

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 67 of 2012****Order Reserved on 06.04.2017****Order Delivered on 03.05.2017**

1. Vijay Shanker Bhoratiya S/o Ram Bilas Bhoratiya, aged 41 years,
2. Sanjay Bhoratiya, S/o Ram Bilas Bhoratiya, aged about 33 years,
Both R/o village Asandih, P.S. Ragunathnagar, District Sarguja, Chhattisgarh.

---- Appellants (in Jail)**Versus**

State of Chhattisgarh through Station House Officer, police station
Ragunathnagar, District Sarguja, Chhattisgarh.

---- Respondent

For the Appellants	:	Dr. N.K. Shukla Senior Advocate with Shri Shakti Raj Sinha, Advocate.
For the Respondent/ State	:	Shri Adhiraj Surana, Deputy Government Advocate.

Hon'ble Shri Justice Pritinker Diwaker**Hon'ble Shri Justice Rajendra Chandra Singh Samant****CAV JUDGMENT****Per R.C.S. Samant, J.**

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 26.12.2011 passed by the Learned First Additional Sessions Judge, Surajpur, District Sarguja, Chhattisgarh in Sessions Trial No. 244 of 2007 whereby and whereunder the Learned First Additional Sessions Judge has convicted appellant No.1 – Vijay Shanker Bhoratiya under Section 396 of the Indian Penal Code (for short 'IPC') and Section 25 of the Arms Act and sentenced them to undergo imprisonment for life and

fine of Rs.100/- and RI for 7 years and to pay fine of Rs.100/- respectively, in default of payment of fine to further undergo imprisonment for 10 days. Both the substantive jail sentences were directed to run concurrently. Further, appellant No.2 – Sanjay Bhoratiya was convicted under Section 396 of the IPC and sentenced with life imprisonment alongwith fine of Rs.100/- with default stipulation.

2. The case of the prosecution, in brief, is that in the intervening night of 7th and 8th November, 2006 at about 1:00 am, complainant – Ramvriksh Choudhary (PW-11) alongwith Kodu Choudhary (deceased), Alif Ansari, Ramesh Choudhary, Hasim Ansari (PW-7), Abdul Karim Ansari (PW-16) and others were driving the herd of 150 numbers of cattle from Kotadol to Wadrafnagar and when they reached near the forest of village Sonhat, they took a break for taking rest. At that time, the appellants and six others of village Asandih came on the spot and after waking up complainant Ramvriksh Choudhary (PW-11) and others, they demanded for money. Ramvriksh Choudhary (PW-11) gave Rs.6,000/- and Alif Ansari gave Rs.20,000/-, but deceased Kodu Choudhary told that he has no money. On hearing this, appellant No.1 – Vijay Shanker Bhoratiya slapped him and then, Kodu Choudhary gave Rs.600/- to him. Thereafter, Appellant No.1 – Vijay Shanker Bhoratiya used abusive words for deceased Kodu Choudhary for evading to give money and shot him with a country-made gun (katta), which caused injuries on his abdomen. Kodu Choudhary succumbed to the injuries sustained by him.

3. Ramvriksh Choudhary (PW-11) gave information in police station Ragunathnagar on which merg intimation Ex. P/18 was recorded. The First

Information Report Ex. P/19 was recorded on the information of Ramvriksh Choudhary (PW-11). The offence was registered under Section 302 read with Section 34 against the appellants. Inquest on the dead-body of Kodu Choudhary was conducted vide Ex. P/7. Dr. R.B. Prajapati (PW-10) conducted autopsy of the deceased and opined that the injuries caused by firearm resulted in haemorrhagic shock which caused death of the deceased. During the investigation, some clothes having blood stains were recovered from the spot vide Ex. P/1. Clothes of the deceased preserved during postmortem examination were seized vide Ex. P/4. One woolen cap and a pair of slippers were seized from the spot vide Ex. P/9. Appellant No.1 – Vijay Shanker Bhoratiya was interrogated in custody, who gave memorandum statement vide Ex. P/11, Rs.800/- cash was seized from his possession vide Ex. P/12. A country-made firearm wrapped in polythene was recovered at his instance from a place in jungle vide Ex. P/13. The Test Identification Parade vide Ex. P/20, was conducted by the Executive Magistrate in which both the appellants were identified by complainant – Ramvriksh Choudhary (PW-11) and Dharamu Choudhary (PW-12). A spot map of the place of incident was prepared vide Ex. P/22. The documents about legal possession of the cattle were seized from the possession of Ramvriksh Choudhary (PW-11) vide Ex. P/24. The District Magistrate granted the sanction for prosecution under the Arms Act. On completion of investigation, the appellants and co-accused Devsharan were charge-sheeted and rest of the co-accused persons remained absconding.

4. Appellant No.1 – Vijay Shanker Bhoratiya was charged for the offence under Section 396 of the IPC and Sections 25 and 27 of the Arms Act. Appellant No.2 – Sanjay Bhoratiya was charged for the offence under

Section 396 of the IPC. Co-accused – Devsharan was also charged for the offence under Section 396 of the IPC. The appellants and co-accused denied the charges framed against them. The prosecution examined as many as 23 witnesses. The defence examined only one witness. On being examined under Section 313 of the Cr.P.C., denying all the incriminating evidence against them, the appellants pleaded innocence and false implication. After giving opportunity of hearing and leading evidence to the prosecution and the defence, the impugned judgment has been passed by the trial Court acquitting co-accused Devsharan and convicting and sentencing the accused appellants as mentioned above. Hence, this appeal.

5. The grounds in the appeal are that the appellants have been erroneously convicted by the trial court without there being any basis of reliable evidence of the prosecution. Statements of the eyewitnesses are contradictory to each other. The complainant and the witnesses were not previously acquainted with the appellants even then named FIR was recorded, which raises a doubt. Hence, this appeal may be allowed. In the alternative, it is prayed that if this court is not inclined to acquit the appellants, then this Court may take into consideration the fact that the appellants are continuously in jail since their date of arrest i.e. 28.11.2006.

6. It is submitted by learned counsel for the appellants that the trial court has failed to appreciate the fact that some of the witnesses, whose statements have been relied upon by the trial Court, have not been cross-examined on behalf of the accused. Hence, such statements of the witnesses could not have been made the basis for conviction of the appellants. It is further submitted that presently the appellants have already

undergone jail sentence of more than 10 years and therefore, considering the fact that for conviction under Section 396 of the IPC, life imprisonment is not mandatory, the court may be pleased to order for rigorous imprisonment for the period already undergone by the accused persons in this case.

7. Learned State counsel opposed the grounds and arguments submitted on behalf of the appellants.

8. Considering the material on record and the arguments submitted on behalf of both the sides, the question which arises for consideration in this appeal is, whether the conviction against the appellants is supported by the evidence of prosecution beyond all reasonable doubt?

9. The main witness in this case is complainant Ramvriksh Choudhary (PW-11). He stated that he alongwith deceased Kodu Choudhary and others were driving the herd of cattle from Kotadol to Wadrafnagar. When they reached near the forest of village Sonhat, they took a break for taking rest. At about 12:00 – 1:00 am, the appellants and six others of village Asandih came to the spot, waking up and shouting on him and others, they demanded for money with threat. He gave Rs.6,000/- to appellant No.1, but Kodu Choudhary refused to give money. On his refusal, appellant No.1 shot him with a country-made firearm on his abdomen causing injury which caused his death. This witness further stated that prior to the incident, he knew about the appellants and he identified them in the court. He also stated about giving merg intimation Ex. P/18 and lodging First Information Report Ex. P/19. In cross-examination, he denied all the suggestions given in defence. No question has been put to him in rebuttal for his statement

about offence committed by the appellants. His deposition has been closed with a note that cross-examination is postponed for reasons mentioned in the order-sheet. Thereafter, he has not been cross-examined. Order sheet dated 19.10.2010, mentions that further cross-examination of Ramvriksh Choudhary (PW-11) was postponed because of a death reference held on that day. Ramvriksh Choudhary (PW-11) again gave his appearance on 23.10.2010 but could not be cross-examined due to paucity of time.

10. Dharamu Choudhary (PW-12) has supported the statement of Ramvriksh Choudhary (PW-11) though he has not identified all the accused persons. He was declared hostile by the prosecution. His deposition has also ended with a note that for the reasons mentioned in the order-sheet, the cross-examination is postponed. The court allowed the prayer of defence counsel by postponing the cross-examination. Hasim Ansari (PW-7) has stated that he was informed by Ramvriksh Choudhary (PW-11) that the appellants and others demanded money and committed the offence of robbery and murder of Kodu Choudhary. This shows that he is not an eyewitness to the incident. Anil Kumar Patel (PW-14) also stated that he was informed by Ramvriksh Choudhary (PW-11) his cross-examination was deferred. Deposition of Kailash (PW-15) is complete and he was informed about the incident by Ramvriksh Choudhary (PW-11). Abdul Karim Ansari (PW-16) is also a hearsay witness, who got information about the incident from Ramvriksh Choudhary (PW-11). He has been cross-examined at length by the defence counsel, however, his cross-examination was interrupted because the court time was over. Similar is the statement of Asir Ansari (PW-18). The cross-examination of this witness is complete. Ravichand Kushwaha (PW-19) is also a hearsay witness, but his statement

is complete.

11. Rajeshwar Choudhary (PW-21) was an eyewitness to the incident. He identified the appellants in the court and narrated about committing the offence of robbery. In cross-examination, he admitted that he identified the appellants for the first time before the Court. He denied all the suggestions given in defence, however, he stated that he was acquainted to the appellants prior to the date of incident. Hence, the identification of the appellants by this witness does not give rise to any adverse effect.

12. Lachhandhari (PW-1) is a seizure witness and has been declared hostile. Constable, Vikash Mishra (PW-2) is a witness, who helped in the inquest and postmortem procedure. Ajay Singh (PW-4) is witnessed Ex. P/7. ASI, Theodor Lakda (PW-5) is witness, who has examined the seized country-made firearm vide Ex. P/8 and reported that it was in working condition. Head-Constable, Krishnapal Singh (PW-6) has conducted the examination of country-made firearm. Shivshankar Yadav (PW-9) is the witness of memorandum of appellant No.1 – Vijay Shankar Ex. P/11 and seizure vide Exs. P/12 and P/13. He has been declared hostile and has not supported the case of the prosecution.

13. Dr. R.B. Prajapati (PW-10) has conducted the postmortem examination of deceased Kodu Choudhary vide his report Ex. P/16 and reported that excessive bleeding from the injury caused due to gunshot resulted in his death which is an un-rebutted statement. Inspector, J.R. Sahara (PW-13) conducted a part of investigation by preparing spot map Ex. P/22 and the seizure memos from the spot vide Ex. P/1. O.P. Singh (PW-

17), the clerk from the office of District Magistrate, Ambikapur has proved the sanction for prosecution vide Ex.P/23 under the Arms Act. D.R. Kashyap (PW-22) is the Executive Magistrate who conducted TIP of co-accused Devsharan who has been acquitted by the trial Court. Hence, his statement has no relevance. J.Toppo (PW-23), Investigating Officer, who has proved the investigative procedures conducted by him.

14. Coming back to the main witnesses of the incident, statements of Ramvriksh Choudhary (PW-11) and Rajeshwar Choudhary (PW-21) are the most relevant statements which is clear and unrebutted against the appellants about committing the offence of robbery and causing death of deceased Kodu Choudhary by using a country-made firearm by appellant No.1 – Vijay Shankar. The depositions of witnesses Ramvriksh Choudhary (PW-11), Dharamu Choudhary (PW-12) and Abdul Karim Ansari (PW-16) were not complete as their cross-examination was deferred as mentioned in the deposition sheets as well as in the order-sheets. On perusal of the order-sheets of the trial court, it is evident that on 7.7.2011, counsel for the appellant/ accused persons made a statement before the Court that there is no requirement of cross-examining the witnesses whose cross-examination has been deferred and on the basis of this statement the evidence of the prosecution was declared closed.

15. Section 137 of the Evidence Act provides that on appearance of the witness, there shall be examination-in-chief, then cross-examination and re-examination, if needed.

16. Ramvriksh Choudhary (PW-11), Dharamu Choudhary (PW-12) and Abdul Karim Ansari (PW-16) have been cross-examined at length when their cross-examination was deferred, whereas cross-examination of Anil Kumar Patel (PW-14) has been deferred on the request of counsel for defence., although, he is a hearsay witness. Under these circumstances, it has to be examined that whether this situation has been caused any prejudice against the appellants? When these witnesses were present before the Court, the counsel for defence was present on all occasions. Fourth proviso to amended provision of Section 309(2)(c) of the Cr.P.C. provides:

'(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the court may, if it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.'

Although there is no order of the Court below dispensing with the cross-examination of this witness whose cross-examination has been deferred on the request of counsel for defence, but the cross-examination which was deferred, has been closed only on the statement made by counsel for defence himself.

17. No reason has been found on the basis of the submission made to interfere with the findings of the Court below against the appellants because no prejudice seems to have been caused against the appellants in this case as well as they were defended by the counsel of their choice who cross-examined the witnesses and then availed the opportunity of opening

and closing of cross-examination of the witnesses, whose cross-examination was deferred on his request.

18. Reliance has been placed on the judgment of Calcutta High Court in the case of **Dever Part Builders Private Limited and Others vs. Smt. Madhuri Jalan and others** reported in **AIR 2002 CALCUTTA 281** in which it was held that Evidence of person with unfinished cross-examination shall not be admissible. This is a case in which the defence has fully availed the opportunity of the cross-examination. Hence, this case law does not help the appellants.

19. Reliance has also been placed on the judgments of **K.M. Ibrahim alias Bava and Others etc. vs. State of Karnataka** reported in **2000 CRI.L.J. 197 (Karnataka High Court)**, **Khalaksing and others v. State of M.P.** reported in **1992 CRI. L.J. 1150 (Madhya Pradesh High Court)**, **Mohd. Guljar vs. State of Bihar** reported in **2013 CRI.L.J. 352 (Patna High Court)** and **Atum Lengmei and another vs. Manipur Administratio** reported in **AIR 1962 MANIPUR 7 (Manipur High Court)** on the point of appreciation evidence which has been given due consideration in this case.

20. Section 465 of the Cr.P.C. provides as follows:

'465. Finding or sentence when reversible by reason of error, omission or irregularity. —(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings

before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.'

21. In accordance with the aforesaid provision, there is no such error or irregularity in this case which can be regarded as having occasion of failure of justice. Hence, the finding of the trial Court convicting the appellants/ accused persons as mentioned hereinabove does not suffer from any infirmity. Finding of conviction against the appellants in the impugned judgment cannot be interfered with.

22 Now, we shall consider the submission made by counsel for the appellant with regard to reduction of sentence of imprisonment awarded to the appellants. In a case of dacoity with murder, the options of awarding punishment are death or imprisonment for life, or rigorous imprisonment for a term which may extend to 10 years alongwith fine. It is the discretion, which the court has to exercise. However, considering the facts and circumstances of the case, the evidence adduced by the prosecution is clear that appellant No.1 – Vijay Shankar Rathiya fired the country-made firearm causing death of deceased Kodu Choudhary when he was accompanied by appellant No.2 and others. Although, there are options for exercising discretion and awarding lesser punishment to the persons convicted under

Section 396 of the IPC, but there being a clear finding on this point as to the person who caused death of the deceased, it does not appear proper to exercise such discretion in favour of the main culprit. Hence, the sentence of imprisonment awarded to appellant No.1 – Vijay Shankar cannot be reduced. In our considered opinion, the sentence of imprisonment awarded to appellant No.1 – Vijay Shanker Bhoratiya, appears to be proper.

23. The role of appellant No.2 has not been described in detail in evidence of the prosecution. The only thing that is proved is that he was present at the time of the incident. Thus, a view can be taken that he may have been an active participant in the offence of robbery, whereas in the matter of causing death of deceased Kodu Choudhary his active support or encouragement is not proved because the murder was committed during the commission of dacoity. For this reason, his conviction under Section 396 of the IPC shall stand affirmed, however, considering the facts and circumstances, which seem to be in his favour, the prayer for reduction of sentence seems worth consideration.

24. On the basis of the aforementioned reasons, this appeal is allowed in part. With respect to appellant No.1, his conviction and sentence as ordered by the trial Court does not suffer from any infirmity which is upheld and appeal of appellant No.1 – Vijay Shanker Bhoratiya is dismissed. However, with respect to appellant No.2 – Sanjay Bhoratiya, the finding of conviction against him in the impugned judgment is upheld, whereas the order of sentence awarded by the trial court is set aside and instead of that appellant No.2 – Sanjay Bhoratiya, who had undergone a period of more than 10 years in jail i.e. since his date of arrest - 28.11.2006 till today, is sentenced

to the period of custody already undergone by him in jail. He be set at liberty, if not required in any other case.

Sd/-

(Pritinker Diwaker)
Judge

Sd/-

(R.C.S. Samant)
Judge