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HIGH COURT OF CHHATTISGARH, BILASPUR**ACQA No. 219 of 2012****Judgment reserved on 8-1-2018****Judgment delivered on 29-1-2018**

- Rohit Jain S/o Shri Sagarmal Jain Aged About 28 Years R/o Village Sadar Bazar , Near Jain Mandir , Post Raipur , P.S. City Kotwali, Raipur Distt. Raipur C.G. , Chhattisgarh

---- Appellant**Versus**

1. State Of Chhattisgarh Through - P.S. City Kotwali, Raipur ,distt. Raipur C.G. Chhattisgarh
2. Shiv Kumar Chouhan S/o Tikaram Aged About 22 Years R/o Village Tilakpur Post Tilakpur , P.S. Basna , Distt. Mahasamund C.G., District : Mahasamund, Chhattisgarh
3. Vinod Kumar Tharani S/o Goverdhan Das Aged About 29 Years R/o Near Naya Ganj Post Bhatapara City ,distt. Raipur Now Distt. Baloda Bazar Bhatapara C.G. , District : Balodabazar-Bhathapara, Chhattisgarh
4. Sunil Ajgalle S/o Ram Swarup Ajgalle Aged About 28 Years R/o Village Giroudpuri , Post Giroudpuri Out Post Gidhouri , P.S. Bilaigarh ,distt. Raipur Now Distt. Baloda Bazar Bhatapara C.G. , District : Balodabazar-Bhathapara, Chhattisgarh
5. Gajendra Verma @ Gajju S/o Dayaram Verma Aged About 35 Years R/o Bajaj Colony , C- 28 Bajaj Colony Post Raipur , P.S. Rajendra Nagar Raipur Tahsil And Distt. Raipur C.G. , District : Raipur, Chhattisgarh
6. Montu @Bhushan Verma S/o Dayaram Verma Aged About 28 Years R/o Bajaj Colony , C- 28 Bajaj Colony Post Raipur , P.S. Rajendra Nagar Raipur Tahsil And Distt. Raipur C.G., District : Raipur, Chhattisgarh
7. Mona @ Lokeshverma S/o Tulu @ Tularam Aged About 23 Years R/o Village Gatapar , Post -Palari , P.S. Palari ,distt. Raipur , C.G. At Present R/o Bajaj Colony , P.S. New Rajendra Nagar , Raipur C.G. , District : Raipur, Chhattisgarh

---- Respondents

For Appellant : Mr. C.R. Sahu, Advocate

For respondent No.1/State : Mr. Avinash K. Mishra, Panel Lawyer

Hon'ble Shri Prashant Kumar Mishra,
Hon'ble Shri Ram Prasanna Sharma, JJ

CAV Judgment

Per Ram Prasanna Sharma, J

1. This acquittal appeal is preferred against the judgment of acquittal dated 27-9-2012 passed by the Fifth Additional Sessions Judge, Raipur, Sessions Division Raipur(CG) (for short, "the trial Court") in Sessions Trial No. 138 of 2010 wherein the trial Court has acquitted respondent Nos. 2 to 7 of the charges under Sections 397, 120B of the IPC and Sections 25 (a) and 27 of the Arms Act 1959.
2. As per the case of prosecution on 8.5.2010 at about 17.12 hrs., three persons came on a Pulsar Motorcycle bearing registration No. CG 04 DG 8767 armed with deadly weapons i.e. country made revolver/pistol(katta) and entered into the shop of the appellant situated at Sadar Bazar (behind Jain Temple), Raipur, threatened him and other persons present there with dire consequences and thereafter robbed golden chain from Rohit Jain, golden ring from Yogendra, golden ring from Pintu @ Shantilal, mobiles of Nokia and Samsung Company and cash of Rs.5 lacs and fled away.
3. On the basis of report lodged by Rohit Jain, Police of City Kotwali, Raipur registered an offence against the unknown person. During course of investigation on the basis of discovery statement some cash and mobile phone was seized from respondent Shiv Kumar Chouhan, some cash, mobile and country made revolver was seized from respondent Vinod Kumar Tharani, some cash T.V. and other articles from respondent Sunil Ajgalle, cash from respondent

Gajendra Verma @ Gajju, golden chain, ring, country made revolver and cash from respondent Montu @ Bhushan Verma and cash and country made revolver from respondent Mona @ Lokesh Verma.

4. After completion of investigation charge-sheet was filed against respondent Nos. 2 to 7. The respondents denied the charges, therefore, trial was conducted. After examination of prosecution witnesses, statements of respondents under Section 313 of Cr.P.C., were recorded and after hearing both the parties, the trial Court acquitted the respondents as mentioned above.
5. Learned counsel for the appellant submits as under:
 - i) It is established before the trial Court by oral and documentary evidence that decoity was committed by the respondents, but the trial Court has acquitted the respondents by giving benefit of doubt, which is not permissible under the law.
 - ii) The country made revolver used in commission of the offence is seized during investigation and the same is proved, but it is disbelieved by the trial Court and there is grave error of law.
 - iii) The trial Court ordered that the material seized from respondents 2 to 7 be returned to them which is arbitrary in nature and bad in the eye of law.
6. The first point for consideration is whether it is open to this Court in an appeal against the order of acquittal to review the entire evidence to come to its own conclusion.
7. In the matters of **Sanwat Singh Vs. State of Rajasthan, AIR 1961**

SC 715, State of Punjab Vs. Kulwant Singh alias Kanta (2008) 16 SCC290 and Satya Narain Yadav Vs. Gajanand and another (2008) 16 SCC 609, it is held that an appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded. It is also held that the Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and law.

8. To substantiate the charge, prosecution has examined as many as 17 witnesses.
9. Rahul Jain (PW1) was not present at the time of incident. He has been informed by his friend regarding the incident. Rohit Jain (PW2) deposed that three persons who have covered their faces with clothes, entered into his office and triggered the revolver towards him and thereafter looted the articles and cash. Yogendra Parakh (PW6), Parasmal Parakh (PW7), Shantilal Jain @ Pintu (PW8) and Umesh Yadav (PW10) deposed on same line.
10. From the evidence of witnesses present at the time of incident, it is not established that they have seen face of any of the culprit. As the witnesses have no occasion to see faces of the culprits they were not able to identify them even after the incident. No identification parade was conducted in the present case and the case of prosecution is based on identification of articles seized from the possession of the respondents.
11. Umesh Mishra (PW14), Police Inspector is the person before whom

discovery statement and seizure was made. As per version of this witness on the discovery statements, he seized Rs.3,000/-, one mobile phone and sim card from the possession of respondent Shiv Kumar Chouhan, Rs.16,000/-, one country made revolver and one mobile phone from respondent Vinod Kumar Tharani, Rs. 27,000/-, one T.V., one receiver from respondent Sunil Ajgalle, Rs.3,87,000/- from respondent Gajendra Verma @ Gajju, one golden chain and 2 golden rings, one country made revolver and Rs.2,000/- from respondent Montu @ Bhushan Verma and one motorcycle and one country made revolver and Rs.2,000/- from respondent Mona @ Lokesh Verma.

12. Now the point for consideration is whether criminal liability can be fastened against the respondents on the basis of such seizure. The F.I.R. is lodged against three unknown persons. There are no identification marks regarding Nokia and Samsung mobiles as mentioned in the F.I.R. and there is no description regarding currency notes as denominations of those notes are not mentioned in the F.I.R.
13. From the evidence it is not established as to who is the registered owner of the Pulsar Motorcycle bearing registration No. CG 04 DG 8767 and statement of such registered owner is not recorded. As earlier stated, three persons had entered the shop who were unknown to the witnesses and therefore, it cannot be said that any respondent has used the said motorcycle in commission of the crime of dacoity. It is stated by Rohit Jain (PW2) that he is working in Share Market, but he has not produced any account details regarding

transactions of share market and regarding the balance of amount in his shop. No such account details have been produced before the trial Court to establish really how much amount was kept in the shop as per record. He further deposed (para 11) that the identification of article was conducted in Police Station.

14. Though Devendra Kumar Soni (PW4) was produced before the trial Court to establish identification of articles, but he was unable to answer as to who prepared the memorandum Ex. P/7 which was prepared for identification of articles.

15. It is stated by Yogendra Parakh (PW6) that one golden ring from his finger and one golden ring from the hand of Pintu @ Shanti Bhansali was removed during the incident, but he is silent about the identification of his ring though it is alleged to be seized by the police agency. When description of article was not mentioned in the F.I.R. and no account details of the cash was produced before the trial Court, the trial Court was not in a position to conclude that certain articles and amount was removed from the office of the appellant. The evidence was not sufficient to inspire confidence of the trial Court to hold that the seized articles were removed from the office of the appellant. Unless it is proved that seized articles are subject matter of the crime, the respondents are not under criminal liability and articles seized from them can not be termed as articles of complainant side. It is not clear from the evidence of Police Inspector (PW14) who is the Investigating Officer of the case that the seized articles were sealed in presence of the witnesses and same were kept in safe custody of

Malkhana of Police Station and thereafter, it was handed over to the authorities who conducted identification of the articles. Evidence on this aspect is lacking, therefore, it is difficult for us to hold that the articles seized were kept in safe custody and same were sent for identification and that creates doubt in conduction of identification of articles seized.

16. There is no evidence that any firearm was used during the said incident. Section 27 of the Arms Act 1959 attracts only when the firearm is used. For taking cognizance under Section 25 of the Arms Act, it is essential that a sanction from District Magistrate be produced and proved. Unless such sanction is produced, no Court is competent to take cognizance for the said offence.

17. Section 39 of the Arms Act, 1959 may be read as under :-

Previous sanction of the District Magistrate necessary in certain cases :- No prosecution shall be instituted against any person in respect of any offence under Section 3 without the previous sanction of the District Magistrate. Section 39 of the Arms Act, commands that sanction must be granted by District Magistrate. As per Section 21 of the Cr.P.C., the State Government may appoint, as many persons as it think fit, Executive Magistrates, and one of them to be District Magistrate. From the word of the provision, it is clear that only one Executive Magistrate will be appointed as District Magistrate and no other Magistrate can be called as District Magistrate.

18. In the present case as per evidence sanction was granted by the Additional District Magistrate.

19. As per Section 21 of the Cr.P.C. Additional District Magistrate is not the District Magistrate, therefore, any sanction granted by him is not in accordance with law. Santosh Kumar Dubey (PW3) who was Assistant Grade -III in the office of Additional District Magistrate has not deposed that any firearm was produced before the said Magistrate. Unless the sanctioning authority looks itself the instrument in respect of which sanction is sought, he cannot be said to have any idea regarding firearms. When the instrument was not produced before the said Magistrate it cannot be said that the said magistrate has applied his mind while granting sanction. As additional Magistrate was not competent to grant sanction as the firearm was not produced before the authority, sanction is not proved in peculiar circumstance of the case. Section 39 of the Arms Act bars for taking cognizance and unless sanction is valid no cognizance can be taken and no trial can be conducted, therefore, the trial against the applicant is invalid for offences under Arms Act.
20. As per statement of Umesh Mishra (PW14), Police Inspector, it is not clear whether he sealed the firearm on the spot and whether the same was kept in safe custody of Police Station and same is sent for examination. No evidence of Incharge of Malkhana of Police Station is adduced by the prosecution, therefore, it cannot be said that the seized articles were kept in safe custody of Malkhana of Police Station and same was sent for examination.
21. In the instant case, prosecution has not been able to establish that respondent Nos. 2 to 7 were the persons who came with deadly

weapons and committed dacoity and robbed the cash and other golden articles from the shop of the appellant, therefore, the finding arrived at by the trial Court is based on evidence on record, is not liable to be interfered with and acquittal of respondents 2 to 7 is in accordance with law. When evidence of robbery is not proved, the property is not proved to be the property of complainant side and therefore, it cannot be given to the custody of the complainant. The finding of the trial Court regarding disposal of property is also not liable to be interfered with.

22. Considering all the facts and circumstances of the case, we are of the opinion that the judgment of the trial Court is based on legally admissible evidence. Accordingly, the appeal is liable to be and is hereby dismissed.

**Sd/
Judge
(Prashant Kumar Mishra)**

**Sd/
Judge
(Ram Prasanna Sharma)**