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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on : 31/08/2018****Judgment Delivered on : 07/09/2018****Criminal Appeal No. 505 of 2015**

1. Dileep Khora, S/o Shri Abdul Khora, aged about 24 years, R/o. Bapuji Nagar, Jaipur, Post Office & Police Station – Jaipur, District Koraput (Odisha)
2. Vicky @ Devid Bahadur, S/o Shri Samual Bahadur Isai, aged about 26 years, R/o. Village Dhepuda, Jaipur, Post Office & Police Station – Jaipur, District Koraput (Odisha)

---- Appellants**Versus**

State Of Chhattisgarh through the District Magistrate, Dhamtari,
District Dhamtari, Chhattisgarh.

---- Respondent**AND****Criminal Appeal No. 758 of 2017**

Raja @ Shekh Mahemood, S/o Shekh Amir, aged about 22 years,
R/o. Ward No. 19, Pathansai, Police Station – Jaijipur, District
Koraput (Odisha)

---- Appellant**Versus**

State Of Chhattisgarh through the Police Station Kurud, District
Dhamtari, Chhattisgarh.

---- Respondent

For Appellants	:	Shri Shivendu Pandya and Ms. Sareena Khan, Advocates.
For Respondent/ State	:	Shri Ashok Swarnakar, P.L.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**CAV JUDGMENT**

(1) Challenge in these appeals is to the judgment of conviction and order of sentence dated 1.4.2015 passed by Learned Sessions Judge,

Dhamtari, District Dhamtari, Chhattisgarh in Sessions Trial No. 3 of 2014 whereby and whereunder the learned Sessions Judge has convicted the appellants for the offence under Section 397 of the IPC and sentenced them to undergo rigorous imprisonment for 7 years.

(2) Conviction is impugned on the ground that without there being any iota of evidence, the trial Court has convicted and sentenced the appellants as aforementioned and thereby committed illegality.

(3) As per case of the prosecution, in brief, on the date of incident i.e. 18.8.2013 when complainant – Prawal Chandrakar, a jeweller was on his way to home carrying with him ornaments of gold and silver, three unknown persons looted all the articles in his possession after assaulting and injuring him. The complainant identified one of the culprit as Raja @ Shekh Mahemood and lodged FIR Ex.P/13. The investigation was conducted and co-accused - Raja @ Shekh Mahemood was apprehended, who gave the lead for other appellants/ accused persons. At his instance, two gold rings were seized vide Ex.P/7. At the instance of appellant No.1 – Dileep Khora in Cr.A. No. 505 of 2015, gold and silver ornaments were seized vide Ex. P/9 and at the instance of appellant No.2 – Vicky @ Devid Bahadur, gold and silver ornaments and one Mauser pistol were seized vide Ex. P/11. The seized articles were identified as the stolen property by complainant – Prawal Chandrakar (PW-7) vide Ex.P/5.

(4) Statements of the witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short 'the Code'). The

investigation was carried out and on completion of the same, the charge-sheet was filed before the concerned Court.

(5) During trial, the Court below framed the charge under Section 397 of the IPC. The appellants denied the charges and prayed for trial. The prosecution examined as many as 12 witnesses to prove the guilt of the appellants. No witness was examined in defence. Statements of the appellants were recorded under Section 313 of the Cr.P.C. wherein the appellants denied the circumstances appearing against them and pleaded innocence and false implication in the crime in question.

(6) After affording opportunity of hearing to both the parties, learned trial Judge convicted and sentenced the appellants in both the cases as aforementioned.

(7) I have heard learned counsel for the parties, perused the judgment impugned and records of the Court below.

(8) Learned counsel appearing on behalf of the appellants submit that the impugned judgment of conviction and sentence is contrary to law laid down in this regard. According to the material available on record, no case is made out against the appellants. Hence, it is prayed that the appellants be acquitted in both the cases and in alternative, it is prayed that if this Court is not inclined to allow the appeal and acquit the appellants, looking to the fact that the appellants are in jail since near about 5 years and also looking to the long detention of the appellants in

jail, their sentence of imprisonment be reduced to the period of custody already undergone by them.

(9) Per contra, learned counsel for the Respondent/ State opposed the prayer and submissions. It is submitted that the prosecution has proved its case beyond reasonable doubt. Neither there is any ground for reduction of sentence of imprisonment of the appellants nor any ground for interference. Hence, no ground is made out for interference in the impugned judgment.

(10) In order to appreciate the arguments advanced on behalf of the parties, I have perused the evidence adduced by the prosecution.

(11) The evidence is that on the date of incident Prawal Chandrakar (PW-7) who was in possession of gold and silver ornaments of his jewellery shop was looted by three unknown persons, appears to be undisputed. No question has been put to him in his cross-examination to contradict that at the time of incident, he was in possession of gold and silver ornaments and he was looted for the same. Prompt lodging of FIR Ex.P/13 in P.S. Kurud also supports the version. Apart from that, the articles from 1 to 35 were produced by this witness before the Court, in support of his statement about the purchase of ornaments by him, which were in his possession, which is totally unchallenged in the cross-examination and the same by itself shows beyond reasonable doubt that the complainant was in possession of gold and silver ornaments at the time of incident which were looted by the culprits.

(12) Complainant – Prawal Chandrakar (PW-7) has stated that on the date of incident he was on motorcycle which was kicked and then he was assaulted by the culprits with an article of iron rod on his head, front and back. In cross-examination, this statement was not challenged. No question was put to him by counsel for defence as to injuries caused to him were rather than the assault by the culprits.

(13) Dr. Mamta Thakur (PW-1) has stated that on 18.8.2013 she examined complainant – Prawal Chandrakar (PW-7) at about 11:40 in the night and found two injuries and abrasions on his head which were of simple nature. Although she admitted in her cross-examination that such injuries can be caused by a fall, but neither there is evidence on record to show that the complainant had a fall nor the complainant was asked any question on this point. Hence, this admission is of no effect, which adds to the finding arrived at about the complainant who was assaulted and injured at the time of offence committed with him.

(14) Goverdhan Singh Thakur, ASI (PW-5) has stated that appellant – Raja @ Shekh Mahemood made a statement on memorandum vide Ex. P/6 and at his instance, one gents gold ring and one ladies gold ring were seized vide Ex. P/7. Similarly, appellant – Dileep Khora in his memorandum statement vide Ex. P/8 lead to the recovery of one gents gold ring and one pair of silver ornament that is *pair patti* vide Ex. P/9 from his possession. This witness has stated that appellant No.2 - Vikky @ Devid Bahadur gave a statement of memorandum vide Ex. P/10 and lead to the recovery of gold and silver ornaments alongwith one Mauser pistol, one motorcycle and one bag vide Ex. P/11. This witness has

remained firm in his statement and there is no such contradiction in the cross-examination towards the statement given by him in examination-in-chief.

(15) Independent witness – Deepak Kumar Sahu (PW-8) has supported the statement given by Goverdhan Singh (PW-5) to some extent which is sufficient to corroborate the statement of the Investigation Officer and the proceedings were carried on accordingly as stated by him.

(16) After analyzing the evidence of Goverdhan Singh Thakur (PW-5) and the supporting witness Deepak Kumar Sahu (PW-8), this view can be easily formed that recovery of articles of gold and silver have been made at the instance of the appellants by the respective memorandums and seizure memos which is sufficient proof and can be regarded as beyond reasonable doubt. After the proof of seizure of gold and silver articles from all the appellants so made, the burden was shifted upon the appellants to explain as to in what manner they were in possession of the articles that were seized from them, regarding which no statement has been made by any of the appellant while they were examining under Section 313 of the Cr.P.C. and no witness has been examined in defence, which shows that the appellants have no explanation about articles of gold and silver found in their possession, which is a strong circumstance against them.

(17) The articles recovered from the appellants were subjected to TIP. G.L. Yadav, Executive Magistrate, (PW-12) has stated in his examination-in-chief that the articles seized were mixed with similar

articles of gold and silver during the Identification Parade and complainant – Prawal Chandrakar (PW-7) spotted and picked each and every article by identifying them vide Ex.P/15 in presence of the witnesses. On scrutinizing the statement given by him in cross-examination, his statement in chief is found unrebutted and there is no such circumstance brought-forth in the cross-examination to doubt as also the procedure conducted in identifying the articles by this witness.

(18) G.L. Yadav (PW-12) is also the witness of TIP of the appellants/accused persons in this case and he has stated that in the TIP conducted in his presence appellant – Vicky @ Devid Bahadur was identified accordingly by the complainant vide Ex.P/2, appellant – Raja @ Shekh Mahemood was identified by the complainant accordingly vide Ex.P/3 and appellant No.1 – Dileep Khora was identified by the complainant vide Ex. P/4. In cross-examination, his statement has remained unrebutted.

(19) Complainant – Prawal Chandrakar has stated accordingly in examination-in-chief. He denied in his cross-examination that he had seen the appellants before the TIP in Police Sation Kurud and stated that he has not seen the photographs of the appellants in the newspaper, whereas, no such newspaper has been confronted to him by the defence. He is acquainted with the witnesses of the procedure by itself does not raise any doubt in the correctness of these procedures.

(20) After due consideration of all the evidence present in this case,

I am of the opinion that the prosecution has proved the case against the appellants beyond reasonable doubt that on the date of incident the complainant who was in possession of gold and silver of his jewellery shop was looted by these appellants after assaulting and injuring him. Now the question under consideration is whether the offence committed is under Section 397 of the IPC or under Section 394 of the IPC. To make out an offence under Section 397 of the IPC, the requirement of proof is that the appellants must have used deadly weapon or must have caused grievous hurt or must have attempted to cause death of some person. In this case, the complainant has been unable to state as to what was the weapon of assault with which he was caused injuries. Secondly, according to the medical report vide Ex. P/1 and the statement of Dr. Mamta Thakur (PW-1) the injuries caused to the complainant were of simple in nature. Hence, it cannot be presumed that the appellants attempted to cause death or grievous hurt of the complainant. Further no grievous hurt was caused to the complainant and there is no evidence of use of any deadly weapon at the time of assault. Hence, complete proof in support of Section 397 of the IPC is missing and thus, the case will fall under Section 394 of the IPC.

(21) After due consideration and on the basis of the findings wherein-above, these appeals are allowed in part. The conviction of the appellants under Section 397 of the IPC is set aside and instead thereof they are convicted for the offence under Section 394 of the IPC. It has been submitted that the appellants have remained in custody for near about 5 years which appears to be sufficient sentence to be imposed upon them for the offence committed. Hence, all the appellants are

sentenced with imprisonment of period of custody already undergone by them in jail. They be set at liberty forthwith if not required in any other case.

(22) Accordingly, the appeals are allowed.

Sd/-

(Rajendra Chandra Singh Samant)
JUDGE

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