

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 1459 of 2016

1. Dilawar Sheikh S/o. Abdul Khalid, aged about 35 years, R/o. Badabdura, Thana Moralganj, District Bagerbahar (Bangladesh) at present Seemapuri, New Delhi (India).
2. Mohd. Ibrahim Sheikh @ Aslam S/o. Mohd. Abdul Khalid, aged about 19 years, R/o. Badabdura, Thana Moralganj, District Bagerbahar (Bangladesh) at present Uttam Nagar, New Delhi (India).
3. Mohd. Aalameen S/o. Mohd. Mushraff, aged about 26 years, R/o. Ranki Nagar, Thana Moralganj, District Bagerbahar (Bangladesh) at present Moiligaon, Ramkisan's House, New Delhi (India).
4. Abdul Hakeem S/o. Mohd. Sheikh, aged about 40 years, R/o. Samgodada, Thana Moralganj, District Bagerbahar (Bangladesh) at present Uttam Nagar, Jhugqi Basti, New Delhi (India)

---- Appellants

Versus

State of Chhattisgarh Through Officer-in-charge, Ganj Police Station
Raipur District Raipur (CG) ----- **Respondent**

---- Respondent

For the Appellants :- Mr. B.P. Rao and Mr. Hemant
Kesharwani, Advocates

For the respondent :- Mr. Lalit Jangade, Dy. GA

Hon'ble Shri Justice Manindra Mohan Shrivastava

Hon'ble Smt. Justice Vimla Singh Kapoor,

Judgment on Board By Manindra Mohan Shrivastava, J.

25.08.2021

1. This appeal is directed against the impugned judgment of conviction and order of sentence dated 25.06.2016 passed by the Additional Sessions Judge, Raipur District Raipur, in Sessions Trial

No. 185/2014 whereby and whereunder the appellants have been held guilty of commission of offences and sentence as described below:-

Conviction	Sentence
U/s. 458 IPC	Rigorous imprisonment for 14 years and to pay fine of Rs. 500/- failing which 1 month additional RI imposed on appellant No.1 to 3, Dilawar Sheikh, Mohd. Ibrahim and Mohd. Aalameen.
U/s. 395 IPC	Rigorous imprisonment for 10 years and to pay fine of Rs. 1000/- failing which 3 months additional RI imposed on appellant No.1 to 3, Dilawar Sheikh, Mohd. Ibrahim and Mohd. Aalameen.
U/s. 25 of the Arms Act	Rigorous imprisonment for 2 years and to pay fine of Rs. 500/- failing which 1 month additional RI imposed on appellant No.1 to 3, Dilawar Sheikh, Mohd. Ibrahim and Mohd. Aalameen.
U/s. 412 IPC	Rigorous imprisonment for 10 years and to pay fine of Rs. 1000/- failing which 3 months additional RI imposed on appellant No. 4 Abdul Hakeem. with a direction to run the sentences concurrently

2. Prosecution case in brief is that, on 19.04.2014 in the mid night during the period from 2.00 AM to 4.30 AM, a dacoity took place in the house of complainant Bhavandas Ramchandani. According to the prosecution, dacoity was committed by the appellants and the absconding accused. According to the prosecution allegation, the appellants and another absconding accused entered in the house of the complainant in the mid night by house braking and assaulted

one member in the family of the complainant and on the gunpoint, cash and jewellery were looted. After lodging of the FIR, police seized some clothes and paper slip containing some mobile numbers on 19.04.2014 itself. Call details of mobile numbers noted in the slip was obtained vide memo dated 25.4.2014. While the investigation was going on, the accused/ appellants were stopped by the police on suspicion while they were going towards Railway station and during checking, it is said that from the possession of the appellants, jewellery, cash and mobile were seized, and thereafter, on the basis of memorandum of appellant No.1, Dilawar Sheikh, appellant No.2 Mohd. Ibrahim Sheikh and appellant No.3 Mohd. Aalameen recorded in Ex.P-6, Ex.P-7 and Ex.P-8 respectively recoveries were made. Thereafter, upon completion of investigation, charge sheet was filed against the appellants and other absconding accused. The appellants having abjured guilt, were put to trial and the prosecution, in order to prove its case, examined as many as 10 witnesses. The accused persons were also examined under Section 313 CrPC in respect of incriminating evidence and circumstances brought against them by the prosecution, which was denied by all the accused. No defence witnesses was examined.

3. Learned trial Court relied upon the evidence of recovery of golden ornaments, cash, mobile, pistol and also certain call details to come to the conclusion that the appellant No.1 Dilawar Sheikh, appellant No.2 Mohd. Ibrahim Sheikh and appellant No.3 Mohd. Aalameen are involved in the alleged commission of dacoity and appellant No.4

Abdul Hakeem knowing fully well that the property offered for sale to him are looted property, dishonestly received.

4. Learned counsel appearing for the appellants would argue that the entire case of the prosecution has not been able to translate suspicion into truth so as to draw inference that in all probability, the appellant and the appellant alone must have committed the offence. The victim witnesses have clearly stated that the faces of the accused were covered therefore, they could not be identified by them. None of the appellants have been identified at the dock during trial. Further submission is that though, the evidence in the form of call details of certain mobile numbers is led in evidence in Ex.P-23, the mobile numbers and the call details made from one mobile number to other mobile number could not be connected with any of the accused/appellants. It is further submitted that even the evidence of seizure of ornaments, mobile and pistol seized from different accused is also doubtful because the evidence of seizure witnesses, Sunil Kumar (PW-5) and Deepak Soni (PW-9) does not inspire confidence and concocted proceedings have been drawn against them. Learned counsel for the appellants would further argue that in the present case, though during investigation, broken handle of locker and a glass from the spot were seized with finger print details but no forensic report in this regard has been led in the evidence to connect any of the appellants with the alleged commission of offence. Learned counsel for the appellants would submit that the recovery of jewellery, mobile phone could not be connected with the alleged commission of offence to any clinching evidence of the prosecution. The complainant failed to produce any bill of purchase of jewellery and they have gone

to the extent of stating in the court that the jewellery which was shown to them did not belong to them. Thus, in the absence of any identification of the jewellery by the looted victims, mere possession of certain jewellery items does not connect the appellants with the alleged commission of offence and therefore, they could not be convicted only on that basis. Neither mobile phone nor pistol (*katta*) have been seized from the appellant have been proved to be connected with the alleged commission of offence by the appellants, therefore, they are entitled to be acquitted by giving benefit of doubt.

5. State counsel on the hand, would submit that though there is no evidence of identification of the accused by the looted persons and they have not been identified by the victims at the dock during the trial, he would submit that recovery of jewellery and mobile from the possession of the different accused and recovery of firearm from one of the accused and seizure of railway tickets from all the accused showing their date of journey and the destination being one and the same shows that all were acting in concert with each other and remained in company of each other since long and, therefore, seizure of various articles, including jewellery from them involves the appellants in the alleged commission of crime. He would further submit that the call details (Ex.P-23) also involves the appellants because in the memorandum of the appellants, they have disclosed the mobile numbers, which they were using to call each other and the location of the mobile caller from different places shows the involvement of the accused in the alleged crime. He would submit that appellant No.1 Dilawar Sheikh was found in unauthorized and

illegal possession of pistol and he failed to produce any valid license for such possession.

6. We have heard the learned counsel for the parties and perused the record and also the impugned judgment.
7. The prosecution case is that, in the mid night of 19.4.2014, a dacoity took place in the house of complainant Bhavandas Ramchandani, initially an unnumbered report was taken by the Station House Officer of P.S. Ganj, Raipur from Bhavandas Ramchandani (PW-1), wherein it has been detailed that a dacoity took place in his house and cash of Rs. 2 lacs as also jewellery of the complainant's wife were looted and one of the family members was assaulted by the appellants with the help of the pistol, resulting an injury in the head. According to the complainant, gold approximately in 15-20 'tola' were looted by the appellants. He also stated that eight number of mobile phones have also been looted. He stated that accused persons were holding knives and a local made revolver (katta) in their hand. In the report, however, he does not state that he had identified their faces and if put to identification, he will identify them. In the Court, also, the complainant (PW-1) could not identify the accused and has stated that at the time of incident the accused persons had covered their faces and their eyes were also closed with the help of clothes, therefore, he could not identify. His wife (PW-2) Nanki Bai Ramchandani, had also made similar statement by stating that she cannot identify the accused. Hemant Ramchandari (PW-3) son of complainant has also made similar statement, as also stated that there due to darkness in the night,

he could not identify the accused who had come to commit dacoity in the house.

8. From the aforesaid set of evidence of the victim and his family members, it is clear that, as the dacoits had their faces covered, they could not be identified and that is the reason why these witnesses could not even identify the accused during trial. Thus, there is no evidence of identification of the accused.
9. According to the prosecution, jewellery, mobile, cash and railway tickets were seized from the possession of the appellants Dilawar Sheikh, Mohd. Ibrahim Sheikh and Mohd. Aalameen. Memorandum of the accused Dilawar Sheikh, Mohd. Ibrahim Sheikh and Mohd. Aalameen were recorded in Ex.P-6, Ex.P-7 and Ex.P-8 respectively. As far as recording of memorandum is concerned, the prosecution witnesses Sunil Kumar (PW-5) has stated that while he was going in an auto, Police stopped and he was brought to the police station but says that in his presence Dilawar Sheikh, Mohd. Ibrahim Sheikh and Mohd. Aalameen did not give any statement to the police but some jewellery were seized from the appellants and except that, no other articles were seized. In the cross-examination, however, it has been elicited that the police had shown him a mobile, stating that this is looted mobile and police had informed him that the jewellery had been seized from Mohd. Ibrahim. It has further been elicited in the cross-examination, and he admits suggestion that the seized articles were seen in the hands of the police. Thus, from the evidence of this witness, recording of memorandum is not proved

and seizure of various articles from the accused become doubtful in view of what has been elicited in the cross-examination.

However, the other prosecution witnesses of memorandum and seizure Deepak Soni (PW-9) support the case of the prosecution to the extent of recovery. This witness, however, does not state as to what disclosure with regard discovered fact was made by the accused but only states that the accused stated regarding they have been committed dacoity, which clearly is not admissible in evidence. Whether the recovery of various article was on the basis of any discloser made by the accused has not been stated by this witness, though this witness supports seizure of jewellery, one pistol and some cash. In the cross-examination, it has been elicited that three to four police officer enquired from the accused and which police officer was enquiring from which accused cannot be disclosed by him on the date of examination. He also does not say mobile of which company and colour was seized.

10. As far as the memorandum of accused is concerned, the evidence of none of these witnesses disclosed as to what discloser was made by the accused which led to discovery of fact. Though, the evidence of Deepak Soni (PW-9) proves recovery of certain ornaments, one katta and some cash. Therefore, this witness supports seizure of ornaments from the accused persons and seizure of one (katta) firearm from appellant No.1 Dilawar Sheikh. To that extent, seizure of various articles vide Ex.P-9 and Ex.P-13 relating to appellant No.1, Ex.P-10 relating to appellant No.2, Ex.P-11 relating to appellant No.3 and Ex.P-12 relating to appellant No.4 are proved.

10. However, the question that arises for consideration is whether the prosecution has been able to prove that these articles, which were found in possession of the appellants, belonged to the victim so as to connect the accused with the alleged crime of dacoity. From this aspect, none of the prosecution witnesses claimed to have identified the stolen jewellery and mobile. Bhavandas Ramchandani (PW-1), the FIR informant and the victim does not claim to identify any of the looted articles. Nanki Bai (PW-2) has stated in her evidence, that after 15- 20 days of the incident when some jewellery items were shown to her for identification, she stated that those ornaments did not belong to her. She has admitted in her cross-examination, that whatever articles were shown to her by the police that did not belong to any of the member of her family and not even of her daughter-in-law.

The victim has also failed to produce any bill of purchase of the jewellery, which they alleged to have been looted from their house. The bill of purchase of mobile alleged to have been looted and said to be recovered from one of the accused has also not been produced. Mere seizure of cash by itself is not sufficient to prove that the cash which was recovered was looted by the appellant from the house of the victim.

Therefore, none of the articles which are said to have been seized from the possession of the appellants were identified by any of the member of the victim's family. On the contrary, Nanki Bai (PW-2) has gone to the extent of stating that whatever articles was shown to her, did not belong to any of the members in the family

and not even of her daughter-in-law. Thus, there is no evidence of identification of the ornaments, mobile and cash.

11. With the aforesaid backdrop, where the prosecution has failed to lead evidence of identification of the accused, doubtful evidence of seizure and absence of evidence of identification of the allegedly looted articles, reliance on the call details (Ex.P-23) does not come to the aid of the prosecution by any stretch of imagination. An attempt has been made to connect the accused person from the call details (Ex.P-23). Though serious objection has been taken to the admissibility of the call details on the submission that the requirement of section 65 B of the Evidence Act has not been complied with, even for the argument sake, if the call details admitted in evidence and looked into, we do not find that the call details taken together with other material collected during investigation connect the accused with the alleged commission of offence. Soon after the incident on 19.04.2014, when the police carried out search near the house where the dacoity was committed, they found a shirt, a paint and a piece of paper in which two mobile numbers were recorded which was seized vide Ex.P-3 on 19.04.2014. The two mobile numbers noted on the paper slip are 9718202203 and 7503629352. Further evidence of investigation officer PW-8, and that of Kalim Khan (PW-7) Sub inspector in crime branch, reveals that on 25.04.2014 memo was written by Investigation Officer to crime branch for providing call details of the aforesaid two numbers and such call details were provided in Ex.P-23. The accused persons were taken into custody

on 06.05.2014 that is much after the call details reached the hands of the investigating officer. The mobile numbers which are stated in the memorandum of the accused are those which were already disclosed to the police during investigation being the numbers involved in call made to each other of which record in Ex.P-3 has been produced. Neither the SIM cards containing these mobile numbers nor any mobile phone proved to have been used by such SIM cards, neither the subscribers name of the SIM card could be led in evidence by the prosecution to establish any connection of the accused with these three mobile numbers 9718202203, 7503629352 and 9091957948.

12. Though learned State counsel would submit that the accused persons have stated in their memorandum regarding their presence at different stations which tallies with the location of the caller from the aforesaid mobile numbers at different dates, it cannot be used in incriminating evidence, by virtue of section 27 of the Evidence Act because the location of the places and the number of mobile SIM from which calls were allegedly made to each other was already disclosed and was actually in the hands of the police even prior to arrest of the accused person. Therefore, none of the evidence of call details made from one mobile number to other mobile number bear any connection with any of the appellants.
13. Learned State counsel argued that all the accused persons were acting in concert and in company of each other since long which culminated in all of them attempting to leave the station by train, proved from seizure of railway ticket from possession of all of them

containing date of travel as 06.05.2014 with same destination. This does not lead to any logical conclusion with regard to involvement of the appellant in the alleged commission of offence. It only proves, that the appellants were going to same destination by the same train together. But in the absence of any other connecting evidence, that they were involved in the alleged dacoity, the material evidence which has been brought on record creating only suspicion but failing to translate suspicion into truth by reliable evidence, in our considered opinion, the learned trial Court committed illegality in convicting the appellants only on the basis of seizure of ornaments without there being any proof of its identification and on the basis of certain call details which remained inconclusive for want of seizure of SIM containing those mobile numbers or mobile cell phone from which such mobile calls were made from any of the accused. It is well settled that conviction cannot be based on suspicion, however, strong it may be. Unless there is legally and reliable evidence, conviction could not be ordered, suspicion however, strong would only lead to acquittal by giving the accused/appellants benefit of doubt. Therefore, in the result the appeal is allowed and all the appellants are acquitted of charges. The appellants be set free, if not required in any other case.

Sd/-

Manindra Mohan Shrivastava
Judge

Sd/-

Vimla Singh Kapoor
Judge