

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.114 of 2011

Farid Ahamed, son of Jamil Musalman, aged about 21 years, resident of Charoda, Nehru Chowk, Purani Bhilai, District Durg, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh through Police Station Purani Bhilai, District Durg, Chhattisgarh

--- Respondent

and

Criminal Appeal No.310 of 2011

Chhotu @ Tipu Sultan, son of Shri Abdul Latif, aged 19 years, resident of Nehru Chowk, Charoda, P.S. Purani Bhilai, District Durg, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh through Arakshi Kendra, Purani Bhilai, District Durg, Chhattisgarh

--- Respondent

For Appellant Farid Ahamed	:	Shri Rahil Arun Kochar, Advocate
For Appellant Chhotu	:	None
For State/Respondent	:	Shri K. K. Dewangan, Deputy Government Advocate

Hon'ble Shri Justice Arvind Singh Chandel

Judgment on Board

26.7.2019

1. Since both the appeals arise out of a common judgment, they are disposed of together by this common judgment.
2. Both the appeals have been preferred against the judgment dated 21.1.2011 passed by 8th Additional Sessions Judge (FTC), Durg in Sessions Trial No.185 of 2009, whereby both the Appellants have been convicted and sentenced as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 397 read with Section 34 of the Indian Penal Code	Rigorous Imprisonment for 7 years and fine of Rs.500/- each with default stipulation

3. Case of the prosecution, in brief, is that on 2.1.2009 at about 2:45 p.m., Ajay Kumar (PW1) submitted a written complaint (Ex.P1) in Police Station Purani Bhilai, District Durg stating therein that on 11.1.2008 at about 7:45 p.m., he was returning along with his friend Pradeep Nair (PW2) from Raipur and going towards M.P. Housing Board, Jamul. Near the Janjgiri turning, when he was discharging urine after stopping his motorcycle, both present Appellants Farid and Chhotu came there and by showing knife they looted his Nokia mobile phone bearing model No.6280 and also looted his ring and cash of Rs.400/- and saying that if he reports the matter they will kill him and thereafter they fled from there. After the incident, he went to Indore for his studies. Thereafter, when he knew the fact from his family members that both the present Appellants were caught by the police and police had recovered his mobile phone then he submitted the written complaint (Ex.P1). On the basis of Ex.P1, offence was registered. During the course of investigation, on the basis of memorandum statement of acquitted co-accused Gadwil, one mobile phone was seized from his possession vide Ex.P9. On the basis of memorandum statement of Appellant Farid, one knife was seized from his possession vide Ex.P10. Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure. After completion of the investigation, a charge-sheet was filed. Charges were framed against the Appellants under Section 397

read with Section 34 of the Indian Penal Code and against acquitted co-accused Gadwil charge under Section 411 of the Indian Penal Code was framed.

4. In support of its case, the prosecution examined as many as 5 witnesses. In examination under Section 313 of the Code of Criminal Procedure, the accused persons denied the guilt and pleaded innocence. No witness has been examined in defence.
5. On completion of the trial, the Trial Court acquitted co-accused Gadwil of the charge framed against him, but convicted and sentenced the present Appellants as mentioned in second paragraph of this judgment. Hence, these appeals.
6. Shri Rahil Arun Kochar, Learned Counsel appearing for Appellant Farid Ahamed submits that as per the prosecution story the incident occurred on 11.1.2008, but the written complaint (Ex.P1) was submitted by Ajay Kumar (PW1) on 2.1.2009, i.e., about 1 year after the alleged incident. Before that, there was ample opportunity available to the Complainant as well as to his friend Pradeep Nair (PW2) to report the matter, but they did not do so. Cause of delay has not been explained by the Complainant properly. It is further submitted that Complainant Ajay Kumar has admitted the fact that since at the time of incident there was darkness, he could not identify the Appellants. The Complainant has also admitted the fact that he is not sure that the said loot was committed by the Appellants themselves. Though Pradeep Nair (PW2) identified the Appellants, but his statement is not reliable. There are material contradictions and omissions occurred in his

statement. It is further submitted that in the receipt (Ex.P4), IMEI and Code numbers of a Nokia mobile phone are mentioned, but there is no mention of the said numbers in the written complaint (Ex.P1). In the seizure memo (Ex.P9) also, IMEI and Code numbers of the mobile phone seized from acquitted co-accused Gadwil are not mentioned. Thus, it is not established that the mobile phone seized from Gadwil was the mobile phone of Complainant Ajay Kumar.

7. None appeared for Appellant Chhotu alias Tipu Sultan.
8. Learned Counsel appearing for the State supports the impugned judgment of conviction and sentence.
9. I have heard Learned Counsel appearing for the parties and perused the record with due care.
10. Akhil Singh (PW3) and Ramkumar (PW4) are the witnesses before whom, as stated by the prosecution, memorandum statements of the Appellants as well as acquitted co-accused Gadwil were recorded and on the basis of their statements certain articles were seized, but both the above witnesses have not supported the case of the prosecution and turned hostile. The case of the prosecution is mainly based on the statement of Complainant Ajay Kumar (PW1) and Pradeep Nair (PW2). Both these witnesses have stated that on 11.1.2008 at about 7:30 p.m., both were returning from Raipur on a motorcycle. When they reached near Janjgiri turning and went to attend the call of nature, at that time, both the Appellants came there from their behind. They were laced with a

knife. Both the Appellants threatened them and looted one Nokia mobile phone bearing model No.6280, cash of Rs.400/- and one gold ring from Complainant Ajay Kumar (PW1). In paragraph 7 of his cross-examination, Ajay Kumar (PW1) has categorically admitted the fact that at the time of incident, due to the weather being winter there was darkness and, therefore, he could not identify the Appellants. He has also admitted the fact that he is still not sure that the said incident was committed by the Appellants themselves. Thus, from the above admissions made by Complainant Ajay Kumar (PW1), it is clear that he could not identify the Appellants at the time of incident. Later on also, no test identification parade was conducted by the prosecution. He has also admitted the fact that after 1 year of the incident when he came to know that one mobile phone was recovered by the police, then as directed by the police, he submitted the written complaint (Ex.P1). From the statement of Ajay Kumar (PW1), it is also clear that after the incident he had ample opportunity to lodge a report regarding the incident, but he did not do so for about 1 year nor did his friend Pradeep Nair (PW2) do so. Though Pradeep Nair (PW2) has named both the Appellants and stated that at the time of incident, Appellant Chhotu had caught and slapped him and had also threatened him that he does not know him that he had been released just now in a half-murder case. But, this statement of Pradeep Nair (PW2) is not mentioned in his police statement (Ex.D1) recorded under Section 161 of the Code of Criminal Procedure. In paragraph 9 of his cross-examination, Pradeep Nair (PW2) has also admitted that at the time of incident, 2-3 more persons were also present there in the company of the Appellants. In these circumstances, conducting of test identification parade

was essential, but the prosecution has not done so. From the admission made by Pradeep Nair (PW2), it is clear that he had also ample opportunity to lodge First Information Report and tell about the incident to others, but he also did not do so.

- 11.** Though as per the prosecution story, one Nokia mobile phone bearing model No.6280 was seized from acquitted co-accused Gadwil, this mobile phone was looted from Complainant Ajay Kumar is not established because in the receipt (Ex.P4) seized from Ajay Kumar, IMEI and Code numbers of a Nokia mobile phone are mentioned, but there is no mention of these numbers in the written complaint (Ex.P1). In the seizure memo (Ex.P9) also, IMEI and Code numbers of the mobile phone seized from acquitted co-accused Gadwil are not mentioned. Thus, it is not established that the mobile phone seized from acquitted co-accused Gadwil was the mobile phone of Complainant Ajay Kumar.
- 12.** On a minute examination of the above evidence, it is clear that the incident took place 1 year prior to lodging of the written complaint (Ex.P1). Prior to lodging of Ex.P1, both Ajay Kumar (PW1) and Pradeep Nair (PW2) had ample opportunity to lodge complaint/FIR on time, but they did not do so. Delay in lodging Ex.P1 has not been explained by the Complainant properly. From the statement of Complainant Ajay Kumar (PW1), it is also clear that at the time of incident, there was darkness and, therefore, he could not identify any of the Appellants. Pradeep Nair (PW2) has also admitted that at the time of incident, 2-3 more persons were present there. Therefore, conducting of test identification parade was essential, but the prosecution did not do so. In view of the aforesaid

discussion, I find that the conviction of the Appellants is not sustainable.

13. Consequently, both the appeals are allowed. The impugned judgment of conviction and sentence is set aside. The Appellants are acquitted of the charges framed against them.

14. 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