

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.3019 of 1998

- 1. Mohd. Naseem, son of Mohd. Yasin, aged about 19 years, R/o Baikunthpur, P.S. Baikunthpur, District Korea, M.P. (now Chhattisgarh)
- 2. Shambhu @ Shyam Narayan, son of Lal Dev Chikwa, aged about 30 years, R/o Baikunthpur, P.S. Baikunthpur, District Korea, M.P. (now Chhattisgarh)

---- Appellants

versus

The State of Madhya Pradesh (now Chhattisgarh) through P.S. Patna, District Korea

--- Respondent

For Appellants	:	Shri Shakti Raj Sinha, Advocate
For Respondent	:	Shri Sumit Jhanwar, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

Judgment on Board

12.7.2018

- 1. This appeal is directed against the judgment dated 8.12.1998 passed by the Additional Sessions Judge, Baikunthpur, District Korea in Sessions Trial No.94 of 1989 convicting and sentencing each of the Appellants as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 398 of the Indian Penal Code	Rigorous Imprisonment for 7 years
Under Section 460 of the Indian Penal Code	Rigorous Imprisonment for 7 years and fine of Rs.1,000/- with default stipulation

- 2. On completion of the sentence by Appellant No.1, Mohd. Naseem, the instant appeal, so far as it related to him, has been dismissed as not pressed vide order dated 25.1.2018.

3. Prosecution case, in brief, is that on 15.9.1988 at about 10:00 p.m., 3 brothers Shiv Chandra (PW6), Tara Chandra (PW7) and Ramheer Gupta (PW5) were sleeping with family at their house. Someone knocked the door of the house from outside and asked them to open the door. When they refused to open the door and peeped outside, they saw that 8-10 persons were standing outside armed with *kattas* (country-made pistols). Thereafter, those persons began to fire with their *kattas*. Few *chharra* (cartridge of country-made pistol) inflicted to Shiv Chandra, Tara Chandra and Ramheer Gupta. Shiv Chandra came out with a *tangi* and *balua* and assaulted on one of those persons. At that time, they began to flee. The villagers gathered there. Those persons fired in the air and fled from there. First Information Report (Ex.P7) was lodged by Shiv Chandra (PW6) against unknown persons. During the course of investigation, vide test identification parade (Ex.P8), Appellant No.2, Shambhu @ Shyam Narayan was identified by the 3 brothers Shiv Chandra (PW6), Tara Chandra (PW7) and Ramheer Gupta (PW5). On completion of the investigation, a charge-sheet was filed for offence punishable under Sections 398, 460 and 307 of the Indian Penal Code against the present Appellants only and Babulal and Deonath were declared to be absconded. Charges were framed against the Appellants under Sections 398 and 460 of the Indian Penal Code.
4. In support of its case, the prosecution examined as many as 16 witnesses. Statements of the Appellants were recorded under Section 313 of the Code of Criminal Procedure in which they denied the guilt, pleaded innocence and false implication. No witness has been examined in their defence.

5. After trial, the Trial Court convicted and sentenced the Appellants as mentioned in the first paragraph of this judgment. Hence, this appeal.
6. Learned Counsel appearing for Appellant No.2, Shambhu @ Shyam Narayan submits that Appellant No.2 has been falsely implicated in the case. Evidence against him is only the test identification parade, but the test identification parade is not reliable because as per the First Information Report, it was registered against unknown persons and no detail or description was mentioned in the FIR and as per the Court statements of the witnesses, the assailants had covered their faces with clothes and some of the witnesses had seen them from behind only and hence their identification vide the test identification parade (Ex.P8) is suspicious and not reliable. Therefore, Appellant No.2 is entitled to get benefit of doubt.
7. Per contra, Learned Counsel appearing for the State opposes the arguments advanced on behalf of Appellant No.2 and supports the impugned judgment of conviction and sentence. He submits that during the test identification parade, Appellant No.2 was duly identified by Ramheer Gupta (PW5), Shiv Chandra (PW6) and Tara Chandra (PW7) and, therefore, the conviction imposed by the Trial Court is proper.
8. I have heard Learned Counsel appearing for the parties and perused the record with due care.

9. Pannalal (PW1), Laxman Prasad (PW2) and Tula Chand Gupta (PW4) are the witnesses before whom certain articles were seized from the spot and from the Complainant party, but they have not supported the case of the prosecution and have been declared hostile.
10. Shiv Chandra (PW6), Ramheer Gupta (PW5) and Tara Chandra (PW7) are brothers. They have stated that at about 9:00 – 10:00 p.m., they were going to sleep. At that time, some persons began to abuse and started firing. Few *chharra* inflicted to Tara Chandra (PW7) and few *chharra* inflicted to Ramheer Gupta (PW5). Ramheer Gupta (PW5) has further stated that thereafter the assailants began to flee from there. Then he threw a *tangi* towards the assailants which caused injury on a leg of one of the assailants. In paragraphs 5 and 7, he has admitted that he did not know any of the assailants from before. The assailants had covered their faces with *gamchha* (a cloth) and only their eyes and noses were appearing.
11. Tara Chandra (PW7) has also stated that after opening the door, when they made the assailants run, Appellant No.2 got injured and fell down in the agricultural field. This witness has also admitted in paragraph 5 that few of the assailants had hidden their faces with clothes and when they came out, the assailants began to flee.
12. Shiv Chandra (PW6) has also admitted that he could not see from inside that who were the persons present outside and when they began to flee. He saw the assailants from their behind. In

paragraph 8, he has also admitted that all the assailants had covered their faces with clothes. But, immediately thereafter, he has stated that some faces were open. In paragraph 12, he has stated that during the test identification parade, he identified by height, but in his statement under Section 161 of the Code of Criminal Procedure or in the First Information Report which was lodged by him, nothing is mentioned about height of the assailants.

- 13.** Rajwantibai (PW8) has stated that the assailants had first come to her house and thereafter they had gone to the house of Shiv Chandra (PW6). As per her statement, she had not identified the persons (the assailants) who had come to her house because they had covered their faces.
- 14.** Balram (PW9) has stated that though there was light at the place of incident yet he could not identify any of the persons present there.
- 15.** Pulast Kumar (PW10) has stated that at about 8:00 p.m., 2 persons had come to his house. They had covered their faces with clothes. They had asked him about the house of one Gupta who had tractor. During cross-examination, he has stated that the persons, who had come to his house, were not the Appellants.
- 16.** Head Constable Rajkumar Chouhan (PW11) has stated that he recorded the FIR (Ex.P7). Dr. R.K.Sharma (PW13) has stated that he examined Tara Chandra (PW7), Shiv Chandra (PW6) and Ramheer Gupta (PW5). His reports are Ex.P9, P10 and P11. He found gun-shot injuries of simple nature on the body of Shiv

Chandra and Ramheer Gupta.

17. Patwari Ramnarayan Jaiswal (PW14) has stated that he prepared spot-map (Ex.P6). Naib-Tahsildar D.R. Khute (PW15) is the witness who conducted the test identification parade on 5.10.1988. As per his statement, Shiv Chandra (PW6), Tara Chandra (PW7), Ramheer Gupta (PW5) and Gurudayal Singh had identified Appellant No.2 during the test identification parade. Sub-Inspector S.R. Diwan (PW16) investigated into the offence in question.
18. A minute examination of the evidence available on record makes it clear that the FIR (Ex.P7) was registered against unknown persons. Body structure, height, complexion etc. are not stated in the FIR. As per the statements of Ramheer Gupta (PW5), Shiv Chandra (PW6) and Tara Chandra (PW7), the assailants had covered their faces with clothes and few of the witnesses had seen them from behind. Rajwantibai (PW8) has also stated that all the assailants had covered their faces with clothes. In these circumstances, on what basis, Ramheer Gupta (PW5), Shiv Chandra (PW6) and Tara Chandra (PW7) identified Appellant No.2 is not clear. Identification of Appellant No.2 on the basis of the evidence on record is suspicious. Therefore, Appellant No.2 is entitled to get benefit of doubt.
19. Consequently, the appeal is allowed. The impugned judgment of conviction and sentence is set aside. Appellant No.2, Shambhu @ Shyam Narayan is acquitted of the charges framed against him.

- 20.** It is reported that Appellant No.2, Shambhu @ Shyam Narayan is on bail. His bail bonds shall continue for a further period of six months in terms of the provisions contained in Section 437A of the Code of Criminal Procedure.
- 21.** 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