

HIGH COURT OF MADHYA PRADESH

BENCH GWALIOR

SINGLE BENCH:

HON'BLE SHRI JUSTICE G.S. AHLUWALIA

Criminal Appeal No.678/2011

.....Appellant: **Rajesh.**
Versus
.....Respondent : **State of M.P.**

Criminal Appeal No.882/2011

.....Appellant: **Laxman @ Bhura.**
Versus
.....Respondent : **State of M.P.**

Criminal Appeal No.701/2018

.....Appellant: **Rahul @ Chhaviram.**
Versus
.....Respondents : **State of M.P.**

For Cr.A. No. 678/2011

Shri Hemant Singh Rana, Counsel for the appellant.

Smt. Padam Shri Agarwal, Counsel for the respondent/State.

For Cr.A. No. 882/2011

Shri R.K. Shrivastava, Counsel for the appellant.

Smt. Padam Shri Agarwal, Counsel for the respondent/State.

For Cr.A. No. 701/2018

Shri Amit Kumar Goswami, Counsel for the appellant.

Smt. Padam Shri Agarwal, Counsel for the respondent/State.

Date of hearing : 19/07/2021

Date of Judgment : 19/07/2021

Whether approved for reporting : Yes

J U D G M E N T**(19/07/2021)****(Through Video Conferencing)**

By this common judgment, Criminal Appeal filed by Laxman @ Bhura (Cr.A. No. 882/2011) and Rahul @ Chhaviram (Cr.A.701/2018) shall also be finally disposed of.

With the consent of parties, the appeal is heard finally.

It is submitted by Shri M.S. Rana that in compliance of the order of this Court, the appellant Rajesh is present in his office. Similarly, Shri R.K. Shrivastav also submitted that appellant Laxman @ Bhura is present in his office. Appellant Rahul @ Chhaviram is in jail. Since the physical hearing is not going on, therefore, the presence of the appellants Rajesh and Laxman @ Bhura is marked without obtaining their signatures.

These Criminal Appeals have been filed under Section 374 of Cr.P.C against the judgment and sentence dated 02.08.2011 passed in Special Sessions Trial No. 6/2009 by which appellant Rajesh and Laxman @ Bhura were convicted for offence under Sections 392, 397 of IPC r/w Section 13 of MPDVPK Act 1981 and sentenced to undergo rigorous imprisonment of seven years with fine of Rs. 500/- with default rigorous imprisonment of three months. Since the appellant Rahul @ Chavi Ram jumped bail during pendency of the trial, and was arrested at a later stage, therefore, by separate judgment and sentence dated 01.12.2017 in Special Sessions Trial No. 6/2009, he too has been convicted under

Sections 392, 397 of IPC r/w Section 13 of MPDVPK Act and has been sentenced to undergo rigorous imprisonment of seven years with fine of Rs. 5,000/- with default rigorous imprisonment of three months.

According to the prosecution case, on 20.01.2009 at about 4:15 pm, the complainant Veerendra Singh (PW/5) was going on on his Boxer Motorcycle bearing registration no. MP 07 KA 8675 which was of black colour. When he reached Mauch Ghati, then he was waylaid by three unknown persons on the gun point and they dragged him 100 meters towards the forest area and after tying his hands and legs with his belt and laces of his shoes, his motorcycle, mobile phone of LG Company, an amount of Rs. 12,200/- and shoes were taken away and threat was also extended that in case if he raises an alarm, then he would be killed. Thereafter, the accused persons ran away towards Chinor. After 15 minutes of the incident, the complainant somehow managed to get himself free and came on the road and lodged the report in Police Station Panihar Distt. Gwalior. The spot map was prepared. The appellants were arrested in some other case and motor cycle of the complainant was seized from the appellant Rahul @ Chhaviram, accordingly, they were formally arrested. Their Statements under Section 27 of the Evidence Act were recorded. The broken piece of number plate of motor cycle, one pair of shoe and some cash amount was seized in the present case. After completing the investigation, the police filed the charge-sheet for offence under Sections 392, 397 of IPC r/w

Section 13 of MPDVPK Act, 1981.

The Trial Court by order dated 23.06.2009 framed charges under Section 392, 397 r/w Section 13 of MPDVPK Act.

The appellants abjured their guilt and pleaded not guilty.

The prosecution examined Constable Sudeep Pandey (PW/1), Rati Ram Kushwaha (PW/2), Ashok Singh Bhadhoriya (PW/3) Surendra Singh (PW/4), Veerendra Singh Parihar (PW/5), Anil Shakya (PW/6), Amar Singh Sikarwar (PW/7) and R.K Pandey (PW/8), in support of its case.

After the closure of prosecution evidence, appellant Rahul @ Chavi Ram did not appear before the trial Court on 31.03.2011 and filed an application under Section 317 of Cr.P.C seeking exemption from personal appearance. The said application was allowed and appellant Rahul @ Chavi Ram was directed to appear positively on 11.4.2011 for the accused statement under Section 313 of Cr.P.C. However, on 11.4.2011, appellant Rahul @ Chavi Ram did not appear and accordingly his bail bonds were canceled and the notices were issued to the surety and the case was adjourned for 28.4.2011 for his appearance. On 28.04.2011, not only appellant Rahul @ Chhaviram did not appear, but appellant Laxman also did not appear and accordingly, his bail bonds were also canceled and the case was fixed for 27.06.2011. However, in the meanwhile, on 21.06.2011, an application under Section 44(2) of Cr.P.C. was filed on behalf of appellant Laxman and accordingly, the same was allowed and appellant Laxman was taken into custody. Thereafter,

by order dated 24.06.2011, the appellant Laxman was granted bail.

On 27.06.2011, the arrest warrant issued against appellant Rahul @ Chhaviram was received back un-served and accordingly, the statement of the witness with regard to the abscondence of appellant Rahul @ Chhaviram was recorded and the trial Court separated the trial of appellant Rahul @ Chhaviram and perpetual non-bailable arrest warrant was issued and accordingly, on 08.07.2011 the statements of accused Rajesh and Laxman were recorded under Section 313 of Cr.P.C. Accordingly, by judgment and sentence dated 02.08.2011, the appellant Rajesh and Laxman @ Bhura were convicted and sentenced for the above mentioned offences. Thereafter, on 29.06.2017, the appellant Rahul @ Chhaviram was arrested and as the original record was sent to the High Court, therefore, after getting the original record back from the High Court, the statement of the accused under Section 313 of Cr.P.C. was recorded on 27.11.2017. As the appellant Rahul @ Chhaviram expressed that he does not wish to give any evidence in his defence therefore, by judgment and sentence dated 01.12.2017, he has been convicted and sentenced for the above mentioned offences.

Challenging the judgment of conviction passed by the Court below, it is submitted by Counsel for the appellant that the prosecution has miserably failed in establishing the identity of the appellants and no incriminating article was seized from their possession to establish guilt of the appellants.

Per contra, it is submitted by Counsel for the State that in the Test Identification Parade conducted by the Police, the appellants were duly identified by the complainant Veerendra Singh Parihar (PW/5). On 21.12.2010, the appellants were not present before the Trial Court, and by filing an application under Section 317 of Cr.P.C they expressed that they would not challenge the question of their identity. Accordingly, the prosecution has succeeded in establishing identity of the appellants. It is further submitted that the motorcycle of the complainant was recovered from the possession of Rahul @ Chhaviram, in a different case. In the present case a pair of shoe of the complainant and an amount of Rs. 100/- was seized from the possession of the appellant Rahul @ Chhaviram. The number plate of the motorcycle of the complainant and an amount of Rs. 500/- was recovered from the possession of Laxman @ Bhura. It is submitted that the number plate of the motorcycle was deliberately broken with an intention to hide the registration number of the motorcycle of the complainant and the same was thrown in the field of Bannasi Jatav. An amount of Rs. 500/- was seized from the possession of appellant Laxman @ Bhura.

Heard the learned Counsel for the parties.

The moot question for consideration is as to whether the evidence of Veerendra Singh Parihar (PW/5) was rightly recorded in the absence of the appellants on 21.12.2010 or not.

Section 273 of Cr.P.C reads as under:-

“273. Evidence to be taken in presence of accused- Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader:

[Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accuses while at the same time ensuring the right of cross-examination of the accused.]”

Thus, it is clear that if the personal attendance of an accused has been dispensed with, then the evidence in the presence of his pleader can be taken on any condition which may be imposed by the Court.

The Supreme Court in the case of **U.P. Pollution Control Board Vs. Mohan Meakins Ltd. And Others** reported in (2000) 3 SCC 745 has held as under:-

“15. If any of the accused applies for dispensing with his personal presence in the court, after making the first appearance, the trial court can exempt him from continuing to appear in the court by imposing any condition which the court deems fit. Such conditions can include, inter alia, that a counsel on his behalf would be present when the case is called, that he would not dispute his identity as the particular accused in the case, and that he would be present in court when such presence is imperatively needed.”

(Underline supplied)

The Supreme Court in the case of **Atma Ram and Ors. v.**

State of Rajasthan reported in **(2019) 20 SCC 481** has elaborately considered the effect of absence of an accused on the day when the evidence is recorded. It is held that the right of an accused under Section 273 of Cr.P.C to watch the prosecution witness is a valuable right. However, it is also held that the exceptions to the application under Section 273 Cr.P.C. must be those which are expressly provided in the Cr.P.C like Sections 299 and 317 of Cr.P.C. In the case of **Atma Ram (Supra)** the Supreme Court found that when the evidence of the witness was being recorded, an objection was raised by the Advocate appearing for the accused that the evidence is being recorded without ensuring the presence of the appellant in the Court. Thus, it was held that there was neither any willingness on the part of appellants nor any order or direction by the trial Court that the evidence be recorded in the absence of the appellant. Thus, it was held that there was no willingness and no dispensation with personal attendance of the accused as contemplated in the later part of the Section 273 of the Cr.P.C and yet the evidence was recorded without ensuring the presence of the accused. However, it was also held that aforesaid infringement is curable and would not vitiate the trial and accordingly the direction to re-examine those witnesses who were examined in the absence of the accused was given. However in the present case the facts are different.

The order dated 21.12.2010 reads as under:-

“शासन द्वारा ए0जी0पी0 श्री बुधौलिया।

आरोपीगण राजेश, राहुल, लक्ष्मण अनुपस्थित। उनकी ओर से श्री ए0एल0 मिश्रा एडवोकेट एवं श्री ए0के0 द्विवेदी अधिवक्ता।

उक्त आरोपीगण का हाजरी माफी आवेदन पेश वादविचार स्वीकार।

प्रकरण में अभियोजन साक्षी बीरेन्द्र सिंह परिहार (अ0सा0 5) उपस्थित आरोपीगण एडवोकेट ने पहचान के प्रश्न पर आरोपीगण की ओर से कोई आपत्ति न होना व्यक्त किया।

उक्त साक्षी को परीक्षण, प्रतिपरीक्षण उपरांत उन्मोचित किया गया। प्रकरण में अभियोजन साक्षी तहसीलदार आर0 के0 पाण्डेय, के0पी0 चौहान, अनिल साक्य को 5-5 हजार रु के जमा वारण्ट से तलब किया जाये।

प्रकरण अभियोजन साक्ष्य हेतु दिनांक 24.01.2011 को पेश हो।”

From the above mentioned order, it is clear that Veerendra Singh Parihar (PW/5) was present before the Court and none of the appellants were present and accordingly, application under Section 317 of Cr.P.C was filed and it was expressly expressed by the appellants that they would not dispute the question of identification. This Court has tried to find out the application which was filed on 21.12.2010 under Section 317 of Cr.P.C. Unfortunately, some of the applications are undated, therefore it is very difficult to decipher as to which application was filed on 21.12. 2010. However in one application, it has been mentioned as under:-

“प्र0क0 06/09 विशेष सत्रवाद

पुलिस पतिहार— अभियोगी
राजेश आदि— अभियुक्तगण

आवेदन पत्र अन्तर्गत धारा 317 दं0 प्रं0 सं0

श्रीमानजी,

अभियुक्त राहुल की ओर से आवेदन पत्र प्रस्तुत है।

(1) यहकि उपरोक्त प्रकरण न्यायालय के समक्ष साक्ष्य हेतु नियत है। आरोपी राहुल न्यायालय में उपस्थिति नहीं है क्योंकि वह आवश्यक कार्य से बाहर गया हुआ है। तथा अपरिहार्य कारण से वह आज न्यायालय में उपस्थिति नहीं है।

(2) यहकि अभियुक्त की ओर से जरिये अभिभाषक आज दिनांक की अनुपस्थिति मान्य किया जावे। प्रकरण में उपस्थिति साक्षी को जिरह के समय अभियुक्त की ओर से अभिभाषक उपस्थिति होकर जिरह पूर्ण करेंगे। आज की अनुपस्थिति सदभावना पर आधारित होने से क्षमा किया जावे।

अतएव प्रार्थना है कि अभियुक्त की अनुपस्थिति माफ करने की कृपा करें।

प्रार्थी
राहुल – अभियुक्त”

Neither the date has been mentioned on this application nor the judge has put a date below his signatures, but the fact that the appellants had given an undertaking that their Counsel would cross-examine the witness in their absence, merely indicates that the aforesaid application must have been filed on 21.12.2010. In the order dated 21.12.2010, it has been specifically mentioned that the Counsel for the appellants has expressed that the appellants have no objection with regard to their identification. Under these circumstances, it cannot be held that the examination of the complainant Veerendra Singh Parihar (PW/5) on 21.12. 2010 in absence of the appellants was violative of Section 273 of Cr.P.C. In fact, the appellants prayed for dispensation of their appearance with a stipulation that their Counsel would cross-examine the witness and also did not dispute their identity. Accordingly, it is held that the prosecution has succeeded in establishing the identification of the appellants. Furthermore, the appellants were also identified by the complainant in the TIP conducted by the police Ex. P/14. It is true that Test Identification Parade conducted by Police is not the substantive piece of evidence and the dock identification is the substantive piece of evidence and since the appellants have not challenged their identity at the time of examination of Veerendra singh Parihar (PW-5), therefore, it is held

that the identification of the appellant in the dock is a reliable piece of substantive evidence as it was preceded by the Test Identification Parade, Ex. P.14, conducted by the Police during the investigation.

So far as the recovery of incriminating articles from the possession of the appellants is concerned, the confessional statement, Ex. P.2 under Section 27 of the Evidence Act of appellant Laxman @ Bhura was recorded on 10-2-2009, in which he stated that the mobile is kept in his house, however, on search, Ex. P.1, neither any mobile nor any cash amount could be seized from his house. However, another confessional statement under Section 27 of Evidence Act of the appellant Rajesh @ Bhura was recorded on 11-2-2009, Ex. P.4 and 5 currency notes of denomination of Rs. 100 each i.e., Rs. 500/- were seized vide seizure memo dated 11-2-2009, Ex. P.7.

On the confessional statement of appellant Rahul @ Chhaviram, Ex. P.3, one pair of shoe was recovered vide seizure memo Ex. P.4. It is not out of place to mention here, that the motor cycle of the complainant was seized from Rahul @ Chhaviram by Police Station Pichhore, Distt. Gwalior vide seizure memo Ex. P.11, which has been duly proved by Ratiram Kushwaha, P.W.2.

Similarly on 10-2-2009, confessional Statement, Ex. P.12 of appellant Rajesh @ Balveer was recorded and accordingly on 10-2-2009, a broken piece of number plate of motor cycle of the complainant was seized from the field of Bannasi Jatav, which was

having mustard crop vide seizure memo Ex. P.6.

It is true that so far as the cash amount is concerned, in absence of any specific mark of identification, it is very difficult to hold that the cash amount which was recovered from the possession of the appellants is the same amount which was robbed from the complainant, but the recovery of broken piece of the number plate of the motorcycle at the instance of the appellant Rajesh @ Balvir from the field of one Bannasi Jatav vide seizure memo Ex.P/6 can be said to be a seizure of incriminating article showing involvement of appellant Rajesh @ Balvir in the offence.

Further, one pair of shoe was recovered from the possession of appellant Rahul @ Chhaviram, vide seizure memo Ex. P/5. Appellant Rahul @ Chhaviram has not claimed ownership of the pair of shoe in his statement under Section 313 of Cr.P.C. In the statement under Section 313 of Cr.P.C, the appellant Rahul @ Chhaviram has denied seizure of one pair of shoe. However, the pair of shoe seized from the possession of appellant Rahul @ Chhaviram was not got identified from the complainant Veerendra Singh Parihar (P.W.5) in the Court.

However, it appears that Police Station Pichhore, District Gwalior had seized one motorcycle from the possession of appellant Rahul @ Chhaviram on 28/01/2009 alongwith a country made pistol and two live cartridges. The said seizure memo has been proved by Ratiram Kushwah (PW/2) as Ex.P/11. From the seizure memo Ex.P/11, it is clear that it was not having number

plate. Thus, the prosecution has succeeded in establishing that the motorcycle of the complainant was seized from the possession of the appellant Rahul @ Chhaviram in a different criminal case registered at Police Station Pichhore, District Gwalior on 28/01/2009 vide seizure memo Ex.P/11.

Thus, it is held that the prosecution has succeeded in establishing that appellant Rahul @ Chhaviram was not only duly identified by the complainant but motorcycle of the complainant was seized from his possession of appellant Rahul @ Chhaviram.

So far as the appellant Rajesh @ Balvir is concerned, apart from the identification of the said appellant, the broken number plate of motor cycle of the complainant was seized. If seizure of motor cycle of complainant vide seizure memo Ex.P/11, and the seizure of broken number plate of motor cycle of complainant vide seizure memo Ex. P.6 are considered conjointly, then it is clear that after taking away the motorcycle of the complainant, the registration number plate of the motorcycle was broken and was thrown in the field, which was recovered after discovery made by appellant Rajesh @ Balvir.

It is submitted by the counsel for the appellants that since the broken piece of registration number plate of the motorcycle was seized from an open place, therefore, it cannot be said that the said number plate was seized on the discovery made by appellant Rajesh @ Balvir.

Considered the submissions made by the counsel for the

appellants.

The broken number plate of the motorcycle has been seized from the field of Bannasi Jatav, in which the crop of Mustard was standing, therefore, it is clear that the broken piece of registration number plate of the motorcycle was not visible and could not have been recovered from a field having the crop of Mustard. Unless and until, the person who had thrown the number plate, points out the exact position as the crop was standing, even the owner of the field could not have located any foreign article in his field.

Under these circumstances, the submission made by the counsel for the appellants is hereby rejected.

Accordingly, the prosecution has succeeded in establishing the guilt of appellant Rajesh @ Balvir beyond reasonable doubt by proving that not only he was duly identified by the complainant Veerendra Singh Parihar (P.W.5), but the broken number plate of the motorcycle was also recovered at his instance vide seizure memo Ex.P/6.

So far as the appellant Laxman @ Bhura is concerned, except an amount of Rs.500 nothing incriminating has been seized from his possession. However, it is already held that appellant Laxman @ Bhura was duly identified by the complainant and prosecution has proved his identification.

Section 9 of Evidence Act provides that identification is a relevant fact.

Section 54-A of Cr.P.C. provides for identification of

arrested person. Thus, it is clear that the identification of an accused is a relevant fact and has to be given importance.

Under these circumstances, this Court is of the considered opinion that prosecution has not only succeeded in establishing that all the three accused persons were duly identified by the complainant but the motorcycle of the complainant Veerendra Singh Parihar (PW/5) was seized from the possession of the appellant Rahul @ Chhaviram and the broken piece of number plate of the motorcycle of the complainant Veerendra Singh Parihar (PW/5) was seized on the discovery made by appellant Rajesh @ Balvir. Accordingly, the conviction of the appellants for offence under Sections 392, 397 IPC r/w Section 13 of MPDVPK Act is hereby **affirmed**.

It is submitted by the counsel for the appellants that the appellant Rajesh @ Balvir and Laxman @ Bhura were granted bail and they have not misused the liberty. Further the appellant Rajesh @ Chhaviram is in jail from the date of judgement. Accordingly, it is submitted that appellants may be awarded jail sentence of the period already undergone by them.

Considered the submissions made by the counsel for the appellants.

Since, the appellants had robbed the complainant at the gun point, therefore, they have been held guilty for committing offence under Section 397 of I.P.C. The minimum sentence for offence under Section 397 of I.P.C. is seven years. Therefore, no sentence

less than minimum sentence can be awarded. Accordingly, the appellants cannot be awarded the jail sentence already undergone by them.

Ex Consequenti, the jail sentence of Rigorous Imprisonment of Seven Years and fine of Rs. 500/- with default imprisonment of R.I. of 4 months is hereby **affirmed**.

The appellants Rajesh and Laxman @ Bhura are on bail. Their bail bonds are hereby cancelled. They are directed to immediately surrender before the Trial Court for undergoing the remaining jail sentence.

The appellant Rahul @ Chhaviram is already in jail. He shall undergo the remaining jail sentence.

A free copy of this judgment be given to the appellants.

The Cr.A. No. 678 of 2011 (Rajesh), Cr.A. No. 882/2011 (Laxman @ Bhura) and Cr.A. No. 701/2018 (Rahul @ Chhaviram) are hereby **Dismissed**.

(G.S.Ahluwalia)
Judge