 8 months of the incident.

16. Thus, the questions for consideration are whether;

- (a) At the time of incident, the family members of the complainant did not identify the accused persons?
- (b) The Test Identification Parade (TIP) of accused Sunder has not been conducted by the police though the TIP was conducted in respect of the other accused persons, who have been acquitted by the trial Court ?
- (c) So far as the offence under Section 6/9 of Indian Explosive Act is concerned, the Sutli Bomb is recovered at the instance of accused Santosh vide Ex. P-20, but the same has not been sent for Forensic Examination.

- (d) The accused can be held guilty on the basis of the seizures made vide Ex.18 & P-20 which was made on the basis of memo Ex.P-17 & P-19.

17. In this regard, Illustration (a) of Section 114 of the Evidence Act may be referred to:

“114. Court may presume existence of certain facts.-

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XXXXX

XXXXX

(a) That a man who is 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.”

18. In **Sanwat Khan and another -vs- State of Rajasthan, AIR 1956 SC 54**, on similar issue, it was observed as follows:-

“ In our judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof.” This judgment was relied in **Sheo Nath -vs- The State of Uttar Pradesh, AIR 1970 SC 535.**”

19. In **State of Rajasthan -vs- Talevar and Another, (2011) 11 SCC 666**, the question again came for consideration before the Supreme Court as to whether adverse inference could be drawn against the accused merely on the basis of recoveries made on their disclosure statements? Many earlier

decisions were quoted in this regard vide para(s), 13 to 17, which read as follows:

“13. In **Gulab Chand -vs- State of M.P., (1995) 3 SCC 574,** this court upheld the conviction for committing dacoity on the basis of recovery of ornaments of the deceased from the possession of the person accused of robbery and murder immediately after the occurrence. In **Geejaganda Somnath -vs- State of Karnataka, (2007) 9 SCC 315,** this Court relied on the judgment in Gulab Chand and observed: (Geejaganda case, SCC p. 328, para 28)

“28.....'4 that simply on the recovery of stolen articles, no reference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. But culpability for the aforesaid offences will depend on the facts and circumstances of the case and the nature of evidence adduced.”

It has been indicated by this Court in Sanwat Khan -Vs- State of Rajasthan that no hard-and-fast rule can be laid down as to what inference should be drawn from certain circumstances.

14. In **Tulsiram Kanu -vs- State, AIR 1954 SC 1,** this Court has indicated that the presumption permitted to be drawn under Section 114 Illustration (a) of Evidence Act, 1872 has to be drawn under the important time factor. If the ornaments in possession of the deceased are found in possession of a person soon after the murder, a presumption of guilty may be permitted. But if a long period has expired in the interval, the presumption cannot be drawn having regard to the circumstances of the case.

15. In **Earabhadrapa – vs- State of Karnataka, (1983) 2 SCC 330,** this Court held that the nature of the presumption under illustration (a) of Section 114 of the Evidence Act must depend upon the nature of evidence adduced. No fixed time-limit can be laid down to determine whether possession is recent or otherwise. Each case must be judged on its own

facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according “as the stolen article is or is not calculated to pass readily from hand to hand”. If the stolen articles were such as were not likely to pass readily from hand to hand, the period of one year that elapsed could not be said to be too long particularly when the appellant had been absconding during that period.

16. Following such a reasoning, in **Sanjay -vs- State (NCT of Delhi), (2001) 3 SCC 190** (SCC p. 205, para 29), this Court upheld the conviction by the trial Court since—

“disclosure statements were made by the accused persons on the next day of the commission of the offence and the property of the deceased was recovered at their instance from the places where they had kept such properties, on the same day”.

(emphasis supplied)

The Court found that the trial Court was justified in holding that the disclosure statement of the accused persons and huge recoveries from them at their instance on the very next day of the incident by itself was a sufficient circumstance which clearly went to show that the accused persons had joined hands to commit the offence of robbery. Therefore, recent and unexplained possession of stolen properties will be taken to be presumptive evidence of the charge of murder as well.

17. In **Ronny -vs- State of Maharashtra, (1998) 3 SCC 625**, this Court held that apropos the recovery of articles belonging to the family of the deceased from the possession of the appellants soon after the robbery and the murder of the deceased remained unexplained by the accused, and so the presumption under illustration (a) of Section 114 of the Evidence Act would be attracted: (Ronny case, SCC p. 646, para 30)

“30. It needs no discussion to conclude that the murder and the robbery of the articles were found to be part of the same transaction. The irresistible conclusion would, therefore, be that the appellants and no one else had committed the three murders and the robbery.”

(See also **Baiju – vs- State of M.P., (1978) 1 SCC 588** and **Mukund -vs- State of M.P., (1997) 10 SCC 130**).”

20. In view of the settled position of law, in the facts and circumstances of these cases, there is no additional evidence except memorandum and seizure and the witnesses of memorandum and seizure cannot be said to be complete and independent witnesses. The seizure was made from the open place after eight months of the incident. Keeping of the seized property by the appellants in the open place for a long period of eight months is quite unnatural. Therefore, the prosecution case against the appellants is not proved beyond reasonable doubt.

21. Accordingly, both the appeals are allowed. The impugned judgment of conviction and order of sentence is set aside. Both the appellants are acquitted of the charges framed against them under Sections 395, 397 of the IPC and appellant Sunderlal is acquitted of the charges framed against him under Section 6/9 (b) of the Indian Explosive Act.

22. The appellants are on bail. Their bail bonds are not discharged at this stage and shall remain operative for a further period of six months from today in view of the provisions contained in Section 437-A of the Cr.P.C.

Sd/-
(Anil Kumar Shukla)
Judge