

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRA-S-3153-SB of 2009

Date of decision: 14.01.2015

Allaudin @ Badal and others

...Appellants

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR.JUSTICE JITENDRA CHAUHAN

Present: Mr. Jagdish Rai, Advocate/Amicus Curiae
for the appellant.

Mr. Mukesh Kaushik, DAG, Haryana
for the State.

Jitendra Chauhan, J.

This appeal is directed against the judgment of conviction dated 02.12.2009 and order of sentence dated 04.12.2009, passed by the Additional Sessions Judge, Gurgaon, vide which the accused/appellants were convicted for the offence punishable under Section 412 of the Indian Penal Code (hereinafter called as 'IPC') and sentenced them to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs. 5000/- each or in default of payment thereof, to further undergo RI for a period of two years. The accused/appellants were acquitted of the charges framed against

them under Sections 395, 397 IPC and Section 25 of Arms Act.

The brief facts as set out in para No.2 of the judgment of trial Court, is reproduced as under:-

“On 01.09.2008 Ashok Kumar Inspector was present in the police station DLF, Gurgaon and he received information to this effect that dacoity has been committed in house No. S-13/22. Consequently, Ashok Kumar Inspector reached the spot and he met there Anshu Kharbanda. Complainant Anshu Kharbanda made a written complaint to him to this effect that he is resident of House No. S-13/22, DLF-III, Gurgaon and on the night he, his parents, his wife and his cousin went to sleep after taking the dinner. At about 3.30 a.m. (night) 7 or 8 persons entered the house after breaking the grill of the window. They tied the hands of his cousin who was sleeping in the room on the ground floor. Then they entered the room of his parents and also tied them. They then came up stairs armed with gun and knives. They also tied him and his wife and searched their house. They took away three gold chains. Two gold bangles, one gold coin, two rings (of gents), six mobiles and cash of about Rs. 55,000/-. Some other goods might have been taken away but the details of the same can be told after checking. It is alleged that age of the culprits was between 25 to 30 and they were with muffled faces. One of them was of the height of about 5'10” while others were also of the height of 5'6” etc. Out of these culprits two were armed with gun and remaining were armed with knives. They had put on pant and shirt. On this report of Anshu Kharbanda, endorsement was made by the inspector and was sent to the police station for registration of the case on the basis of which formal FIR was recorded and investigation was started. It transpired

during the investigation that these accused were arrested in a criminal case of Shahadara to Delhi having FIR No. 268 of 2008 u/s 399/402 IPC/25 of Arms Act and during investigation of that case Shahadara-Delhi, these accused made disclosure statement about the occurrence committed by them including the present occurrence. Then these accused were arrested in this case according to law. They refused to join the identification parade. On interrogation these accused made disclosure statements and got recovered the looted property. The same was taken into possession and was identified by the complainant etc. Some case property was also got transferred from Faridabad as police of Faridabad had got transferred some cash etc., from Delhi police. On completion of investigation, challan was put up.”

On commitment, the accused were charge sheeted under Sections 395, 397, 412 IPC and Section 25 of Arms Act to which the accused/appellant pleaded not guilty and claimed trial.

In support of the case of prosecution, it examined PW-1 SI Hukam Singh; PW-2 ASI Subhash Chand; PW3 Raj Kumar Kharbanda; PW4 Lalit Kharbanda; PW5 Complainant Anshu Kharbanda; PW6 Seema Kharbanda; PW7 SI Parmod Anand; PW8 ASI Rajender Singh; PW9 Om Parkash; PW10 Akshra; PW11 Pankaj Juneja; PW12 Vijay Sandhuja; PW13 Constable Baljinder Singh; PW14 Inspector/SHO Devender Kumar; PW15 Dr. Jyoti Utkar; PW16 Girish Kumar, Draftsman; PW17 HC Harish Kumar; PW18 Constable Balram; PW19 Constable Sukhvinder Singh;

PW20 Inspector Ashok Kumar; PW21 HC Virender Singh; PW22 Rajpal and PW23 ASI Yashvir Singh.

PW-1 SI Hukam Chand, Finger Print Expert, visited and examined the spot. He proved chance print report Ex.PA on record.

PW-2 ASI Subhash Chand, deposed regarding disclosure statements made by all the accused about several dacoities and the recovery effected from them.

PW-3 Raj Kumar Kharbanda, deposed regarding the whole occurrence.

PW-4 Lalit Kharbanda, also testified the whole prosecution story.

PW-5, Anshu Kharbanda deposed regarding the whole incident and testified the application Ex.PD on the basis of which the FIR Ex.PD/1 was recorded.

PW-6, Seema Kharbanda, also testified the whole occurrence.

PW-7, SI Parmod Anand, deposed regarding the arrest of accused in FIR No. 265 of 2008 and the recovery of pistol etc. from the possession of the accused.

PW-8, ASI Rajender Singh, deposed regarding handing over wrist watch and other articles to HC Jagdev Singh.

PW-9, SI Om Parkash, deposed regarding sanction accorded by DCP North East Delhi against Abbas @ Chootu and

Allaudin, in pursuance of Section 39 of Arms Act.

PW-10, Akshra, also narrated about the dacoity committed by the accused.

PW-11 Pankaj Juneja, had stated about the commission of the dacoity.

PW-12 Vijay Sandhuja, had proved photographs Ex. P8 to Ex.P19 and their negatives Ex. P20 to Ex.P31.

PW-13, Constable Baljinder Singh, had stated regarding disclosure statement Ex.PK made by accused Najrul.

PW-14 Devender Kumar, Inspector, had deposed about the preparation of report under Section 173 Cr.P.C.

PW-15, Dr. Jyoti Utkar, deposed regarding the injuries suffered by R.K. Kharbanda.

PW-16, Girish Kumar, Draftman, proved the scales site plan Ex.PN.

PW-17, HC Harish Kumar, had deposed regarding registration of formal FIR Ex.PD/1.

PW-18, Constable Balram, had stated regarding interrogation of the accused, about their disclosure statements and the recovery got effected by them.

PW-19, Constable Sukhvinder Singh, had deposed regarding the investigation carried out and disclosure statement Ex.PZ made by accused Jakir Hussain.

PW-20, Inspector Ashok Kumar, testified Ex.PD, the application given by the complainant Anshu Kharbanda, Ex.PBB, the rough site plan of the place of occurrence. He further stated that he moved application before the Illaqa Magistrate for conducting test identification parade of the accused.

PW-21, HC Virender Singh, also deposed regarding case property deposited by ASI Subhash Chand, which was recovered in FIR No. 265 of 2008.

PW-22, Rajpal, had deposed regarding identification of the ornaments done by Seema Kharbanda and complainant.

PW-23, ASI Yashvir Singh, had deposed regarding the whole incident and the investigation carried out by him.

The statements of the accused under Section 313 Cr.P.C., were recorded. They pleaded innocence and alleged false implication. They, however, did not lead any evidence in their defence.

After hearing the learned counsel for the parties and after going through the evidence on record, the trial Court convicted and sentenced the accused/appellants, as stated hereinbefore.

Feeling aggrieved, against the judgment of conviction and order of sentence passed by the trial Court, the instant appeal was filed by the accused/appellants.

Learned counsel for the appellants argued that the

learned trial Court has misread the evidence of the prosecution; the prosecution has failed to prove the case against the appellants under Sections 395/397 IPC, therefore, no offence under Section 412 IPC is made out against the appellants. It is submitted that the recovery of noted articles were effected from Bhiwadi (Rajasthan) but no independent witness was joined. Neither the police of concerned area was joined nor informed. The place of recovery is an open place and has been accessible to all, therefore, it cannot be said that the accused persons were in the possession of stolen articles especially when they were already in the custody of police. The recovered articles were taken into possession by the Gurgaon police vide recovery memos Ex. PV, Ex.PW, Ex.PX and Ex.PY, but weight of the articles recovered at the instance of accused has not been mentioned in either of the documents. The identification of stolen articles were conducted in the presence of Rajpal and HC Amit Kumar, vide Ex.PD/2 but the same has not been signed by HC Amit Kumar, therefore, the identification of the articles has no evidentiary value in the eyes of law.

The learned counsel for the appellants further contended that the accused/appellants were arrested in the present case on 15.10.2008 by Gurgaon police but no identification parade was ever conducted. He refers to the testimony of PW-5, Anshu Kharbanda, wherein, he has categorically admitted that though the physical

appearance of accused persons is identical yet from the faces he cannot identify them as assailants as they were with muffled faces. He further admitted that the case property which was identified in the Court were easily available in the market because there was no special mark on the articles which he had identified belonged to him. He admitted that he had no bills/ownership proof of the articles identified by him. He has categorically admitted that the site plan was prepared by the police persons themselves after visiting the spot without his demarcation and no recovery of the case property was made in his presence. He further admitted that many persons of his family and neighbourhood were present at the time of submitting the application which was followed by the FIR. He was declared hostile at the instance of the prosecution but nothing came out of his statement which can help the prosecution to prove its case.

The learned counsel also refers to the testimonies of PW-3, Raj Kumar Kharbanda and PW-4 Lait Kharbanda, wherein, they had also toe the lines as stated by PW-5. They were also declared hostile by the prosecution. It is further submitted that as per the prosecution, the accused persons identified the place of occurrence in pursuance of their disclosure statements. It is settled law that when a fact is in the knowledge of police itself, therefore, the identification of place made by the accused is inadmissible under Section 27 of the Indian Evidence Act, because the statement is self

exculpatory and deserves no consideration. There were material contradictions in the statements of the witnesses. The learned counsel cites **Sahib Singh** Vs. **State of Punjab** 2005(2) AICLR 808 and states that once the prosecution failed to prove the case offences under Sections 395/397 IPC for the commission of dacoity, the accused cannot be convicted for the offence under Section 412 IPC for dishonestly receiving the stolen property in the commission of dacoity.

On the other hand, the learned State counsel submits that the prosecution has fully proved its case against the accused/appellants and has supported the judgment of the trial Court.

This Court has scrutinized the lower Court record carefully with the able assistance of the learned counsel for the parties.

In the present case, the accused/appellants were charged for offences punishable under Section 395 and 397 IPC for which they were acquitted. The Appellants have been convicted for offence under Section 412 IPC, that is, for dishonestly possessing stolen property with the knowledge or reasons to believe that the same has been transferred by the commission of a dacoity or that the same belongs to a gang of dacoits. This being the charge, it is the duty of the prosecution to prove beyond reasonable doubt that the Appellants were in conscious possession of the stolen property.

Secondly, they had the knowledge that the articles were stolen in dacoity. The material witnesses of the prosecution i.e. PW-3 Raj Kumar Kharbanda, PW-4 Lalit Kharbanda, PW-5, the complainant Anshu Kharbanda and PW-6 Seema Kharbanda, did not support the prosecution version and turned hostile. As per the testimony of PW-5, the complainant, he has categorically deposed that he cannot identify the accused/appellants as assailants as they had appeared with muffled faces. The recovered articles were easily available in the market. He had no bills/ownership proof of the watches and mobile phone, which he had identified. In this case, the recovery of stolen articles were effected after more than two months of the alleged occurrence on the basis of disclosure statements of the accused/appellants. The stolen articles were recovered from Bhiwadi (Rajasthan) but neither any independent witness nor any police official was joined from Bhiwadi. The statements of PW-3 to PW-6 do not reflect that it were the appellants-accused, who had buried the articles, the accused-appellants could not have been the recipient of the stolen property, possession whereof was obtained by commission of dacoity. Consequently, the ingredients of Section 412 IPC, are not proved by the prosecution against the appellants/accused.

There is no evidence on record fastening the present appellants/accused with the recovery of stolen articles. This aspect of the case appears to have escaped complete attention of learned trial

Court. Thus, it becomes evident that the conviction of the appellants/accused, under Section 412 IPC, was not supported by the evidence on record.

For the reasons recorded above, it is held that the prosecution has failed to prove its case against the accused/appellants beyond a reasonable shadow of doubt. The benefit of doubt is extended to the appellants.

Accordingly, the present appeal is accepted, the judgment of conviction, and order of sentence passed upon the accused/appellants are set aside. They stands acquitted of the charges framed against them by giving them the benefit of doubt. They be set at liberty forthwith, if not required in any other case. The appeal stands allowed.

14.01.2015

sumit.k

(JITENDRA CHAUHAN)
JUDGE