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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

1. CRA-S-1032-SB of 2003

Mohinder Kumar Appellant

Versus

State of U.T. Chandigarh Respondent

2. CRA-S-1117-SB of 2003

Om Pal and others Appellants

Versus

State of U.T. Chandigarh Respondent

3. CRA-S-1208-SB of 2003

Vinod Kumar and another Appellants

Versus

State of U.T. Chandigarh Respondent

Date of Decision : December 14, 2016

CORAM : HON'BLE MR. JUSTICE DR. SHEKHER DHAWAN

Present Mr. Om Pal Sharma, Advocate,
for the appellants and *amicus curiae*
for Om Pal, appellant No.1 in CRA-S-1117-SB-2003.

Mr. Rajiv Sharma, Advocate,
for the respondent- U.T. Chandigarh.

SHEKHER DHAWAN, J.

The above titled three appeals are directed against the common

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judgment of conviction and order of sentence dated 26.04.2003 passed by learned Additional Sessions Judge, Chandigarh whereby all the accused-appellants were convicted under Section 395 IPC and were sentenced as under:-

Under Section	Sentence	In default
395 IPC	to undergo Rigorous Imprisonment for a period of 8 years and to pay a fine of Rs.500/- each.	to further undergo RI for three months.

2. Facts relevant for the purpose of decision of present appeals; that the complainant – Yoginder Singh reported to the police that he used to reside at village Kishangarh, Chandigarh and on the night intervening March 29 and March 30, 1998, he was sleeping in the *verandha* of his house. His two sons were sleeping in another room and his wife and daughter with small child were also sleeping there. At about 2.00 AM (mid night), he heard ring of a bell of his house and had gone to the main gate of his house and noticed that four persons in Commando uniform were standing at the gate. Two out of them were of the age of 26-27 years with small beard and mustache and were having red coloured headgear. One of them was wearing *khaki* pant and shirt and another was having black coloured *pant* and check-shirt. Besides them, some other persons were also standing outside who were also wearing headgears. They asked the complainant that they were police officials and wanted to search his house. Complainant opened the gate and 6-7 persons entered his house. Two of

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them were armed with something like pistols and rest were armed with *dandas*. They ransacked the entire house and belongings of the complainant and took away currency notes of Rs.23,000/-, two gold rings, one gold chain, three silver anklets and one piece of silver weighing four *tolas* and a wrist watch. They bolted the room, where his sons were sleeping from outside. One of the accused persons was asking that their boss was sitting in the Gypsy. The accused persons had taken away all the articles with the intention to show the same to the boss who was sitting in the Gypsy. The complainant had gone to the main gate and suspecting some foul play, gave bell to his neighbour Puran Chand. On this, accused persons fled away alongwith looted articles and currency notes after advancing threats to the complainant.

3. During investigation, accused persons were arrested in another FIR bearing No.60 dated 16.04.1998 and they were interrogated in this case also. After completion of investigation proceedings, initially charge was framed on 18.09.1998 against four accused, namely, Vinod Kumar, Mohinder Kumar, Sunil Kumar and Om Pal. Vide subsequent order dated 22.4.1999, charge was framed against five accused including Om Parkash. On 1.7.2000, charge was re-framed against six accused persons including Rohit alias Rohit Kumar. The charge was ultimately re-framed against all the accused persons, namely, Vinod Kumar, Mohinder Kumar, Sunil Kumar, Om Pal, Om Parkash, Rohit alias Rohit Kumar and Rohtas alias Pappi on 4.4.2001, when all the accused were arrested and were facing the trial. They

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pleaded not guilty and claimed trial. Learned trial Judge completed various proceedings of the trial including recording of evidence of the prosecution witnesses and examination of accused under Section 313 Cr.P.C. After considering the prosecution evidence and the defence version on record, learned Court below held six of the accused persons [appellants herein] to be guilty and convicted them for commission of offence under Section 395 of IPC and sentenced them on 26.04.2003 and accused Rohtas alias Pappi was acquitted of the charge.

4. Aggrieved of passing of judgment of conviction and order of sentence, all the six convicts are before this Court by way of present three separate appeals.

5. Learned counsel for the appellants while pleading for innocence of all the appellants, contended that there is practically no evidence against the appellants because all the three material witnesses including complainant/victim, Yoginder Singh, who again appeared as PW-3 on 31.07.2002 and neighbour, Sumer Singh [PW-5] have not supported the prosecution case at all. PW-4, Rakesh Kumar son of Yoginder Singh, complainant, was examined and he had not supported the prosecution case in toto, rather took the plea that he had seen three accused-persons, namely, Vinod Kumar, Om Pal and Mohinder Kumar on the spot. So, the prosecution case is not proved at all.

6. Learned counsel for the appellants further contended that the accused persons were facing trial under Section 395 IPC as they had taken

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away gold & silver jewellery, currency notes and wrist watch of the complainant, but no recovery was effected from the possession of either of the accused persons during investigation. The only recovery, to which the Investigating Officer has made reference to, is in another case bearing FIR No. 60 dated 16.4.998 and the Court below has completely ignored all these facts while recording the judgment of conviction and order of sentence and the appeals be accepted.

7. Learned counsel representing the Union Territory, Chandigarh contended that Yoginder Singh, complainant had supported the prosecution case when he was examined as PW-1 on 15.7.1999 and 11.10.2000. The remaining prosecution witnesses, who are eye-witnesses had also supported the prosecution case. However, learned counsel representing U.T., fairly conceded that their statements were recorded before framing of charge on 4.4.2001, when all the accused of this case were arrested and the trial had begun *de novo*.

8. There is no dispute on the legal proposition that the testimony of the prosecution witnesses, who are appearing as material witnesses, including the complainant and recovery witnesses, is to be looked into when the charge against the accused persons facing the trial is framed. In the present case, trial started on 4.4.2001, when the charge was re-framed and the evidence led after that date is legal piece of evidence, which can be considered for recording judgment of conviction.

9. Taking the prosecution evidence as available on the file after

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4.4.2001, Yoginder Singh, complainant-victim of this case, who was examined on 31.07.2002 as PW-3, has not supported the prosecution case at all. He failed to identify the accused persons facing the trial. PW-5 Sumer Singh, neighbour of the complainant and an eye-witness to the alleged occurrence, has also not supported the prosecution case and turned hostile. PW-4, Rakesh Kumar, who is son of complainant, Yoginder Singh had not supported the case of the prosecution in *toto*, but he simply mentioned in his cross-examination that he had identified Vinod Kumar, Mohinder Singh and Om Pal. If the entire statement of PW-4, Rakesh Kumar is looked into in the light of statement of PW-3, Yoginder Singh, the testimony of Rakesh Kumar [PW-4] cannot be relied upon because the original version of the complainant is that the accused persons had locked his sons in a room and fled away with gold and silver jewellery and other valuable articles. Meaning thereby that PW-4 Rakesh Kumar had no occasion or opportunity to identify the assailants. There is no 'Test Identification Parade' conducted in this case for reasons being more than one. At any rate, there is no eye-witness account to the alleged occurrence.

10. Now coming to the point of recovery. As per statement of PW10, ASI Karan Singh, recovery of two pistols and cartridges were effected, but those cannot be connected with the present case because in this case, there is no charge framed against the appellants under Section 25 of the Arms Act. There is no recovery of gold or silver jewellery, currency notes or wrist watch etc. from either of the accused persons.

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11. Taking into consideration the entire prosecution evidence, this Court is of the considered view that there was no material or evidence available on the file so as to connect the appellants with commission of offence under Section 395 IPC and learned trial Judge completely ignored these facts while recording judgment of conviction and order of sentence. Resultantly, all the three appeals are accepted the judgment of conviction and order of sentence dated 26.04.2003 passed by learned Additional Sessions Judge, Chandigarh are set-aside and the appellants are acquitted of the charge. The appellants are on bail. Their bail/surety bonds shall stand discharged in this case.

(SHEKHER DHAWAN)
JUDGE

December 14, 2016

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Whether speaking/reasoned	:	Yes
Whether Reportable	:	Yes