

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.M.C NOs.1507 OF 2007, 1564/2007 & 1896/2007**

% **Reserved on :** 31st August, 2010.
Date of Decision : 22nd September, 2010.

PRADESH BERA @ PINTO BERA Petitioner in Crl. M.C. No.1507/2007.
SANJAY Petitioner in Crl. M.C. No.1564/2007
GOOJU @ FOZU & ABDUL LATIF. ...Petitioners in Crl. M.C. No.1896/2007

Through: Mr. Rauf Rahim with Mr.Y.Bansal, Advs.
for Petitioners in Crl.M.C. No.1507/2007 &
1896/2007.

Mr.S.D. Singh with Mr.Rahul Kr. Singh, Advs. for
Petitioner in Crl. M.C. No.1564/2007.

VERSUS

STATE & OTHERS Respondents.

Through: Mr. Arvind Kr. Gupta, APP.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in the Digest ? YES

SANJIV KHANNA, J.:

1 The question raised in the present petitions under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code, for short) is whether the petitioners can/should be charged under Section 411 of the Indian Penal Code, 1860 (hereinafter referred to as IPC, for short). The contention of the petitioners is that there is no evidence/material which justifies framing of charge against them under Section 411 IPC.

2 In a criminal case, charge is framed by the trial court after considering whether material/evidence relied by the prosecution, if unrebutted and accepted as true, is sufficient for conviction. Probative value of the material is not examined in depth as when a final judgment is rendered. At this stage,

only a prima facie case is to be seen and the Court is to ensure that the allegations against the accused are not frivolous. However, if there is no legal evidence, then accused is entitled to be discharged.

3. FIR No.329/2001, Police Station Karol Bagh was registered on 22nd August, 2001 on a complaint made by Desh Deepak Kapoor on behalf of M/s.D.K. Jewellers. It was alleged by Desh Deepak Kapoor that they had entrusted 22.11 kg. of gold to two brothers Ashok Kumar and Vinod Kumar, goldsmiths, for making of gold jewellery. These two brothers were carrying on business of jewellery making in the name and style of M/s. Krishna Jewellery. Earlier also both of them had been entrusted with gold for making jewellery for which they used to charge and were paid making charges as per market rates. Both of them did not make the gold jewellery and had misappropriated 22.11 kg. of gold which was entrusted to them. The petitioners are not named in the FIR.

4. Ashok Kumar and Vinod Kumar surrendered in the Court on 5th September, 2001. Two disclosure statements were made by them on 5th September, 2001 and 6th September, 2001. In these disclosure statements it was stated by them that the gold received from Desh Deepak Kapoor was misappropriated and given to their relatives and others. Attempts were made to recover the said gold from the persons named in these two disclosure statements but without success.

5. On sustained interrogation, Ashok Kumar on 12th September, 2001, disclosed names of Sanjay @ Tiger, Abdul Latif, Goju @ Fozu and Pradesh Bera @ Pinto Bera. (One Shamshudin was also named and is facing prosecution but is not a petitioner.) In his statement, Ashok Kumar also

mentioned the quantity of gold given to each one of them for sale and the payments received from some of them.

6. Thereafter these persons named by Ashok Kumar including the petitioners herein were arrested on 15th September, 2001 and were remanded to police custody up to 18th September, 2001. While in Police custody these arrested persons including the petitioners herein gave statements which the prosecution claims are disclosure statements. On the basis of these statements following recoveries were made from the workshops of the petitioners on 18th September, 2001:-

(1)	Sanjay @ Tiger	=	107 grams
(2)	Pradesh Bera @ Pinto Bera	=	225 grams
(3)	Abdul Latif	=	106 grams
(4)	Goju @ Fozu	=	250 grams

7. The disclosure statements to the police are admissible to the limited extent permitted under Section 27 of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act, for short). The said Section is a proviso to Sections 24 to 26 and stipulates that when information contained in a statement made by an accused in police custody are confirmed by recovery of some object/material, they are admissible to the extent they distinctly relate to the fact discovered as a consequence of such information. Section 27 applies when first there is a statement and then pursuant to the statement a discovery is made. It does not apply when the fact is already in knowledge of the police or discovery is made before the statement is made. The requisites for Section 27 are:-

1. The discovery of 'fact' is in consequence of receipt of information from a person accused of an offence.
2. The discovery of such 'fact' must be deposed to.
3. At the time of receipt of information the accused must be in police custody and
4. Only such information as it relates distinctly to the fact discovered is admissible.
5. Only that portion of the information which *relates distinctly (or strictly)* to the fact discovered can be proved. The rest is inadmissible.
(Md.Inayatulla vs State, AIR 1976 SC 483)

8. The fact discovered under Section 27 not only relates to the 'fact', i.e. physical object, which is discovered but also the place from where it is produced and the knowledge of the accused as to this fact. But what is admissible is that part of the statement which was the immediate and direct cause of the fact discovered. Section 27 of the Evidence Act deals with admissibility of the statements.

9. As noticed above, it is a prosecution case that the disclosure statement made by Ashok Kumar has resulted in discoveries/recoveries of gold from the petitioners herein. Statement of Ashok Kumar is admissible against him under Section 27 to the extent of the resultant discoveries or recoveries of the gold from the petitioners as he is the maker of the said statement. Prosecution relies upon 'disclosure' statements of the petitioners. The contention of the petitioners is that these are not 'disclosure' statements under Section 27 of the Evidence Act as disclosure statement of Ashok Kumar is earlier in point of time. These contentions are not required to be decided at this stage as the present petitions can be disposed of without reference to the 'disclosure' statements of the petitioners. Final opinion on some questions requires in depth examination and scrutiny of evidence including place of recovery etc.

10. The prosecution can rely on the fact that the recovery of gold has been affected from the petitioners. This is an incriminating and a relevant fact. Further, unexplained possession of the incriminating material can be a ground to raise a presumption that the person found to be in possession is guilty of the offence of theft or other offences forming part of the transaction. Section 114 of the Evidence Act provides that the Court may presume existence of any fact which it thinks likely to have happened having regard to the common course of natural events, human conduct and public and private business, in their relation to facts of a particular case. Illustration (a) states that, a person found in possession of stolen goods soon after the theft, may be presumed by the Court to be either the thief or one who has received the goods knowing them to be stolen, unless he can account for his possession. This presumption is one of fact, rather than of law, but the Court can dispense with direct proof of certain facts by applying principle underlying Section 114. Time factor between the date of offence and recovery plays a significant role but this is because the presumption should not be stretched so as to snap the link between the recovery and commission of the offence. No hard and fast rule can be laid down to fix a time period. Often the explanation given by the accused for possession of the stolen property assumes significance. When a case is registered and based upon circumstantial evidence, failure of the explanation for possession of the stolen property though not incriminating by itself, can occasion inference against an accused because the facts are in his inclusive knowledge. (Refer, ***Ganesh Lal versus State of Rajasthan***, 2002 (1) SCC 731).

11. Section 106 of the Evidence Act states that “when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him”.

12. Relying upon the observation in ***Ganesh Lal*** (supra) that “availability of some piece of incriminating evidence or circumstance, other than mere

recovery of the articles, connecting the accused with *such other offence*”, it was submitted that alleged recovery alone is not sufficient to frame charge. Observations in **Ganesh Lal** (supra) are on an appeal against conviction under sections 376,302 and 404 IPC. The offence under Section 411 IPC relates to ‘stolen articles’ which as defined in Section 410 IPC includes misappropriated articles. The petitioners are being prosecuted for offences under section 411 IPC and not for *other offences*. It has been observed in **Hatti Singh versus State of Haryana** (2007) 12 SCC 471, :-

”32. The learned counsel for the State would submit that recovery of the articles would raise a presumption under Section 114 of the Evidence Act. Application of such a presumption is limited. A presumption may be in respect of commission of theft or receipt of stolen property; if a person is found to be in possession of the property belonging to the deceased, but on such presumption alone, the appellant could not have been convicted for commission of murder, particularly when on the same evidence other persons had been given benefit of doubt.”

(emphasis supplied)

13. It is submitted on behalf of the petitioners that there is no link or connection between the article i.e. the gold recovered and the offence charged and the guilt of the accused. For example, it was stated that mere recovery of knife is not sufficient. It must be shown by other evidence that the knife was used for commission of the offence subject matter of the prosecution case. Accordingly, it is argued that mere recovery of gold from goldsmiths like the petitioners does not show and establish any connection or relation between the petitioners and the stolen property as defined in Section 410 r/w Section 411 IPC.

14. The contention is attractive but in the present case does not merit acceptance at the stage of framing of charge. The seizure memos show that what was recovered from Abdul Latif and Goju @ Fozu were one and two gold

biscuits respectively weighing 106 grams and 250 grams having the markings of 'Rand Refinery Ltd. South Africa'. The gold was identified by the complainant Desh Deepak Kapoor, who is witness to the seizure memos. The gold recovered from Sanjay @ Tiger and Pradesh Bera @ Pinto Bera did not have any specific markings but it is mentioned in the seizure memos that 107 grams of gold was in form of "Challe" (Rings) were recovered from Sanjay@ Tiger and 8 pieces of gold weighing 225 grams were recovered from Pradesh Bera @ Pinto Bera. Desh Deepak Kapoor is a witness to the said seizure memos. Desh Deepak Kapoor in his statement under Section 161 of the Code has stated that he was with the police when on the basis of statements gold was recovered from the petitioners' workshops and has stated that this gold was given by his firm M/s D. K. Jewellers to Ashok for manufacture of jewellery. Desh Deepak Kapoor claims that he can identify the gold which was given by him to Ashok for manufacture of jewellery and the very same gold has been recovered. Whether or not this statement is correct and truthful can be only decided after trial and at this stage, it cannot be presumed that the statement is incorrect and it is not possible for him to identify the gold.

In view of the aforesaid reasoning, I do not find any merit in the present petitions. The same are dismissed.

(SANJIV KHANNA)
JUDGE

SEPTEMBER 22, 2010.
J/P