

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.99 of 2004

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Indrasekhar Devedi @ Chuha Pandit, Son of Seonandan Devedi @ Dubey, Resident
of Sharma Bazar, P.S. – Barachaty, District – Gaya.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

with

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Criminal Appeal (SJ) No. 108 of 2004

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Rajesh Yadav @ Rajesh Kumar Yadav @ Rahis Yadav, Son of Yogendra Yadav,
Resident of Village – Turi Kala, P.S. – Magadh University, Bodh Gaya, District –
Gaya.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

(In CR. APP (SJ) No.99 of 2004)

For the Appellant/s : Mr. Arvind Kumar Pandey, Adv.

For the Respondent/s : Mr. Bipin Kumar, APP

(In CR. APP (SJ) No.108 of 2004)

For the Appellant/s : Mr. Ranbir Singh, Amicus Curiae

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 17-03-2018

In spite of repeated calls, none has appeared on behalf of
appellant in Criminal Appeal (SJ) No. 108 of 2004 and it appears that
the case is of the year 2004, as such, I deem it appropriate to appoint
Mr. Ranbir Singh, learned Advocate as *Amicus Curiae* to assist the
court in Cr. Appeal (SJ) No. 108 of 2014.

2. As both the above appeals arise out of same judgment, they are



clubbed together and are being decided by this common judgment, for the sake of convenience.

3. These appeals are directed against the judgment of conviction dated 31.01.2004 and order of sentence dated 05.02.2004, passed by Sri Prakash Chandra Jaiswal, the then Additional Sessions Judge, 5th Gaya in Sessions Trial No. 53/2000, 377/2000, by which the appellant Indrasekhar Devedi stood convicted under Section 397 of the Indian Penal Code (hereinafter referred to as the “IPC”) and was sentenced to undergo R.I. for ten years with a fine of Rs. 10,000/- having default clause and appellant Rajesh Kumar Yadav alias Rahis Yadav stood convicted under Section 412 of the IPC and was sentenced to undergo R.I. for seven years with a fine of Rs. 10,000/- having default clause.

4. Prosecution case as per the fardbeyan of Nand Kishore Prasad Gupta in short is that on 09.01.2000 at 7.35 P.M., the informant along with his mother, namely, Shayam Devi, elder daughter, namely, Ruby Kumari, his son, namely, Shani and servant, namely, Mukesh Yadav and other family members were watching television, in the meantime 8 -10 persons, some of them had covered their faces armed with pistol and gun entered into his room through main gate, two of them pointed their fire arms on his head and demanded for his gun and took him to his another room and took the double barrel license gun from the said



room. Thereafter, they took the informant to courtyard and demanded Rs. 2,00,000/- and assaulted on his left side of face by means of butt of the pistol causing injury to the informant. They took out cash of Rs. 6,600/- from his pocket and also snatched his wrist watch and golden ring. Other miscreants entered into the kitchen, where wife of informant was engaged in cooking food and snatched her ear tops, golden chain and golden nose pin. Besides, this, the miscreants took away black colour leather bag printed with the letter FABCO containing bundle of currency notes of denomination of Rs. 500/- and 20,000/- of denominations of Rs. 100 and Rs. 50, total Rs. 70,000/-. They also took away pass book, cheque book and 5-6 pair of anklet of the women members of the house. They also snatched silver payal from the leg of his daughter Ruby Kumari. The informant claimed to have identified the miscreants in the light of generator. Thereafter, the miscreants escaped and in course of escaping they also made two rounds of firing in the Verandah of the house, which entered into the wall of the room breaking the window pan. Thus the miscreants looted away the cash and other belongings worth Rs. 1,00,000/-.

5. On the basis of the aforesaid fardbeyan of informant Barachaty P.S. Case No. 6/2000 was registered against 8-10 unknown miscreants.



6. Police after investigation submitted charge-sheet. Cognizance of the offence was taken and the case was committed to the court of Sessions, which ultimately came to the file of Sri Uma Kant Srivastava, the then 7th Additional Sessions Judge, Saran at Chapra, for trial and disposal.

7. Charges were framed under Section 397/34 and 412 of the IPC against the appellants.

8. In order to substantiate the charges, prosecution examined altogether nine witnesses, they are; P.W. 1 – Nand Kishore Gupta (informant), P.W. 2 – Ram Lakhan Prasad Gupta, P.W. 3 –Kusum Devi, P.W. 4 – Nitu Kumari, P.W. 5 – Ruby Kumari, P.W. 6 – Guddu Kumar, P.W. 7 – Pramod Kumar, Circle Officer, P.W. 8 – Shyamdeo Yadav, P.W. 9 – Awadhesh Kumar Sinha (I.O.).

9. Apart from that, following documents have been brought on record and marked as Ext. 1 – signature of informant Nand Kishor Prasad Gupta on fardbyean, Ext. 2 – Signature of informant Nand Kishor Prasad Gupta on T.I.P. chart, Ext. 3 and 3/1 – Signature of Circile Officer Pramod Kumar and that of Ram Lakhan Prasad Gupta on the T.I.P. Chart respectively, Ext. 4 – Signature of witness Shyam Deo Yadav on the seizure list, Ext. 5 – Fardbeyan and Ext. 6 – Seizure list.



10. Defence of the accused persons is of complete denial of occurrence and of innocence.

11. Post trial, learned Trial Court convicted the appellant Indrashekhar Devedi alias Chuha Pandit under Section 397 of the IPC and appellant Rajesh Yadav alias Rahish Yadav under Section 412 of the IPC and sentenced them in the manner as stated above.

12. Being aggrieved, the appellants preferred the present appeal.

13. Contention of learned counsel for the appellant Indrashekhar Devedi alias Chuha Pandit in Cr. Appeal (SJ) No. 99 of 2004 is that learned Trial Court has convicted appellant Indrashekhar Devedi alias Chuha Pandit on the basis of evidence of P.W. 1 and also on the basis of evidence of P.W. 5 and P.W. 6, however, the evidence of P.W. 1 disclosed that though he has stated in his evidence in chief that he saw appellant Indrashekhar Devedi alias Chuha Pandit outside the house but in his cross – examination he denied the same and so far evidence of P.W. 5 is concerned, she has also stated that she had seen appellant Indrashekhar Devedi alias Chuha Pandit outside the house but in cross examination, this witness has stated that she had identified him as he was her villager. In such a situation, when the appellant Indrashekhar Devedi alias Chuha Pandit is the villager of the informant and his name is not even mentioned in the F.I.R, itself casts doubt about



identification of this appellant. No T.I.P. was held for his identification. Further submission of learned counsel appearing on behalf of appellant Indrashekhar Devedi alias Chuha Pandit is that so far his conviction under Section 397 of the IPC is concerned, this section has intended to cover the case of a person, who displays the deadly weapon to threaten his victims or their neighbours or to make use of other similar parties but not confined to case where the weapon used actually for causing injury or for attempting to cause the injury to another person. In support of his contention, he has relied upon a decision of Hon'ble Apex Court in the case of **Dilawar Singh v. State of Delhi** reported in **AIR 2007 Supreme Court 3234** and as such conviction of the appellant Indrashekhar Devedi alias Chuha Pandit under Section 397 of the IPC is not sustainable in the eye of law.

14. Learned *Amicus Curiae* for the appellant, namely, Rajesh Yadav alias Rahish Yadav in Cr. Appeal (SJ) No. 108 of 2004 has submitted that the trial court has convicted the appellant Rajesh Yadav alias Rahish Yadav on the ground that there was recovery from his house, which will appear from Ext. 6 and those articles were said to have been identified by P.W. 1 and P.W. 2 in the T.I.P. also but the evidence of P.W. 3 and P.W. 4 disclosed that those ornaments were identified by them when the police brought those articles in the house.



It further appears that occurrence is of 09.01.2000 and recovery is of 12.01.2000 and the T.I.P. was held on 13.04.2000 and that also creates a doubt about the genuineness of identification of the articles in T.I.P. hence the conviction of appellant Rajesh Yadav alias Rahish Yadav under Section 412 of the IPC is also not sustainable in the eye of law.

15. Per contra, learned counsel for the respondent – State supported the finding of guilt recorded by learned Trial Court and has submitted that appellant Indrashekhar Devedi alias Chuha Pandit has been identified by P.W. 1, P.W. 5 and P.W. 6 and he was seen outside the house of the informant at the time of occurrence and as such his conviction under Section 397 is just and proper. Similarly, so far appellant Rajesh Yadav alias Rahish Yadav is concerned, articles were recovered from his house and those articles were put on T.I.P. and were identified by P.W. 1 and P.W. 2 and as such his conviction under Section 412 of the IPC is also just and proper and does not require any interference.

16. Heard both sides. On examination of the evidence of prosecution witnesses, it appears that that P.W. 1 is the informant in this case and he has supported the factum of occurrence of dacoity in his evidence in court also. His evidence in chief shows that dacoits



entered inside his house and they demanded for his licensed gun and he gave the dacoits his licensed gun and, thereafter, the dacoits started demanding Rs. 2,00,000/- from him and also snatched away Rs. 6600/- from his pocket. The miscreants further took him inside the house and got the Almirah opened and from there a bag of FABCO company in which cash was kept, was taken away by the miscreants. His evidence further disclosed that golden chain, anklets and other articles were also taken away by the miscreants and one of the miscreants also assaulted him by butt portion of the pistol and, thereafter, they fled away. This witness has also stated that T.I.P. of the articles was held in the police station and he identified his bag of FABCO company and other articles also including the ear ring and tops of his wife, payal and a currency notes of denomination of Rs. 500/-. He has identified the appellant Indrashekhar Devedi alias Chuha Pandit saying that he was watching from outside. In his cross-examination, this witness has stated that he does not know the number of currency notes but the said bag belonged to him and the said notes were recovered from the bag and as such they belonged to him. His evidence in para -9 shows that he has not stated before the police that at the time of occurrence, appellant Indrashekhar Devedi alias Chuha Pandit was standing outside the house and in para -11 he has stated



that he has not participated in T.I.P. for identification of accused.

17. Considering the evidence of this witness, he has identified the appellant Indrashekhar Devedi alias Chuha Pandit in his chief but in his cross – examination, he has admitted that he has not disclosed the name of appellant Indrashekhar Devedi alias Chuha Pandit before the police. His evidence also disclosed that he has not participated in the T.I.P. No doubt, this witness has stated that he identified the articles in thana but he does not know the number of currency notes. P.W. 2 has also supported the factum of occurrence but he has stated in his cross-examination that he has seen the payal in the police station and golden tops, nose pin and bundle of currency notes of denomination of Rs. 500/- but he has stated that he does not know as to after how much time, he had seen the articles.

18. P.W. 3 has also supported the factum of occurrence but her evidence disclosed that the police has brought the articles for identification in her house and she claimed to have identified the ear rings, payal in the test identification parade but to a query of the court, this witness has stated that before him, only 2 payals were kept and one tops was kept, which she identified.

19. P.W. 4 has also supported the factum of occurrence of dacoity but has stated that police has brought the seized articles in her house



for identification and she has identified payals and golden tops.

20. P.W. 5 has also supported the prosecution story with regard to dacoity and stated that she identified the appellant Indrashekhar Devedi alias Chuha Pandit and had seen him standing outside the house from her roof top but she has again stated that she had not seen and her evidence also disclosed that Indrashekhar Devedi alias Chuha Pandit is her villager. As such identification of appellant Indrashekhar Devedi alias Chuha Pandit by this witness is self contradictory. However, the trial court has believed the identification of appellant Indrashekhar Devedi alias Chuha Pandit on the ground that due to fear, this witness has later on stated that she had not seen him.

21. P.W. 6 also supported the factum of occurrence and identified appellant Indrashekhar Devedi alias Chuha Pandit but his evidence in cross – examination did not show that as to what appellant Indrashekhar Devedi alias Chuha Pandit was doing near the beetle shop. He has also stated that except appellant Indrashekhar Devedi alias Chuha Pandit, he identified so many villagers.

22. P.W. 7 is the Circle Officer, he got the T.I.P. held. He has stated in his evidence that he mixed up the articles of similar type with the seized articles and held the T.I.P. and Nand Kishor Prasad Gupta (P.W. 1) and Ram Lakhan Prasad Gupta (P.W. 2) identified



those articles. His evidence also disclosed that there was no special mark on the articles.

23. P.W. 8 is the seizure list witness but he has not supported the prosecution case and stated that nothing has been recovered in his presence, thereafter, this witness was declared hostile.

24. P.W. 9 is the I.O. in this case and he has stated that he recorded the fardbeyan of P.W. 1 Nand Kishor Prasad Gupta, which is marked as Ext. 5. Statement of informant was recorded and place of occurrence was examined. He has also stated that during investigation appellant Indrashekhar Devedi alias Chuha Pandit was arrested and the house of appellant Rajesh Yadav alias Rahish Yadav was searched and seizure list was prepared and he also proved the seizure list (Ext. 6). He has stated that seized articles were kept in *Malkhana*.

25. On discussion on the prosecution evidence, it appears that so far appellant Indrashekhar Devedi alias Chuha Pandit is concerned, from evidence of P.W. 1, P.W. 5 and P.W. 6 shows that they identified him saying that he was present outside the house. Evidence of P.W. 5 disclosed that appellant Indrashekhar Devedi alias Chuha Pandit is co-villager. P.W. 1 has admitted that he has not identified the appellant Indrashekhar Devedi alias Chuha Pandit before the police and he has



also not participated in the T.I.P., though police asked him for that. Evidence of P.W. 5 also shows that her evidence is self contradictory as at one stage she has identified the appellant Indrashekhar Devedi alias Chuha Pandit but later on she stated that she did not see him. Learned Trial Court has tried to explain that from her demeanor, it appears that due to fear she had not identified the appellant Indrashekhar Devedi alias Chuha Pandit, but has stated that Chuha Pandit was her villager. P.W. 6 has also identified the appellant Indrashekhar Devedi alias Chuha Pandit but it appears that learned counsel for the appellant is right in his submission that according to prosecution, the evidence shows that appellant Indrashekhar Devedi alias Chuha Pandit is his villager but in spite of that he has not been named in the F.I.R. the earliest version and that creates a serious doubt about the identification of this appellant by P.W. 1, P.W. 5 and P.W. 6 also.

26. So far appellant Rajesh Yadav alias Rahish Yadav is concerned, the evidence available on record shows that articles were seized from his house and the same was identified by P.W. 1 and P.W. 2 in T.I.P. held by P.W. 7 but the evidence of P.W. 2 and P.W. 3 disclosed that those articles were brought by the police to their house and they identified the articles there, which casts serious doubt about the



identification of articles. Apart from that there was delay in conducting the T.I.P. of articles as the articles were seized on 12.01.2000 but T.I.P. was held on 13.04.2000 as such the T.I.P. is not free from reasonable shade of doubt.

27. Appellant Indrashekhar Devedi alias Chuha Pandit has been convicted under Section 397 of the IPC and appellant Rajesh Yadav alias Rahish Yadav has been convicted under Section 412 of the IPC.. Hon'ble Apex Court in the case of Dilawar Singh (supra), observed in para 22 and 23 as follows:-

“22 The essential ingredients of Section 397, IPC are as follows:

- 1. Accused committed robbery.*
- 2. While committing robbery or dacoity (i) accused used deadly weapon (ii) to cause grievous hurt to any person (iii) attempted to cause death or grievous hurt to any person.*

3 “Offender” refers to only culprit who actually used the deadly weapon, others cannot be awarded the minimum punishment. It only envisages the individual liability. Section 397 IPC is attracted only against the particular accused who uses the deadly weapon or does any of the acts mentioned in the provision. But other accused are not vicariously liable



under that Section for acts of co-accused.

23. As noted by this Court in Phool Kumar v. Delhi Administration (AIR 1975 SC905), the term “offender” under Section 397, IPC is confined to the offender who uses any deadly weapon. Use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397, IPC for the imposition of minimum punishment on another offender who had not used any deadly weapon. There is distinction between ‘uses’ as used in Section 397, IPC and 398, IPC. Section 397, IPC connotes something more than merely being armed with deadly weapon.

28. In the present case also, there is no evidence that the appellant Indrashekhar Devedi alias Chuha Pandit was armed with any deadly weapon or he participated in any manner in dacoity as the evidence of the witnesses disclosed that he was only seen outside the house and further his identification itself is doubtful. So far appellant Rajesh Yadav alias Rahish Yadav is concerned, seizure list witness has been declared hostile and T.I.P. itself is not free from reasonable doubts. However, learned Trial Court has not considered these infirmities while convicting the appellant Indrashekhar Devedi alias Chuha Pandit under Section 397 of the IPC and appellant Rajesh Yadav alias Rahish Yadav under Section 412 of the IPC.



29. Accordingly, these appeals are allowed. Conviction of appellant Indrashekhar Devedi alias Chuha Pandit under Section 397 of the IPC and conviction of appellant Rajesh Yadav alias Rahish Yadav under Section 412 of the IPC, are set aside.
30. As the appellants are on bail, they are discharged from liability of bail bonds.

(Vinod Kumar Sinha, J)

sunil/-

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