

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 17 of 2013**

1. Himau Khan S/o Istiyak @ Laluwa Khan Aged About 23 Years R/o Village Kailai, Ps - Barar Kanpur, Dehat Uttar Pradesh , Uttar Pradesh
2. Kanhaiya @ Jahid S/o Abdul Hasan Aged About 25 Years R/o Village Bhawanipur Gujrai, Ps Gajner Kanpur, Dehat Uttar Pradesh , District : Kanpur Nagar, Uttar Pradesh
3. Shyam Chouhan S/o Mukundram Chouhan Aged About 24 Years R/o Village Sendrimunda, Ps Narayanpur, Distt. Jashpur C.G. , District : Jashpur, Chhattisgarh

---- Appellants**Versus**

State Of Chhattisgarh Through District Magistrate Jashpur, Distt. Jashpur C.G. , Chhattisgarh.

---- Respondent

For Appellants	:	Smt. Indira Tripathi, Advocate.
For Respondent/ State	:	Shri Lav Sharma, P.L.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**Judgment on Board****09/01/2019**

Heard.

(1) Challenge in this appeal is to the judgment of conviction and order of sentence dated 11.12.2012 passed by Learned Additional Sessions Judge, Kunkuri, District Jashpur, Chhattisgarh in Sessions Trial No. 52 of 2010 whereby and whereunder the learned Additional Sessions Judge after holding the appellants guilty for the offences under Sections 457 and 392/ 97 of the Indian Penal Code and Sections 25 and 27 of the Arms Act, sentenced them to undergo rigorous imprisonment for 5 years, 10 years, 3 years and 7 years, respectively, with default stipulation.

(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 11.3.2010 between 8:15 to 11:45 pm, three unknown persons armed with swords, forced their entry into the house of complainant – Hasildhar Yadav (PW-1) and committed loot of gold and silver ornaments, cash of Rs.30,000/-, mobile sets and one Maruti car. The complainant lodged FIR Ex. P/1 which was unnumbered, on that basis numbered FIR Ex. P/32 was separately recorded in the police station. During investigation, the appellants were apprehended and identified by the complainant and other witnesses vide Exs. P/3, 4 and 5. The looted article-Maruti Alto Car bearing registration No.C.G. 14/8964 was recovered in abandoned condition vide Ex. P/8. The persons injured during the incident Vaidehi Bai (PW-3) and Rameshwar Yadav (PW-2) were medically examined vide Exs. P/13 and P/14. On the basis of the memorandum statement given by Akhilesh Chaudhary vide Ex. P/17 recovery of one silver jewelery, cash, a country-made firearm and empty cartridge was made which was seized vide Ex. P/8. On the basis of memorandum statement given by appellant No.1 – Himau Khan vide Ex.P/23, recovery of one country-made firearm, 3 x 5 live cartridges were made which were seized vide Ex. P/21 memorandum of appellant No.2 – Kanhaiya @ Jahid, the seizure of one country-made firearm with three live cartridges were made vide Ex. P/20 and further some jewelery was seized vide Ex. P/22. Some jewelery was also seized from the possession of appellant No.1 – Himau Khan Ex. P/24. Seized firearm and live cartridge were sent for examination vide

Ex. P/6 and some seizure was made from the spot of incident also vide Ex. P/7. Spot map was prepared vide Ex. P/9.

(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) The appellants were charged for the offences under Sections 457 and 392/ 397 of the IPC and Sections 25 and 27 of the Arms Act. The appellants denied the charges and prayed for trial.

(6) In order to prove the guilt of the appellants, the prosecution examined 19 witnesses. Statements of the appellants were recorded under Section 313 of the Cr.P.C. in which they denied all the incriminating evidence against them, pleaded innocence and false implication in the crime in question. No witness examined in defence.

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

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

(9) Learned counsel appearing on behalf of the appellants submits that no case is made out for conviction of the appellants. The witnesses of identification Hasildhar Yadav (PW-1), Rameshwar Yadav (PW-2) and Draupadi Yadav (PW-4) are not trustworthy and they have made contradictory statements. The memorandum statement of search and seizure from all the accused persons have not supported the case of the prosecution and were declared hostile, therefore, the conviction is based only on the evidence of the Investigation Officer which cannot be held as proper and prays that benefit of doubt may be given to the appellants in this case. Hence, the appeal be allowed.

(10) 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 and the evidence of the witnesses produced had been worthy of reliance. Therefore, no case is made out for acquittal.

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

(12) Hasildhar Yadav (PW-1) submits that on the date and time of incident when he came out of his room he saw appellant – Himau Khan armed with sword inside his house. When he attempted to close the door appellant No.1 – Himau Khan stopped him from doing so and pointed a gun towards him threatening that he will shoot him. Subsequent to that, appellant No.1 – Himau Khan assaulted his wife with

a sword and injured her. He was then taken to the courtyard where he saw that Rameshwar Yadav (PW-2) and Neera Bai (PW-5) were sitting and their hands were tied by the ropes and then, he saw appellant No.2 – Kanhaiya @ Jahid was standing there pointing a gun towards them. The hands and feet of this witness and his wife were also tied. Thereafter, they asked for key which was given by the wife of this witness. This witness has stated that he identified this appellant as one of the culprits as he had been a student earlier, although he had covered his face with a cloth. After looting the articles from the house, appellant No.1 – Himau Khan asked for the key of the vehicle which was given. All the appellants escaped in the car with the looted articles i.e. jewellery, cash and mobile sets etc. He identified all the appellants in the Test Identification Parade before the Executive Magistrate. In cross-examination, there is no rebuttal to his statement that the articles and the car were looted from the house. In paragraph 17 of his cross-examination, he has been given suggestion by the defence counsel that the photographs of the appellants were published in the newspaper, to which he expressed his ignorance and also denied that he had earlier viewed the photographs of the appellants in some newspaper. With regard to the other suggestion given that he was not acquainted with the other persons who were standing alongwith the appellants, there is no such admission made by him so as to conclude that the identification of this appellant made by this witness in TIP becomes disputed. He has denied all the adverse suggestions given by the defence. Hence, his statement in examination-in-chief has remained unrebutted in cross-examination.

(13) Rameshwar Yadav (PW-2) is the servant of complainant – Hasildhar Yadav (PW-1) who has stated about the presence of all the appellants at the time of commission of offence and has narrated about the offence that has been committed. He has also stated that he was acquainted with appellant No.3 – Shyam Chouhan although he was wearing a mask at the time of incident. He has clearly made the statement that he identified the appellants in TIP memorandum vide Exs. P/3, 4 and 5 before the Executive Magistrate. In cross-examination, his statement has remained unrebutted. No adverse statement has been given by this witness in this respect and there is no such statement in cross-examination so as to contradict or rebut his statement in examination-in-chief.

(14) Smt. Vaidehi Yadav (PW-3) has stated similarly about the incident and the identification and her statement is also unrebutted in her cross-examination.

(15) Draupadi Yadav (PW-4) has stated that she is another eyewitness of this case and has witnessed the presence of all the appellants at the time of commission of offence and her statement has remained unshaken in her cross-examination.

(16) Neera Bai (PW-5) has stated that she was present at the time of incident. She has also identified the appellants in the TIP memorandum. In cross-examination, there is no such other statement made by her so as to contradict her examination-in-chief.

(17) Dr. Sangeeta Tirkey (PW-12) has examined Vaidehi Bai (PW-3) and reported vide Ex. P/13 that she had one injury of abrasion which was simple in nature. She also examined Rameshwar Yadav (PW-2) and found one injury of abrasion with swelling on the lower lip and one blackening on the upper part of the abdomen vide Ex. P/14. Her statement has remained unrebutted in her cross-examination.

(18) Rameshwarnath Pandey (PW-18) is the Executive Magistrate who conducted the TIP vide Exs. P/3, 4 and 5 of the appellants separately. In cross-examination, there is no such admission made by him so as to hold that the identification conducted was not in accordance with the law and the principle laid down.

(19) Sub-Inspector, K.R. Bhagat submits that on receiving information regarding the commission of offence, he made an entry in the station house diary and proceeded to the spot where complainant – Hasildhar Yadav lodged FIR vide Ex.P/1. He prepared a spot map vide Ex. P/25 and recorded the statements of the witnesses present on the spot. During investigation, he seized the abandoned Maruti Alto Car bearing registration No. C.G. 14-8964 vide Ex. P/8 and also made seizure of one sword and other articles vide Ex. P/7 from the spot. He has further stated that on 16.3.2010 he apprehended appellant – Himau Khan and recorded his memorandum statement Ex. P/23 and on that basis he made seizure of gold and silver jewelery, a mobile phone, cash Rs.13,000/- with coins of Rs.306/- in presence of witnesses vide Ex.P/24. On the same day, he apprehended appellant No.2 – Kanhaiya

@ Jahid and after interrogating and recording the memorandum statement Ex.P/21, he recovered and seized silver jeweleries, two numbers of mobile phones and cash of Rs.5,000/- from his possession vide Ex.P/22. On the same day, he apprehended appellant No.3 – Shyam Chouhan and recovered and seized one silver ornament, one country-made firearm and cash of Rs.5,000/- vide Ex. P/18. He has further stated about seizure of one country-made firearm, 3 numbers of live cartridges, 2 numbers of other cartridges in presence of witnesses from appellant No.1 – Himau Khan vide Ex. P/19. He also stated that he made recovery of seizure of one country-made firearm and 3 numbers of live cartridge on the basis of the memorandum statement given by appellant No.2 – Kanhaiya @ Jahid vide seizure memo Ex. P/20. Subsequently, he has recorded the numbered FIR Ex.P/32 and conducted rest of the investigation. In cross-examination, his statement regarding recording of statement of the appellants on memorandum and recovery and seizure made on that basis, has remained unrebutted and there is no such question put to him by defence counsel or any such admission made by him so as to show that he had any personal interest to falsely implicate the appellants in this case.

(20) The independent witnesses of memorandum and seizure, Manohar Prasad (PW-15), Chandar Singh (PW-16) and Shahid Shah (PW-17) have not supported the case of the prosecution and were declared hostile by the prosecution whereas, Chandar Singh (PW-16) who is also witness of memorandum Ex.P/21 of appellant No.2 – Kanhaiya @ Jahid and seizure made by vide Ex.P/22 has stated in

support of the prosecution and similarly, he also supported the statement Ex.P/17. Regarding the seizure of the articles Ex.P/8 he has also supported the prosecution and recording of memorandum statement Ex.P/23 and the statement given by appellant No.1 – Himau Khan and the seizure made on this basis vide Ex.P/24. In cross-examination, his statement has remained unshaken and he has denied all the adverse suggestions given by the defence in this respect. Therefore, this witness has supported the statement given by the Investigating Officer, K.R. Bhagat (PW-19).

(21) After closely scrutinizing all the relevant evidence in this case, I am of the opinion that the prosecution has clearly proved the identity of the appellants on which no doubt can be raised and further the evidence collected in the investigation made, procedure of memorandum and seizure also have proved on the basis of reliable statement of the Investigating Officer, K.R. Bhagat (PW-19) and one seizure witness Chandar Singh (PW-16). Hence, there is no scope for interference in the conviction of the appellants, that has been recorded by the trial Court. At this stage, the appellants submits that appellants No.1 and 2 – Himau Khan and Kanhaiya @ Jahid are in jail since 16.3.2010 and appellant No.3 – Shyam Chouhan is in jail since 19.3.2010 and they are in jail since almost 9 years. Hence, it is prayed that the sentence of imprisonment be reduced to the sentence of period of imprisonment already undergone by them in jail.

(22) Considered the prayer made by the appellants. It appears that the length of the period of the appellants in jail would serve the purpose and the appellants are very near to completion of sentence which was imposed by the trial Court. The appellants are also entitled for remission and other reliefs granted by the State time to time. Hence, taking all these facts into consideration, I feel inclined to allow the prayer made on behalf of the appellants. This appeal is allowed in part and the conviction of the appellants recorded by the trial Court is upheld. However, the sentence imposed upon the appellants for the offence under section 457 of the IPC and Sections 25 and 27 of the Arms Act is upheld whereas the sentence imposed upon the appellants for the offences under Section 392 read with Section 397 of the IPC is reduced to the period of sentence of imprisonment already undergone by them in jail. All these sentences shall be deemed to have run concurrently. Hence, if the appellants are not required in jail in any other case, they may be set at liberty.

(23) Accordingly, the appeal is disposed off.

Sd/-

(Rajendra Chandra Singh Samant)
JUDGE