

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 591 of 2006**

1. Shivraj Pando S/o Bhair, age 35 years,
2. Mehilal S/o Kailash, age 24 years,
3. Raghuwar Pando S/o Shriram, aged about 19 years,

Appellants No. 1 to 3 are R/o Village Mahora, Jamjharia, PS Patna, District - Korea, CG

4. Mangal Sai S/o Ranjeet, aged about 25 years,
5. Amarjeet S/o Bhudram, aged about 30 years,
6. Lele @ Shivbalak S/o Dalsai, aged about 25 years,
7. Kishunram S/o Dalsai, aged about 40 years,

Appellants No. 4 to 7 are R/o Village Indarpur, PS Khadgawan, District - Korea, CG

---- Appellants

Versus

1. State of Chhattisgarh through District Magistrate, Baikunthpur, District Korea, CG

---- Respondent

AND

CRA No. 739 of 2006

1. State of Chhattisgarh through PS Khadgawan, District - Korea, CG

---- Appellant

Versus

1. Shivraj Pando S/o Bhairu, age 35 years, R/o village Mahora Jamjharia, Thana Patna, District Korea, CG
2. Mehilal S/o Kailash, age 24 years, R/o village Mahora Jamjharia, Thana Patna, District Korea, CG
3. Raghuwar Pando S/o Shriram, aged about 19 years, R/o village Mahora Jamjharia, Thana Patna, District Korea, CG
4. Mangal Sai S/o Ranjeet, aged about 25 years, R/o Village Indarpur, PS Patna, District - Korea, CG
5. Amarjeet S/o Bhudram, aged about 30 years, R/o Village Indarpur, PS Patna, District - Korea, CG

6. Lele @ Shivbalak S/o Dalsai, aged about 25 years, R/o Village Indarpur, PS Patna, District – Korea, CG
7. Kishunram S/o Dalsai, aged about 40 years, R/o Village Indarpur, PS Patna, District – Korea, CG

---- Respondent

For accused persons	:	Shri Mahendra Dubey, Advocate
For State	:	Smt. Smitha Ghai PL

Hon'ble Shri Justice Pritinker Diwaker

Hon'ble Shri R.P. Sharma

Judgment on Board by Pritinker Diwaker, J

12/09/2017

As the aforesaid two Criminal Appeals – one preferred by the accused challenging their conviction under Sections 458, 395 and 398 and sentence of RI for 10 years with fine of Rs. 500/- u/s 458 and 395 and RI for 7 years u/s 398 IPC; and the other one by the State seeking enhancement of the sentence imposed by the Court below, arise out of the same judgment dated 27.05.2006 passed by Additional Sessions Judge, Manendragarh, Korea in Sessions Trial No. 149/2005, they are disposed of by this common judgment.

2. Facts of the case leading to disposal of these two appeals in brief are that on 04.01.2005 at 7.30 AM FIR Ex. P-3 was lodged by Anil Kumar Pandey (PW-2) to the effect that on that day at 3 AM when he was sleeping in his house, he heard the cries of his mother that the thief had barged into the house. FIR further says that immediately thereafter he came out of his room and saw 5-6 persons running away after opening the door carrying battle-axe with them. Household articles were found scattered and on being asked his mother informed him that one pair of gold tops, gold ring and silver anklets were removed from her person. After taking key which was kept beneath the pillow, they are also said to have

opened the almirah and also taken away silver anklet, gold tops, gold nose-pin belonging to his sister; cash of Rs. 4,500/- out of it and Rs. 400/- from the purse, and some clothes. FIR registered was for the offences under Sections 458 and 380 IPC against the unknown persons. On 08.01.2005 all the accused persons were arrested and on the memorandum of accused Shivraj Pando Ex. P-6, seizure of battle-axe, silver anklets and cash of Rs. 50/- was made under Ex. P-18; on the memorandum of accused Mehilal Pando Ex. P-5, seizure of battle axe, gold nose-pin and cash of Rs. 50/- was made under Ex. P-17; on the memorandum of accused Raghuvar Pando Ex. P-11, seizure of silver anklets, bamboo stick and cash of Rs. 110/- was made under Ex. P-13; on the memorandum of accused Mangal Sai Ex. P-7, seizure of club and cash of Rs. 150/- was made under Ex. P-16; on the memorandum of accused Amarjeet Ex. P-9, seizure of one iron made object used for breaking open the door and cash of Rs. 100/- was made under Ex. P-12; on the memorandum of accused Lele alias Shiv Balak Ex. P-10, seizure of one steel water container, crowbar and cash of Rs. 40/- was made under Ex. P-15; and on the memorandum of accused Kishunram Ex. P-8, seizure of crowbar and cash of Rs. 100/- was made under Ex. P-14. Test identification parade was conducted on the same day by Nayab Tehsildar (PW-7) vide Ex. P-1 and it is said that the accused persons were identified by Anil Kumar Pandey (PW-2) and Chandravati (PW-3). Identification of the seized articles was conducted vide Ex. P-2 where PW-2 and PW-3 are said to have identified three pairs of silver anklet - old and new and the gold nose-pin. After investigation, charge-sheet was filed by the police against 10 accused persons including the accused/appellants u/s 458, 380 and 395 IPC followed by framing of

charge by the Court below u/s 458, 395 and 398 IPC.

3. In order to prove its case the prosecution has examined 07 witnesses in support of its case. Statements of the accused persons were also recorded under Section 313 of the Code of Criminal Procedure in which they denied their guilt and pleaded innocence and false implication in the case.

4. After hearing the parties the Court below by the judgment impugned acquitted three accused namely Sushil, Ghuran alias Ram Narayan and Rajesh of all the charges but has convicted and sentenced all the accused/appellants as described above.

5. Counsel for the accused submits as under:

(i) That identification of the accused persons is doubtful as while lodging the FIR Anil Kumar Pandey (PW-2) has nowhere stated that he saw the faces of the persons who entered his house and committed the crime alleged.

(ii) That similar is the position with Chandravati (PW-3) who too has nowhere stated that she saw the faces of the persons entering her house and committing the offence alleged.

(iii) That PW-3 has not even stated in the Court that the persons present in the Court were the same persons who entered her house and committed the offence.

(iv) That PW-2 and PW-3 have stated in their Court statement that the identification of the persons was done in presence of the police and it appears that they were already shown by the police prior to the test identification parade.

(v) That identification of the seized articles which was conducted under Ex. P-2 is also faulty because proper mixing of the ornaments

was not done and the ornaments recovered from the accused persons were alone kept at the time of identification proceedings.

6. On the other hand counsel for the State supports the judgment impugned and submits that the findings recorded by the Court below convicting and sentencing the accused/appellants as described above are strictly in accordance with law and there is no illegality or infirmity in the same. She submits that considering the seriousness of the offence, State has preferred an appeal also for enhancement of the sentence to life imprisonment.

7. Heard counsel for the parties and perused the evidence available on record.

8. Anil Kumar Pandey (PW-2) - the lodger of the report has stated that after hearing the cries of his mother in the night he woke up and saw 7-8 persons entering his courtyard carrying battle-axe, sword and club with them. Pointing to accused Shivraj he is stated to have seen him clearly and that the hair of the accused persons were dishevelled and could not identify them properly. Thereafter, when he shouted at the accused persons, they ran away by opening the door and when he tried to follow them, accused Shivraj made an attempt to assault him with a sharp-edged weapon. According to this witness, his mother informed him that the accused persons on the point of weapon made her remove gold ear ring, ring, nose-pin and silver anklet and after taking key they also took out ear ring belonging to his sister-in-law, some clothes and cash of Rs. 4,500/- from the almirah. They also took away Rs. 400/- from the purse of his brother, clothes and steel water container. In cross examination he has admitted that when he reached the Tehsil office, the police people had brought the

accused persons. Subsequently, he has stated that the accused persons were accompanied by the police people but at the time of identification proceedings police were present outside whereas the identification parade was being conducted inside the room. Chandravati (PW-3) - the mother of PW-2 has stated that on the date of incident 7-8 persons, out of whom one was carrying battle-axe whereas the others were unarmed, entered her house and asked her to put off all the ornaments worn by her. Thereafter, they took out the key from beneath the pillow, opened the almirah and took away the cash of Rs. 4,500/-, one pair of silver anklets, nose-pin, ear-ring, toe-ring, clothes belonging to her daughter as also a cash of Rs. 400/- of her son. She however has not stated that the persons present in the Court were the same persons who entered her house and committed the offence and has merely given the description of the articles taken away by the accused persons. In paragraph No. 7 this witness has stated that after the incident she was taken to police station where the accused persons were shown to her. Madanlal Sahu (PW-7) is the witness who conducted the test identification of the accused persons and the ornaments vide Ex. P-1 and P-2. He has stated that PW-2 and PW-3 had identified the accused persons. However, from the identification memo Ex. P-2 it appears that proper mixing of the ornaments was not done and only those items were put in the identification parade which are said to have been looted from the house of PW-3. S.N. Tripathi (PW-5) is the investigating officer who has duly supported the case of the prosecution.

9. After going through the evidence on record it is quite apparent that neither at the time of lodging the FIR nor at the time of recording his statement under Section 161 of the Code of

Criminal Procedure Anil Kumar Pandey (PW-2) has stated that he saw the faces of the accused persons. He has not even given any description as to their stature or complexion which would have enabled them to correctly identify them, but all of a sudden in the identification parade he claims to have identified them. However, in cross examination he has admitted that when he reached the Tehsil office, the police people had brought the accused persons and that at the time of identification proceedings police were present outside whereas the identification parade was going on inside the room. Even according to PW-3, after the incident she was taken to police station where the accused persons were shown to her. Moreover, these two witnesses have nowhere stated that the persons present in the Court were the same persons who entered their house and committed the offence. They have merely given the description of the articles said to have been taken away by the accused persons. Thus taking into consideration the evidence of PW-2 and PW-3 the possibility that they had seen the accused persons before the identification parade vide Ex. P-1 was carried out cannot be ruled out. Most important aspect of the matter is that while lodging the FIR or giving statement to the police as per the requirement of Section 161 of Code of Criminal Procedure, PW-2 has not given the description of the persons barging into his house. Even the identification of ornaments vide Ex. P-2 was not done in accordance with law as the evidence goes to show that they were not subjected to proper mixing and only the looted ornaments were put in the identification parade. Furthermore, according to the evidence of PW-2, the accused persons were armed with battle-axe, sword and club but the evidence of PW-3 shows that out of 7-8 persons only one was carrying battle axe and the rest were

unarmed.

10. Thus the prosecution has failed to prove its case beyond all reasonable doubt by collecting any cogent and clinching evidence on the basis of which the guilt of the accused/appellants could be established. Benefit of this, of course, has to go to the accused. Findings of the Court being not based on the proper appreciation of the evidence on record, are liable to be set aside. It is done accordingly.

11. Criminal Appeal No. 591/2006 preferred by the accused persons is hereby allowed and the accused persons are acquitted of the charge levelled against them. As they are already on bail, no order to set them free etc. is required to be passed. Consequent to this, Criminal Appeal No. 739/2006 preferred by the State for enhancement of the sentence is hereby dismissed.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(RP Sharma)
Judge