

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.1742 of 1997**

Chhotu Khan alias Mushtak Khan alias Kaju Khan, son of Shri Mukhtyar Khan, aged about 24 years, resident of Takiyapara, Durg, District Durg, M.P. (now Chhattisgarh)

---- **Appellant**

versus

State of Madhya Pradesh (now Chhattisgarh) through P.S. Fulgaon, District Durg

--- **Respondent**

For Appellant	:	Shri Goutam Khetrapal, Advocate
For State/Respondent	:	Shri Avinash K. Mishra, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

Judgment on Board

4.12.2017

1. This appeal has been preferred against the judgment dated 9.8.1997 passed in Sessions Trial No.537 of 1993 by the 2nd Additional Sessions Judge, Durg convicting and sentencing present Appellant Chhotu as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 392 read with Section 397 of the Indian Penal Code	Rigorous Imprisonment for 7 years and fine of Rs.100/- with default stipulation

2. It is alleged that on 4.9.1992 at about 7:00–8:00 p.m., Complainant Ishwar Sahu (PW1) was going from Village Mudpar to his Village Borsi on his bicycle. He was having a sewing machine of Usha make and a radio of Murfi make with him. Prior to 1 Km. from Village Borsi, Appellant Chhotu caught and pulled his bicycle from behind as a result of which he fell down. Appellant Chhotu was accompanied by two other persons and those persons had a weapon made of iron. All of them assaulted him with hands, fists and the said weapon. They roped in him with a tree by a wire. They also gagged his mouth with a cloth. Thereafter, they looted

his bicycle, sewing machine and radio and fled from there. In the next morning, at about 6:00 a.m., he became conscious. He shouted. Dheluram (PW2) and Kejuram (not examined by the prosecution) made him free from the tree. Dehati Nalishi (Ex.P1) was recorded. Complainant Ishwar was medically examined by Dr. S.P. Saxena (PW3). His report is Ex.P7. Purchase bill of the radio (Ex.P5) and purchase bill of the sewing machine (Ex.P6) were seized vide seizure memo (Ex.P4). Test identification parade was conducted vide Ex.P2 in which Appellant Chhotu was identified. Acquitted accused Jugnu was not identified. Vide Ex.P3, acquitted accused Jeevdhan was identified. Memorandum statement (Ex.P10) of Appellant Chhotu was recorded. Vide Ex.P11, one Usha make sewing machine was seized from Appellant Chhotu. On completion of the investigation, a charge-sheet was filed against accused Chhotu, Jugnu, Jeevdhan and Sheikh Sattar for offences punishable under Sections 394, 397, 411, 34 of the Indian Penal Code. Charges were framed against Chhotu, Jugnu and Jeevdhan under Sections 392, 392/397 of the Indian Penal Code and against accused Sheikh Sattar charge was framed under Section 411 of the Indian Penal Code.

3. In support of its case, the prosecution examined as many as 7 witnesses. Statements of the accused were also recorded under Section 313 of the Code of Criminal Procedure in which they denied the circumstances appearing against them, pleaded innocence and false implication.
4. Vide the impugned judgment, accused Jugnu and Jeevdhan are acquitted. Accused Sheikh Sattar has been convicted under Section 411 of the Indian Penal Code and sentenced with the

period already undergone by him. Accused/present Appellant Chhotu has been convicted and sentenced under Section 392 read with Section 397 of the Indian Penal Code as mentioned in the first paragraph of this judgment. Hence, this appeal by accused Chhotu.

5. Learned Counsel appearing for accused/Appellant Chhotu argued that the test identification parade was conducted belatedly and before the said parade, accused were shown to the Complainant in the police station. Memorandum and seizure witnesses have not supported the case of the prosecution. Statement of the Executive Magistrate, who conducted the test identification parade, was not recorded in the Court. No dangerous weapon was used in the alleged offence. Therefore, no offence under Section 397 of the Indian Penal Code is made out. The Trial court did not properly appreciate the evidence available on record.
6. Per contra, Learned Counsel appearing for the State supported the impugned judgment.
7. I have heard Learned Counsel appearing for the parties and perused the record with utmost circumspection.
8. Complainant Ishwar Sahu (PW1) has stated that on 4.9.1992 in the evening hours he was going from Village Mudpar to his Village Borsi on his bicycle. He was having a sewing machine and a radio with him. Prior to 1 Km. from Village Borsi, one person pulled handle of his bicycle as a result of which he fell down. Two more persons came there from his behind. All of them assaulted him with hands, fists and an article made of iron. They dragged him to a nearby agricultural field, roped in him with a tree and gagged his mouth with a handkerchief. He has further stated that he became

conscious in the next morning at about 5:00 a.m. He anyhow removed the handkerchief from his mouth and shouted. Dheluram (PW2) and one other person reached there and made him free. On becoming conscious, he saw that his bicycle, sewing machine and radio were not there. Thereafter, he lodged the report (Ex.P1).

9. Statement of Ishwar (PW1) has been duly supported by Dheluram (PW2). He has stated that in the morning, he came to know that one person was shouting in the agricultural field. He went there and saw that one person (the Complainant) was roped in with a tree. He made him free.
10. Dr. S.P. Saxena (PW3) examined Complainant Ishwar. His report is Ex.P7. He found one incised wound, four contusions and one lacerated wound on the body of Ishwar.
11. From the above, it is clear that at the time of occurrence, three persons had assaulted Complainant Ishwar and looted his bicycle, sewing machine and radio. The Complainant had sustained the above stated injuries.
12. Dehati Nalishi (Ex.P1) was promptly recorded soon after the incident in which accused/Appellant Chhotu is named. In paragraph 4 of his examination-in-chief, Ishwar (PW1) has also supported the above evidence and has stated that out of the three assailants, one was accused/Appellant Chhotu. Appellant Chhotu was identified by him in the Court also. Vide the test identification parade (Ex.P2), Appellant Chhotu was identified by the Complainant. Though in paragraph 10 of his deposition, Ishwar (PW1) has stated that he had seen the three assailants in Police Station Utai and thereafter he identified as stated above in the jail during the test identification parade, yet in Dehati Nalishi (Ex.P1)

accused/Appellant Chhotu is named. In Court also, he has identified Appellant Chhotu and in the test identification parade also, he has identified him. Thus, it is clear that Appellant Chhotu was involved in the occurrence.

13. Vide Ex.P4, two bills (Ex.P5 and P6) relating to purchase of Murfi make radio and Usha make sewing machine were seized. As per Ex.P6, serial number of the sewing machine is SN32590. Investigating Officer R.K. Rai (PW6) has deposed that as per memorandum statement (Ex.P10) of Appellant Chhotu, he had seized one sewing machine of Usha make vide Ex.P11 from Appellant Chhotu. In the seizure memo (Ex.P11) also, serial number of the sewing machine is mentioned as SN32590. Thus, from the above, it is also clear that the looted sewing machine was recovered and seized from Appellant Chhotu.
14. As per the medical report (Ex.P7), Complainant Ishwar (PW1) had sustained total 6 injuries which were not grievous in nature. The article/weapon used in the offence has also not been seized. The Complainant has not stated anything about the type and size of the article/weapon used in the offence. As per the Court statement of Ishwar (PW1), three assailants were involved in the occurrence. Out of them, one assailant was having a long article made of iron and the Complainant was assaulted by hands, fists and the said article made of iron. In his Court statement, Ishwar has nowhere stated that the person who was having the said article made of iron was Appellant Chhotu himself. Even if it is accepted for the sake of argument that the said article made of iron was a deadly weapon, there is no evidence on record to show that the said article/weapon was used by Appellant Chhotu for the assault.

- 15.** Therefore, in my considered opinion, no case is made out under Section 397 of the Indian Penal Code against Appellant Chhotu. Rather, the offence committed by him falls only under Section 394 of the Indian Penal Code. Therefore, the conviction and sentence imposed upon Appellant Chhotu under Section 392 read with Section 397 of the Indian Penal Code is set aside and instead he is convicted under Section 394 of the Indian Penal Code.
- 16.** So far sentence part is concerned, Appellant Chhotu has already undergone about 2½ years. He is facing the *lis* since 1992. He has no criminal antecedent. Therefore, taking into consideration the facts and circumstances of the case, I am of the opinion that sentencing Appellant Chhotu with the period already undergone by him and imposing upon him a fine of Rs.10,000/- would meet the interest of justice. Ordered accordingly. This amount of fine shall be payable within 2 months from the date of receipt of a copy of this judgment. In default of payment of fine, Appellant Chhotu shall be liable to undergo rigorous imprisonment for 1 year. If any amount has already been deposited towards fine, the same shall be adjusted against the amount of fine imposed today.
- 17.** Consequently, the appeal is allowed in part to the extent indicated above.
- 18.** Record of the Court below be sent back along with a copy of this judgment forthwith for information and necessary compliance.

Sd/-
(Arvind Singh Chandel)
Judge