

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 07 of 2015**

1. Manish Mishra son of Prafull Mishra, aged about 26 years, resident of Tulsaghat, Near Forest Naka, Lormi, Present R/o Sadar Bazar, House of Jagdish Halwai, PS City Kotwali, Civil & Revenue District Bilaspur, CG

---- Appellant**Versus**

1. State of Chhattisgarh through Station House Officer, Sarkanda, District Bilaspur, CG

---- Respondent

For Appellant	:	Shri Akhil Mishra, Advocate
For Respondent/State	:	Shri Vaibhav Goverdhan, PL

AND**CRA No. 153 of 2015**

1. Bhishma Narayan Jha, aged about 32 years, son of late Suresh Jha, resident of village Unchagano, PS Bath, District Bhagalpur, Bihar, presently – Keshavapura, Bhattharoad, Hemunagar, PS Torva, District Bilaspur, CG

--- Appellant**Versus**

1. State of Chhattisgarh through District Magistrate, Bilaspur CG

--- Respondent

For Appellant/State	:	Smt. Kiran Jain, Advocate
For Respondents	:	Shri Vaibhav Goverdhan, PL

Hon'ble Shri Justice Pritinker Diwaker &
Hon'ble Shri Justice Gautam Chourdiya

Judgment on Board by Pritinker Diwaker, J**24/07/2018 :**

As these two appeals arise out of the same judgment dated 26.12.2014 passed by Additional Sessions Judge, Bilaspur in

Sessions Trial No. 189/2013, they are being disposed of by this common judgment.

2. By the judgment impugned the Court below has convicted accused Bhishma Narayan Jha u/s 450, 397/392 twice and 302 IPC twice and sentenced him to undergo RI for 10 years with fine of Rs. 100/- u/s 450, RI for seven years u/s 397 twice, RI for 10 years with fine of Rs. 100/- u/s 392 twice and imprisonment for life with fine of Rs. 100/- under Section 302 twice, plus default stipulations. At the same time, accused/appellant Manish Mishra has been convicted under section 411 IPC and sentenced to undergo RI for three years with fine of Rs. 100/- plus default stipulation.

3. Prosecution case in short is that on 5.8.2013 in between 12.30 and 4.30 PM some unknown persons had entered the house of Devashish Gangopadhyaya (PW-1) and committed the murder of his wife Swagata Ganguli and mother Bina Pani. After committing murder of these two women, those persons are also said to have taken away the ornaments worn by the two deceased. Case of the prosecution further says that complainant (PW-1) was working in a private company at Seepat whereas his house situate at Sarkanda, Bilaspur. On receiving the information about the incident, PW-1 rushed to his house and saw two dead bodies lying there-in. On that very day at about 9 PM he lodged un-numbered *Dehati Nalisi* (Ex.P-1) followed by recording of un-numbered *Dehati Mergs* Ex. P-2 and P-3. FIR Ex.P-22 was also registered on the same day at 10.10 PM on the basis of *Dehati Nalisi* and *Dehati Mergs* for the offence punishable under Sections 302 and 397 IPC against unknown persons. Numbered *Dehati Mergs* Ex.P-20 and P-21 too were recorded on the same day. After drawing inquest vide Ex. P-6 and P-8 on the two dead bodies, postmortem examination was conducted

by Dr. B.R. Singh (PW-16) and Dr. Dharmendra Kumar (PW-17) vide reports Ex. P-9 and P-10. Needle of suspicion moved towards accused/appellant Bhishma Narayan Jha on account of the fact that he was seen roaming in the locality in connection with his Gas Burner repair work and that a visiting card mentioning his cell number was found on the spot. On the memorandum of accused/appellant Bhishma Narayan Jha (Ex. P-13) an amount of Rs. 11,100/-, one cell phone with SIM card No. 8085228426 were seized; certain gold ornaments were seized from accused/appellant Manish Mishra under Ex. P-17; a knife having blood-like stains was seized under Ex. P-19; a Yamaha motorcycle, five yellow colour bangles and clothes were seized under Ex. P-18; visiting card mentioning "Adhunik Suhag Bhandar" and a cell number 8085228426 was seized under Ex. P-14; and hair in the fist of deceased Swagata Ganguli, one curtain and rope were seized under Ex. P-15. As per the Test Identification Parade (for short "TIP") conducted by Devendra Kesarwani (PW-10) vide Ex. P-25, S. Malik (PW-18) and Narayan Chakravarti (PW-19) identified accused/appellant Bhishma Narayan Jha on account of the fact that they saw him in the locality as he used to come there in connection with his business of Gas Burner repairing. FSL report Ex. P-29 shows presence of blood on the knife and the clothes so seized, but there is no serological report on record to prove its origin. Call details contained in Ex. P-30 and location report Ex. P-31 go to show that on the date of incident the accused/appellant Bhishma Narayan Jha was in the same locality where the incident took place. Prosecution has further seized the mortgage related documents Ex. P-32-A and P-33-A from the possession of accused/appellant Manish Mishra who was working as Manager in Manipuram Finance Limited.

Allegation against accused/appellant Manish Mishra is that he received the stolen property knowingly. After completing the investigation police filed the *challan* against the accused/appellants under Sections 302, 397 and 411 IPC. However, the Court below framed the charge against accused/appellant Bhishma Narayan Jha under Sections 450, 397/392 twice and 302 twice of the Indian Penal Code whereas against accused/appellant Manish Mishra it was under Section 411 IPC.

4. In order to prove its case the prosecution has examined 27 witnesses in support of its case. Statements of the accused/appellants were also recorded under Section 313 of the Code of Criminal Procedure in which they have denied their guilt and pleaded innocence and false implication in the case.

5. After hearing the parties and going through the record the Court below has convicted and sentenced the accused/appellants as described in paragraph No.1 of this judgment.

6. Counsel for the accused/appellant Bhishma Narayan Jha submits as under:

(i) That the description of ornaments given in the FIR does not tally with the ones seized under Ex. P-17 from the possession of accused/appellant Manish Mishra.

(ii) That no TIP was conducted by the prosecution in relation to the ornaments alleged to have been looted by accused/appellant Bhishma Narayan Jha.

(iii) That the ornaments have not been identified by the complainant Devashish Gangopadhyaya (PW-1) even in the Court.

(iv) That the only piece of evidence of identification of gold

ornaments is the statement of Devayan Ganguli who is said to have identified the same in the Court, but if the cross-examination of this witness is seen it is apparent that he has infact failed to properly identify the ornaments.

(v) That the witnesses are not aware whether the ornaments seized were made of gold.

(vi) That presence of accused/appellant Bhishma Narayan Jha on or near the place of incident at the relevant time has not been proved by the prosecution. Even the call details have not been proved as per the requirement of Evidence Act and he has been implicated in the offence merely on the basis of location of his cell phone.

(vii) That accused/appellant Bhishma Narayan Jha was a gas burner repairer by profession and thus his location in the locality, even if taken as true, does not automatically make him an offender.

(ix) That no visiting card of accused/appellant Bhishma Narayan Jha was seized and in fact it was of one Adhunik Suhag Bhandar in which his cell number was hand-written as repaierer of gas burner, and being so merely on the basis thereof, he cannot be convicted. Surprisingly, the said card has not even been produced in the Court during trial.

(x) That the investigating officer has admitted that the ornaments seized belonged to one Rajni and not of the two deceased women, and that as the prosecution could not catch the real culprit, accused/appellant Bhishma Narayan Jha has been made scapegoat.

(xi) That there is no evidence on record connecting the accused/appellant Bhishma Narayan Jha with the crime in question

where two women have been murdered.

(xii) That there is no morphology report to prove the hair found in the fist of deceased Swagata Ganguli.

(xiii) That though there is FSL report (Ex.P-29) showing the blood stains on some of the seized articles yet in the absence of serological report confirming the origin of the blood, FSL report loses its significance.

(xiv) That there is no concrete evidence against this accused and he has been held guilty merely on the basis of suspicion ignoring the settled legal position that howsoever strong the suspicion is, it cannot be made basis for arriving at a particular conclusion.

7. As regards accused/appellant Manish Mishra, it is argued that the basic ingredients of Section 411 IPC have not been proved by the prosecution and therefore his conviction is not sustainable under the law. Counsel appearing on his behalf submitted that it has not been proved by the prosecution that the accused/appellant dishonestly received or retained any stolen property, knowing or having reason to believe the same to be stolen property. Referring to various documents pertaining to depositing of gold ornaments it is argued that the accused/appellant being the Manager of a finance company had accepted the ornaments for giving loan to accused/appellant Bhishma Narayan Jha without having the knowledge that those ornaments were stolen ones.

8. On the other hand, counsel for the State supports the judgment impugned and submits that the findings recorded by the Court below holding the accused/appellants guilty as mentioned above are strictly in accordance with the evidence on record and there is no infirmity in the same.

9. Heard counsel for the parties and perused the evidence of the witnesses available on record.

10. Devashish Gangopadhyaya (PW-1) at whose instance *Dehati Nalisi* Ex.P-1 was recorded, has stated that he was working at Korba but had his house at Sarkanda, Bilaspur where his wife and mother resided and that he used to come to Bilaspur in every 15-20 days. According to this witness, on 5.8.2013 at 6 PM he received a telephonic information from his neighbour Vimal Kumar Mukherjee about some incident and was asked to reach Bilaspur immediately. After reaching Bilaspur at about 8.30 PM he found the dead body of his wife lying in the kitchen and that of his mother in the dining room, both having injuries on neck which could be caused with some sharp edged weapon. This witness has stated that the gold ear-pins, necklace, bangles and black-stone fitted chain worn by his wife were missing. According to this witness, total cost of the ornaments was around Rs. 50,000/-. He has stated that no receipt was available regarding the ornaments of which description was made to the police. Evidence of this witness, however, does not speak whether at the time of incident also the two deceased were wearing the same, and that his disclosure is based on general assumption because they used to wear the ornaments of similar description. Evidence of this witness further says that in his absence, milkman and maid servant used to visit his Sarkanda situate house. Who else, except these two, came to his house in his absence, he was not aware of. Radha Patre (PW-2), Basant Yadav (PW-7), Dhruvraj Singh (PW-14), Swapnil Nalhal (PW-22) and Rampal (PW-23) are the formal witnesses and have not stated anything specific about the incident. Kavita Haldhar (PW-3) has not supported the case of prosecution and has been declared hostile.

Vimal Kumar Mukherjee (PW-4) - the neighbour of (PW-1) has stated that he had telephonically informed PW-1 about the incident. He is also the witness to memorandum of accused/appellant Bhishma Narayan Jha vide Ex. P-13 and the seizure of articles made under Ex. P-14 to P-19. Ratiram Yadav (PW-5) is the police official who assisted in the investigation. Krishna Gopal (PW-6) has not supported the case of the prosecution and has been declared hostile. Devayan Ganguli (PW-8) - son of PW-1 and deceased Swagata Ganguli has stated that after receiving the information regarding the incident on 5.8.2013 he returned home from Durg and saw the dead bodies of his mother and grand-mother with bleeding injuries on neck. He has further stated that his mother and grand mother used to wear bangles, chain, rings - all made of gold and prior to incident also while he was leaving for Durg on 4.8.2013 they had worn the said ornaments. On the date of recording of evidence of this witness in the Court, the seized ornaments were produced in the Court which he had identified to be of his mother and grand-mother. In paragraph No. 7 of his deposition, this witness has stated that he was not aware as to from where the ornaments marked as A-1 to A-4 were purchased. He has further stated that such articles are easily available in the market. On being confronted with the case diary statement Ex. D-3, he has admitted that he did not disclose to the police that one bangle was missing from each of the hands of his grandmother. He is also stated to have informed the police that the chain worn by his mother contained black colour stone whereas in the article marked as A-3 no such stone was found. According to him, he did not disclose to the police that the chain worn by his grandmother was fitted with black stone. According to him, he could not tell whether the articles

so seized were made of gold or not. This witness has further stated that he did not give the description of the articles to the police. He has reiterated that the gold chain disclosed by him to the police is easily available in the market. He has stated that except gold necklace and two-three bracelets his mother and grandmother did not have any other ornaments. G. Shrinivas (PW-9) - the witness to inquest, memorandum and seizure has stated that all the documents were signed by him in the police station and that when for the first time he visited the place of occurrence, there was no card on the dining table but later it was seen to be there. This witness has expressed his ignorance about the card being put in the house of the deceased persons by some other visitors including the servants engaged there. Devendra Kesharwani (PW-10) is the witness who conducted the TIP of accused/appellant Bhishma Narayan Jha and according to him he (accused/appellant Bhishma Narayan Jha) was identified by S. Malik (PW-18) and Narayan Chakravarti (PW-19) stating that they saw him roaming in the locality for repairing of gas and burner. Kapil Chhabra (PW-11) - the witness to seizure of currency notes of Rs. 500/- denomination totalling to Rs. 10,000/- made under Ex. P-26 from one Mohan Pandey. Ashish Aldhar (PW-12) and Sujata Jha (PW-13) have not supported the case of the prosecution and have been declared hostile. Gopal Ghore (PW-15) is the witness to seizure of currency notes made under Ex. P-26 and P-28. Dr. B.R. Singh (PW-16) and Dr. Dharmendra Kumar (PW-17) are the witnesses who along with one Dr. S. Mahajan conducted postmortem examination on the dead-bodies of two women and gave their reports Ex. P-9 and P-10. Gist of postmortem report of deceased Swagata Ganguli (PW-9) reads as under:

“Multiple deep abrasions on chest and abdomen, lacerated wound on left side of SCM muscle to right side of posterior border of trapeus muscle about 13 cm x 3 cm horizontally, there was through and through cut of laryngeal cartilage (thyroid cartilage) at the level of thyroid cartilage, hypopharynx through and through cut present except posterior wall of hypopharynx was intact about 1 cm, right side of common carotid was cut, right side of cervical spine exposed and broken pieces present, thyroid cartilage was cut and divided into two pieces, lacerated wound from left side of mandible about 7 cm below. Cause of death, according to the doctors conducting postmortem examination was cardio respiratory failure as a result of haemorrhagic shock and due to cut throat injury.”

Postmortem report of deceased Bina Pani Ex. P-10 reads as under:

“Lacerated wound over neck slightly oblique pattern through cricoid cartilage about 2.5 cm above the suprasternal notch, lacerated wound extending from left side of anterior border of SCM muscle to right side of posterior border of SCM muscle about 12 cm x 2 cm, through and through cut of trachea at the level of cricoid cartilage and oesophagus present including the wall of oesophagus, vertebral column was exposed, right side of thyroid gland and SCM muscle was through and through cut and right side of cervical spine (vertebral column) exposed and broken pieces were present and upper part of cricoid cartilage was seen. Cause of death, according to the doctors conducting postmortem examination was cardio respiratory failure as a result of haemorrhagic shock and due to cut throat injury.”

11. S. Malik (PW-18) is the witness who identified accused/appellant Bhishma Narayan Jha in the TIP vide Ex. P-25. He has stated that accused/appellant Bhishma Narayan Jha was a gas

burner repaier who used to visit the area where the incident had taken place in connection with his professional work. In paragraph No.6 of his deposition he has stated that at the time of identification proceedings one police inspector was also present. Narayan Chakravarti (PW-19) is also the witness to TIP conducted vide Ex. P-25 and he too has stated that accused/appellant Bhishma Narayan Jha was a gas burner mechanic who had came to his house to ask about the gas repair work. Ravindra Kumar Mohle (PW-20) is also the witness to TIP but he has not stated anything specific against accused/appellant Bhishma Narayan Jha. Kamlesh Thakur (PW-21) is the witness who assisted in the investigation. He has admitted that the hand-writing on the visiting card was not verified by him. He has also not verified whether the said card was of Adhunik Suhag Bhandar. According to him, he could not tell as to when and by whom the visiting card was put on the place of incident. Prabhakar Tiwari (PW-24) is also the witness who assisted in the investigation and proved the location of cell phone of accused/appellant Bhishma Narayan Jha vide Ex. P-30 and P-31. According to these documents, the call location of cell No. 8085228426 was somewhere near the place of occurrence. It is relevant to note here that there is no document on record to suggest that the said cell number was of accused/appellant Bhishma Narayan Jha. D.S. Rajput (PW-25) is the investigating officer who has duly supported the case of the prosecution. He however has stated that in the *Dehati Nalisi* Ex. P-1 description of chain has been given where it was mentioned that a black stone was studded in it. It was also mentioned in the *Dehati Nalisi* that two rings were missing but no ring whatsoever was seized during investigation. Likewise, the chain also did not have any black stone.

Even the design of bangles too was not mentioned in the report. It also does not mention that any ear-pin was missing. This witness admits that ornaments looted are common ones and easily available in the market. No receipt of the same was however seized by him. He admits that during investigation he came to know that the ornaments so seized were of one Rajni but he could not record her statement. Here it is relevant to note that Rajni is the sister of accused/appellant Bhishma Narayan Jha and thus the possibility of those ornaments being of her cannot be ruled out. According to this witness, the bangles seized from accused/appellant Bhishma Narayan Jha were not of gold and he did not conduct any inquiry regarding the seizure of rings. He has admitted that there was no evidence that the deceased women were wearing those ornaments at the time of incident which were seized subsequently. He has further admitted that the fingers print were not taken from the spot and the reason assigned for that by him was that no such facility was available in the police station. Thereafter he has stated that one so-called finger print expert had come and collected the finger prints of the suspects and that of accused but no such report has been maintained nor is there an entry to this effect in the diary. This witness has stated that the finger prints were collected by the experts in between the afternoon and the evening but there is no entry in the diary in this respect. Ajay Kumar Sahu (PW-26) is the police constable who assisted in the investigation. Vipin K.V. (PW-27) is the Regional Manager of Manipuran Gold Finance Company where the accused/appellant Manish Mishra was working as Branch Manager.

12. Close scrutiny of the material available on record thus goes to show that there is no legally admissible evidence on record to show

the involvement of the accused/appellant Bhishma Narayan Jha in commission of murder of the two deceased women. It appears that he has been made accused mainly for the reason that he was working as gas burner repaierer and used to frequent to the locality in connection with his profession. The other ground for his implication appears to be that from the spot a visiting card of Adhunik Suhag Bhandar was seized on which cell number of accused/appellant Bhishma Narayan Jha was hand-written. Undoubtedly, this is a very weak type of evidence against this accused and merely for the reason that if on some piece of paper the cell phone of someone is mentioned, it cannot be presumed that it is he who was the author of the crime in question. Other piece of evidence relied upon by the Court below is the memorandum Ex. P-13 leading to seizure of some articles including the knife. Though FSL report Ex. P-29 is positive in respect of the knife and the clothes seized from the possesion of the accused/appellant Bhishma Narayan Jha but there is no serlogical report confirming its origin and being so the FSL report loses its evidentiary value. Furthermore, there is discrepancy in the description of gold ornaments allegedly seized from the possession of accused/appellant Bhishma Narayan Jha as if compared to the *Dehati Nalisi* and the FIR, it differs from the ones which were seized by the prosecution. Admission of the witnesses (PW-1 and PW-8) also demonstrates this fact. Another major lacuna in the case of the prosecution is that no TIP in respect of the ornaments has been conducted, and for the first time PW-8 – the son and grandson of the deceased women is said to have identified the same in the Court saying that his mother used to wear the same. Had there been proper identification of the ornaments, defecne would have

got the opportunity to cross-examine the witnesses in this respect but unfortunately it all remains undone. All this apart, investigating officer (PW-25) has also admitted the fact that ornaments seized are common ones and are easily available in the market and that no receipt in that regard has been seized by the police. He has also admitted that though he came to know the fact that the seized articles were of Rajni i.e. sister of accused/appellant Bhishma Narayan Jha but neither he could record her statement nor could make any inquiry in that respect. He has further admitted the fact that the bangles seized from accused/appellant Bhishma Narayan Jha were not of gold, but even in that respect he failed to conduct a detailed inquiry. According to the Investigating Officer, he has not collected any finger prints also. Though he states that one lady finger print expert came to the place of occurrence and took the finger prints of accused/appellant Bhishma Narayan Jha and other suspects but no such document is available on record. From the evidence of Investigating Officer it is apparent that there was a major lacuna in conducting the investigation. TIP of accused/appellant Bhishma Narayan Jha is of no help to the prosecution case as the witnesses PW-18 and PW-19 have merely stated that he was already seen by them in the locality as he used to visit there in connection with his gas burner repairing work. There is nothing on record to show that on the date of incident anybody saw him coming in or getting out of the house of the two deceased. So-called call details merely prove that on the date of incident cell number 8085228426 was within the range of nearby tower but merely on account of that it cannot be held that the accused/appellant was inside the house where such a horrible incident had taken place. Further, the call details have not been

proved as per the requirement of the evidence Act as the prosecution has utterly failed to adduce any evidence that said cell phone was of accused/appellant Bhishma Narayan Jha.

13. Undisputedly, there is no eyewitness to this blood curdling incident and the conviction of the accused/appellants is based on the circumstantial evidence such as seizure of articles, location of cell phone and call details etc. Even the circumstances relied upon do not form a complete chain leading to the unerring conclusion of guilt of the accused/appellants. It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. In other words, there must be a chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused -***Sattatiya @ Satish Rajanna Kartalla Vs. State of Maharashtra, (2008) 3 SCC 210***. Some prosecution witnesses have even stated that the house in question was also visited by the milkman and the maid servant, and therefore, in these circumstances possibility of involvement of some other hand in the commission of the crime in question, can also not be ruled out.

14. As regards accused/appellant Manish Mishra who has been convicted under Section 411 IPC, the material available on record goes to show that the ingredients contained in that provision are completely missing as the prosecution has utterly failed to

establish that the he dishonestly received or retained any stolen property, knowing or having reason to believe the same to be stolen property. Though mortgage documents Ex. P-32 and P-33 are said to be signed by accused/appellant Bhishma Narayan Jha but no such evidence is on record that the present appellant was having the knowledge that the articles placed before him were the stolen ones. Furthermore, these documents are dated 5.8.2013 when the offence was committed and thus there is no reason for accused/appellant Manish Mishra to believe that any such incident had taken place or that the articles pledged to him were involved in the commission of the crime in question. What is culled out from the record is that the ornaments were just placed before this appellant (Manish Mishra) by accused Bhishma Narayan Jha in the capacity of Branch Manager of Manipuram Finance Ltd. in order to get loan and he had absolutely no knowledge that they were the stolen ones. In this view of the matter where the prosecution has not made out its case by adducing any cogent and clinching evidence, this accused/appellant is also entitled for the benefit of doubt.

15. In the result, the appeals are allowed, judgment impugned is set aside and the accused/appellants are acquitted of the charge levelled against them. Accused/appellant Bhishma Narayan Jha is in jail and therefore he be set free forthwith if not required in any other case. Accused/appellant Manish Mishra is however already on bail and therefore no order regarding setting him free etc is necessary.

16. This Court is pained to write a note that the investigation in this case where two women have been murdered has not been done in the manner it should have been. Just a short shrift and

casual approach has been adopted by the investigating officer in so doing. It is for the higher police officers to look into the matter and take steps to ensure the proper investigation so that no innocent is held guilty and no guilty should go scotfree. Let a copy of this judgment be sent to the Director General of Police and Secretary, Law, State of Chhattisgarh, enabling them to issue necessary directions to the subordinates for being cautious in conducting the investigation.

Sd/-

(Pritinker Diwaker)

Judge

Sd/-

(Gautam Chourdiya)

Judge

Jyotishi