

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 18 OF 2014****Reserved on : 13/03/2018****Pronounced on : 10/04/2018**

1. Manohar Malik S/o Dhirendra Malik Aged About 29 Years, R/o. Village P.V.57, Kapsi Police Station Pankhajur, District Kanker (C.G.)

2. Arun Mirdha S/o Kalipad Mirdha Aged About 44 Years R/o. Village P.V.60, Pankhajur, Police Station Pankhajur, District Kanker (C.G.).

----Appellants**Versus**

State of Chhattisgarh Through Police Station Pankhajur, Distt. Kanker, (C.G.).

---- Respondent**Criminal Appeal No. 29 OF 2014**

Raju Mahaldar, S/o Narayan Mahaldar, Aged About 25 Years, Occupation Mobile Shop, R/o Forest Colony, Bade Kapsi, Post Office Bade Kapsi, Police Station Pakhanjur, District North Bastar Kanker, (C.G.).

---- Appellant**Versus**

State of Chhattisgarh through the District Magistrate, North Bastar Kanker, District North Bastar Kanker, (C.G.).

---- Respondent**Criminal Appeal No. 118 OF 2014**

Sushant Mali, son of Manoranjan Mali, Aged About 27 Years, Occupation Agriculturist, R/o Basant Nagar, Bhanupratappur, Tahsil and Police Station Bhanupratappur, Civil and Revenue District Kanker (C.G.).

---- Appellant**Versus**

State of Chhattisgarh through the Station House Officer, Police Station Pakhanjur, District Kanker, (C.G.).

---- Respondent

For Respective Appellants : Mr. Sandeep Shrivastava, Mr. Raj Kumar Pali and
Mr. Aman Kesharwani, Advocates
For State/Respondent : Mr. Adil Minhaj, P.L. and Mr. Ravindra Agrawal, G.A.

**Hon'ble Shri Pritinker Diwaker &
Hon'ble Shri Sanjay Agrawal, JJ.**

C A V Judgment

Per Sanjay Agrawal, J.

1. These appeals have been preferred by the appellants under Section 374(2) of the Code of Criminal Procedure, 1973, (hereinafter referred to as 'the Cr.P.C') against the common judgment dated 28/11/2013 passed by the learned Sessions Judge, North Bastar Kanker (C.G.) in Sessions Trial No. 131/2011, whereby they have been convicted and sentenced as under :-

<u>Conviction</u>	<u>Sentence</u>
Under Section 395 of the Indian Penal Code (for short 'the IPC')	Rigorous imprisonment for 14 years with fine of Rs. 1000/- and in default of payment of fine amount, additional simple imprisonment for one month each.

2. Since all these three appeals arise out of the common judgment, therefore, they are being disposed of by this common judgment.

3. Briefly stated, the case of prosecution is that on 10/09/2010 at about 8.30 P.M., 6-7 unknown persons entered into the house of the complainant Tarun Samaddar forcefully when his mother, wife and children alone were at home. At the relevant time, they were armed with country made pistol (*Desi Katta*) and that by pointing the same threatened his mother and wife and thereby looted cash amount of Rs. 30,000/- (Rs. Thirty Thousand only) along with jewellery, total amounting to Rs. 65,000/- (Rs. Sixty Five

Thousand only).

4. Based upon the aforesaid incident, an offence punishable under Section 395 of the IPC against 6-7 unknown persons has been registered. On the basis of which, First Information Report (Ex. P-1) was lodged by the complainant- Tarun Samaddar before the Station House Officer, Pakhanjur, District North Bastar Kanker.

5. During the investigation, appellants have been identified by his mother and wife through Test Identification Parades (Exs. P-3 to P-5). Disclosure statements (Ex. P-8, Ex. P-16, Ex. P-18, Ex. P-19 & Ex. P-21) were made by the appellants and at their instance two Pulsar Motorcycles and country made pistol (*Desi Katta*), were seized from them vide Ex. P-20, Ex. P-22 & Ex. P-32.

6. After usual investigation of the matter as such, Station House Officer Pakhanjur, District North Bastar Kanker has submitted its final report before the Judicial Magistrate First Class, Pakhanjur, District North Bastar Kanker against the appellants under Section 395 IPC and under Section 25 of the Arms Act, 1959. The matter was thereafter committed to the Sessions Judge, North Bastar Kanker for its trial.

7. After considering the *prima facie* materials available on record, the trial Court has framed the charges under Section 395 IPC and under Section 25 of the Arms Act, 1959 against the appellants, who have pleaded not guilty in connection with the aforesaid crime, as framed, and claimed to be tried.

8. In order to bring home the guilt of the accused persons, the prosecution has examined as many as 15 witnesses, while none was examined by them in their defence.

9. The trial Court, after considering the evidence led by the prosecution, has convicted the appellants under Section 395 IPC and sentenced them as aforesaid while acquitting them of the charge in relation to the offence punishable under Section 25 of the Arms Act, 1959.

10. Being aggrieved, the appellants have preferred these appeals. Mr. Sandeep Shrivastava, Mr. Raj Kumar Pali and Mr. Aman Kesharwani, learned counsels appearing for the respective appellants submit that the judgment under appeal as passed by the trial Court is apparently contrary to law as the same has been passed without considering the evidence in its proper perspective. They submit further that on the basis of weak circumstantial evidence, like the "Test Identification Parade", the trial Court ought not to have convicted the appellants under Section 395 IPC.

11. On the other hand, Mr. Ravindra Agrawal and Mr. Adil Minhaj, learned counsels appearing for the State/respondent has supported the impugned judgment by submitting *inter alia*, that it has been passed upon due and proper appreciation of the evidence of the prosecution witnesses, and therefore, does not require to be interfered.

12. We have heard the learned counsel appearing for the parties and perused the entire record carefully.

13. Tarun Samaddar (PW-1) is said to have lodged the First Information Report (Ex. P-1), who has stated in his evidence that on the fateful day at about 8.00 P.M., he was in his shop and his mother, wife and children were at home. At that particular time, one of his neighbours, namely, Ashok came to his shop and informed his elder brother Tapan that 4-5 unknown persons covering their faces with handkerchiefs entered into the house and by

threatening his family members pointing country made pistol (*Desi Katta*), had looted the cash amount as well as jewellery. According to him, three of them have been identified by his mother and wife in a Test Identification Parade vide Exs. P-3 and P-4, which was conducted in Tahsil Office in his presence. This witness has, however, stated in his cross-examination that one or two police persons were present at the time of the said Identification Parade.

14. Smt. Reeta Samaddar (PW-2) is the wife of the complainant Tarun Samaddar and has stated in her evidence that the appellants who have covered their faces with cloths entered into the house and looted the cash and jewellery. She has stated further that in a Test Identification Parade, she identified three of them vide Ex. P-3 and also identified the appellants Raju Mahaldar and Arun Mirdha in a Test Identification Parade vide Ex. P-5 conducted at Kanker Jail. She, however, stated in her cross-examination that their faces were not visible properly and has stated further that the police persons were present at the time of Test Identification Parade. More or less, a similar is the statement of the mother of the complainant, namely, Suniti Rani (PW-13), who has stated that five persons while covering their faces had come to the Verandah of the house and one of them was holding a Pistol and looted cash amount of Rs. 40,000/- (Rs. Forty Thousand only) and have looted jewellery also. She has stated further that in a Test Identification Parade conducted by Tahsildar Pakhanjur, she identified three of them vide Ex. P-4. She, however, has stated in her cross examination that the alleged Identification Parade was carried out at Tahsil Office, Pakhanjur where police persons were also present.

15. Devilal (PW-3) is the witness of disclosure statement (Ex. P-8) of the

appellant Sushant Mali and has supported the prosecution case. Ishwar Lal Netam (PW-4) is the *Patwari*, who has prepared the spot map (*Nazari Naksha*) vide Ex. P-9. Jitendra Singh Gurung (PW-5) is a Constable and has submitted two MLC reports (Exs. P-12 and P-14) regarding the seized country made pistol (*Desi Katta*). A. Kiro (PW-7) and B.P. Bakhla (PW-15) are the Investigating Officers and have supported the prosecution case. Vishnu Mandal (PW-6), Manmath Mandal @ Munna (PW-9) and Jhiriram (PW-12) have turned hostile without supporting the prosecution case.

16. Om Narayan Tiwari (PW-8) is an employee of the Office of Collector and District Magistrate, Kanker and has identified the signature of one Shri N. K. Khakha, District Magistrate, Kanker, who passed an order dated 26/08/2011 (Ex. P-31) sanctioning the permission for initiating the proceedings against the accused persons under the Arms Act, 1959. B. S. Netam (PW-10) and Sushri Sumit Pandey (PW-11) are Naib Tahsildars, who have carried out the alleged Test Identification Parades of the accused persons vide Exs. P-3 to P-5. Bapi Chakravorty (PW-14) is a formal witness.

17. A close scrutiny of the aforesaid evidence would show that the accused persons while committing the alleged offence had covered their faces with handkerchiefs and are alleged to have been identified by the complainant Tarun Samaddar's mother Smt. Suniti Rani (PW-13) and his wife Smt. Reeta Samaddar (PW-2). However, from bare perusal of their evidence regarding the Test Identification Parades (Exs. P-3 to P-5), it is difficult to accept the same as it was conducted not only in presence of the police officers, but the wife of the complainant, Smt. Reeta Samaddar has categorically admitted at Paragraph-7 of her cross-examination that their

faces were not visible properly. In such circumstances, it can not be held that the appellants have duly been identified by the mother and wife of the complainant.

18. It is the settled principles of law regarding the Test Identification Parade that it is not a substantive piece of evidence and such tests are meant for the purpose of helping the investigating agency in order to ensure that their progress with the investigation into the offence is proceeding on right directions. The Test Identification Parade is not a substantive evidence but it can only be used in corroboration of the statements in Court as held in the matter of ***Musheer Khan Alias Badshah Khan and Another v. State of Madhya Pradesh*** reported in **(2010) 2 SCC 748**, wherein the Hon'ble Supreme Court has observed at paragraphs-24, 25 & 26 as under:-

“24. It may be pointed out that identification test is not substantive evidence. Such tests are meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines. (See *Matru v. State of U.P.*, - 1971(2) SCC 75 at p. 83, para 17.)

25. It is also held by this Court that identification test parade is not substantive evidence but it can only be used in corroboration of the statements in court. (See *Santokh Singh v. Izhar Hussain*, - (1973) 2 SCC 406 at p. 412, para 11.)

26. Recently in *Amitsingh Bhikamsingh Thakur v. State of Maharashtra* - (2007) 2 SCC 310, this Court held on a consideration of various cases on the subject that the identification proceedings are in the nature of tests and there is no procedure either in Cr. P.C., 1973 or in the Evidence Act, 1872 for holding such tests. The main object of holding such tests during investigation is to check the memory of witnesses based upon first impression and to enable the prosecution to decide whether these witnesses could be cited as eye witnesses of the crime. It has also been held that the evidence of the identification of the accused for the first time is inherently weak in character and the Court has

held that the evidence in test identification parade does not constitute substantive evidence and these parades are governed by Section 162 of the Code of Criminal Procedure and the weight to be attached to such identification is a matter for the courts.”

19. Reverting back to the case in hand, where it emerges from the evidence available on record that the Test Identification Parades are the only circumstantial evidence in order to hold the appellants' guilt in connection with the framed offence punishable under Section 395 IPC. However, the said Identification Parades, as observed herein above, cannot be held to be sustainable in the eye of law and, based upon the aforesaid principles, no reliance could be placed upon the alleged Test Identification Parades conducted vide Exs. P-3 to P-5. We are, therefore, of the opinion that the conviction can not be held to be sustainable on the basis of the said Identification Parades, as held by the trial Court.

20. Consequently, the findings of the trial Court convicting the appellants solely on the basis of the Test Identification Parade cannot be held to be sustainable and the findings so recorded deserve to be and are hereby set aside. Accordingly, the appeals are allowed and the conviction of the appellants under Section 395 IPC and sentence awarded thereunder vide judgment impugned dated 28/11/2013 passed by the learned Sessions Judge, North Bastar Kanker (C.G.) in Sessions Trial No. 131/2011 is set aside. The appellants are hereby acquitted of the aforesaid charges. They shall be set at liberty forthwith, if not required in any other case.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(Sanjay Agrawal)
Judge