

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

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CRA-S-1104-SB-2011

Date of Decision : **14/12, 2022**

Gian

.....Appellant

VERSUS

State of Haryana

.....Respondent

2

CRA-S-1457-SB-2011

Deepu

.....Appellant

VERSUS

State of Haryana

.....Respondent

3

CRA-S-1755-SB-2011

Rajender

.....Appellant

VERSUS

State of Haryana

.....Respondent

CORAM: HON'BLE MR. JUSTICE KULDEEP TIWARI

Present : Mr. Sanjay Gupta, Advocate
amicus curiae for the appellants in CRA-S-1104-SB-2011
and CRA-S-1755-SB-2011.

Mr. Sanjay Gupta, Advocate
for the appellant in CRA-S-1457-SB-2011.

Mr. Anmol Malik, DAG, Haryana.

KULDEEP TIWARI. J.

All the three appeals arise out of the same verdict of

conviction passed by learned Additional Sessions Judge (Fast Track Court) Karnal and, therefore, the same are being taken up together for decision.

The present appeals are directed against the verdict of conviction dated 7.2.2011 and order of sentence dated 8.2.2011 passed by learned Additional Sessions Judge (Fast Track Court) Karnal, whereby, the present appellants alongwith one Mahabir were convicted for the offences punishable under Sections 398, 401 and 411 IPC, whereas, in addition to this, appellant-Gian was also convicted for the offence punishable under Section 25 of the Arms Act and were sentenced as under:-

Under Section 398 IPC	All the four accused/convicts to undergo rigorous imprisonment for seven years.
Under Section 401 IPC	All the four accused/convicts to undergo rigorous imprisonment for three years.
Under Section 411 IPC	All the four accused/convicts to undergo rigorous imprisonment for two years.
Under Section 25 of Arms Act	Accused/convict Gian to undergo rigorous imprisonment for one year.

FACTUAL BACKGROUND OF THE CASE

The investigation in the present case was started on the basis of statement of one SI Ishwar Chander (PW4), Incharge Police Post Salwan, who stated that on 3.10.2010 he alongwith other police officials were present at Bultana Link Canal in the area of Salwan in connection with patrolling, where he received a secret information that four persons

were having illegal weapons and were trying to loot the passersby and if a raid is conducted, they could be apprehended. Relying upon the said secret information, investigating officer formed a raiding party. As per plan, EHC Ram Mehar was directed to go in a casual dress on motor cycle and the remaining members of the raiding party waited for the signal. After some time, EHC Ram Mehar gave the signal. The accused persons were seen pointing gun on EHC Ram Mehar. Immediately, the police party reached the spot. From the possession of accused-Gian, a country made pistol 315 bore alongwith live cartridge was recovered which were taken into possession vide separate recovery memo. Sketch of the pistol was prepared. From the possession of other accused, one wooden Binda (LOG), iron rod and battery were recovered which were converted into separate parcels and were sealed with the seal 'IC' and were taken into possession vide separate memo. Seal, after its use, was handed over to ASI Jagbir Singh. A motor cycle was also recovered from the possession of the accused persons for which they could not produce any document showing their ownership.

On the basis of the above statement, an FIR was registered against the appellants and one Mahabir. The investigation was carried out. The accused persons were arrested and final report under Section 173 Cr.P.C. was filed against all the four accused persons under Sections 398, 401, 379, 411 IPC and 25 of the Arms Act.

All the accused were charge-sheeted under Sections 398, 401 and 379/411 IPC vide order dated 23.12.2010, whereas an additional

charge under Section 25 of the Arms Act was framed against accused-Gian.

The prosecution in order to prove its case examined six witnesses. The accused in their defence produced no evidence.

The trial Court, after completion of trial, recorded the verdict of conviction against all the appellants, which is now assailed by filing the present appeals. One of the accused, namely, Mahabir expired during the pendency of the appeal before this Court. Therefore, vide order dated 21.5.2015 his appeal was ordered to be abated.

SUBMISSIONS MADE BY THE COUNSELS FOR THE PARTIES

Learned counsel for the appellants submits that the ingredients of Sections 398, 401 and 411 IPC have not been made out from the story put forwarded by the prosecution and, therefore, the conviction cannot be sustained. He further stated that infact, the appellants were implicated in a false case as there was scuffle with complainant SI Ishwar Chander and appellant-Rajender whose motor cycle struck with the motor cycle of SI Ishwar Chander, due to which he formed a grudge and implicated the appellants in a false case. It was submitted that the learned trial Court has not appreciated the facts of the present case in its right perspective, therefore, the judgment of conviction is not sustainable. He further pointed out some discrepancies in the statements of the prosecution witnesses, to prove that the appellants-accused have been falsely implicated.

Per contra, learned State counsel has relied upon the

statements of PW1, PW2 and PW4 and submitted that all the three witnesses categorically proved the story of the prosecution and during cross-examination nothing material could be extracted by the defence to shatter the credentials of these witnesses. Thus, the learned trial Court has rightly held all the appellants guilty to the charges framed against them.

REASONS

I have examined the entire record with the able assistance of both the counsels.

ASI, Jagbir Singh examined as PW1 stated that on 3.10.2010 he was associated with SI Ishwar Chander PW4. A secret information was received that four persons were hiding under the *kikkar* tree and they were trying to loot the passerbys with the help of deadly weapons. Upon receipt of information, all police officials were instructed and EHC Ram Mehar was asked to wear civil dress and then to proceed towards the *kikkar* tree. EHC Ram Mehar was asked to go to the spot on the motor bike and in case any body gives him signal, then he will apply emergency brakes of the motor cycle. Ram Mehar EHC, PW6, acted as per the plan and when he was stopped by the appellants he applied emergency brakes. Thereafter, all the police men reached the spot and arrested the present appellants and one person, namely, Mahabir. They were armed with deadly weapons. One country made pistol 315 bore was recovered from appellant/accused-Gian. A wooden Binda (LOG) was recovered from appellant-Rajender. Deepu was having an iron rod, whereas, Mahabir

was sitting on a motor cycle without number plate and was giving signal of torch. He further stated that all the articles were taken into possession vide different recovery memos. This witness was put to lengthy cross-examination, however, nothing material could be extracted to impeach his credibility. In his cross-examination, he disclosed the time of secret information as 8.30 p.m. at Western Yamuna Canal near bridge. Prosecution also examined EHC Ram Mehar as PW6. He stated that on instructions of SI Ishwar Chander (PW4) he put on civil dress and proceeded on motor cycle to the disclosed place and when he reached near the place of occurrence then one of the accused gave a torch light signal to stop him. In the meantime, three accused encircled him and one of them aimed at him with pistol and told to hand over whatever he had. He gave signal to the raiding party by applying emergency brakes. Upon which the raiding team reached the spot and apprehended all the four accused. He identified all the four accused in the Court. SI Ishwar Chander stepped into the witness box as PW4 and he narrated the entire version of prosecution as narrated by PW1 and PW6. He further stated that on 26.10.2010 he took out one parcel containing pistol and cartridge from MEASI for testing and handed over the same to Armourer Police Line, Karnal and after testing the pistol and cartridge, he affixed his seal of 'SK' on the parcel and that parcel was again handed over to him. He prepared recovery memos of weapon of offence recovered from the appellant-accused. He also prepared memo of recovery of one battery (torch) and one motor cycle vide recovery memo Ex.P4. In cross-

examination, the counsel for the defence gave a specific suggestion that he has implicated the appellants-accused due to personal enmity as one month prior to the present occurrence, motor cycle of one of the appellants-accused Rajender was struck with the motor cycle of SI Ishwar Chander. However, this suggestion was specifically denied.

I have considered the statements of PW1, PW4 and PW6. These witnesses in same voice proved the case of the prosecution and the defence has miserably failed to impeach their credibilities.

Learned counsel for the appellants submitted that no independent witness was joined and the statements of official witnesses are not sufficient to prove the charges against the appellants-accused without any corroboration.

Joining an independent witness is not a statutory requirement rather, it is a rule of caution. This Court is of the considered view that there is no rule of law which provides that the testimonies of police officials cannot be relied upon, when the same is found trustworthy and duly corroborated by the other evidence. The learned trial Court has rightly and correctly placed reliance upon the testimonies of the police officials whose credentials could not be impeached by putting them on precise and lengthy cross-examination.

Learned counsel for the appellants submitted that to constitute an offence under Section 398 IPC, there has to be either incident of theft or robbery and in the present case no such incident has occurred. No money/valuable were recovered from the possession of the

accused and the accused were not armed with deadly weapons except Gian from whom illicit pistol was recovered.

I do not find any substance in the submission of learned counsel for the appellants. To bring home the guilt of the accused within the parameters of Section 398 IPC, actual robbery or dacoity is not required to be committed. Merely an attempt to commit robbery or dacoity is sufficient to attract the provisions of Section 398 IPC. In the present case, all the appellants were armed with deadly weapons and attempted to commit robbery upon EHC, Ram Mehar who stepped into the witness box as PW6 and fully corroborated the case of the prosecution. Infact, during his cross-examination, he stood by the prosecution version. The minor discrepancies which the counsel for the appellants has pointed out does not go to the root of the matter. Therefore, this Court do not find any illegality or perversity in the judgment of the learned trial Court holding the appellants guilty of offence punishable under Section 398 IPC.

Counsel for the appellants further submitted that the ingredients of Section 401 IPC have not been made out and, therefore, the conviction is not sustainable.

Let us examine the provisions of Section 401 IPC.

Section 401 of The Indian Penal Code:

*401. Punishment for belonging to gang of thieves.—
Whoever, at any time after the passing of this Act, shall
belong to any wandering or other gang of persons
associated for the purpose of habitually committing theft*

or robbery, and not being a gang of thugs or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.”

Provision of Section 401 IPC makes the fact of mere belonging to a gang of robbers or thieves punishable offence. Actual commission of theft and robbery is not necessary to constitute this offence. However, 'belonging to' does not mean a casual association with thieves or robbers but requires there shall be an agreement to habitually commit theft or robbery. Therefore, the two ingredients are required to bring home the charges under Section 401 IPC. First one is agreement to habitually commit theft or robbery and second is participation by any person in that agreement. In the present case, allegation qua the appellants-accused is that they all were present at one place with an intention to commit robbery. However, there is no allegation that all the appellants-accused were in agreement to habitually commit theft or robbery. Therefore, in the absence of any allegation to this extent, no offence under Section 401 IPC is made out. Hence, all the appellants-accused are, hereby, acquitted from the charge framed under Section 401 IPC.

Counsel for the appellants also submitted that the ingredients of Section 411 IPC are not made out and, therefore, the conviction under Section 411 IPC is not sustainable. Important ingredients to constitute an offence under Section 411 IPC is the 'stolen property' and that any person dishonestly received or retained that stolen property knowingly or have

reasons to believe the same to be stolen property.

However, in the present case, the prosecution has not led any evidence to prove that the alleged motor cycle, which was recovered from one of the appellants, was a 'stolen property'.

I have examined the judgment rendered by the learned trial Court. The learned trial Court while convicting the appellants observed that the accused-appellants failed to prove the ownership of the motor cycle which was recovered from them and, therefore, they are guilty of the commission of offence punishable under Section 411 IPC.

Learned State counsel while relying upon the provisions of Section 114 of the Indian Evidence Act submitted that the onus is upon the accused to prove their innocence, as they could not account for the recovered motor cycle.

I do not find any substance in the submissions made by the learned State counsel. The presumption of Section 114 of the Indian Evidence Act can only be invoked once the prosecution discharge their initial burden. Merely because the accused-appellants could not prove the ownership of the motor cycle, the initial onus still remains upon the prosecution to prove that the recovered bike is a 'stolen property'. No such evidence was led by the prosecution to prove that the recovered motor cycle was a 'stolen property'. Therefore, merely on the basis of presumption, the accused-appellants cannot be held guilty under Section 411 IPC.

In view of the above reasons, all the accused-appellants are

acquitted from the charge under Section 411 IPC.

Appellant-Gian was convicted for the offence punishable under Section 25 of the Arms Act. To substantiate the charge, the prosecution examined PW2 SI Satish Kumar. He tested the pistol mechanically with the help of dummy cartridge and proved on record his test report Ex.P7. He also proved on record the case property which was produced before the Court. According to his test report, the recovered weapon is a country made pistol. PW1 ASI Jagbir Singh, PW4 SI Ishwar Chander and PW6 EHC Ram Mehar categorically proved the recovery of illicit weapon from appellant-accused-Gian. The prosecution also examined Sh.Ashok Behal, Reader to District Magistrate, Karnal as PW5, who proved on record the sanction order dated 22.11.2010 issued by Ms.Neelam P. Kasni, IAS, District Magistrate, Karnal.

Learned counsel for the appellants was unable to point out any infirmity or illegality in the sanction order of District Magistrate, Karnal. Therefore, this Court does not find any infirmity in the judgment of the learned trial Court. The accused-appellant-Gian was rightly convicted for the offence punishable under Section 25 of the Arms Act.

In view of the above observations, all the appellants-accused are, hereby, acquitted from the charges framed under Sections 401 and 411 IPC, whereas, the conviction under Section 398 IPC is maintained. The conviction of appellant-Gian under Section 25 of the Arms Act is also ordered to be maintained.

Learned counsel for the appellants further prayed to reduce

the sentence of 7 years to the period already undergone or to release the appellants on probation.

Section 398 IPC provides minimum punishment of 7 years. The prayer of the counsel for the appellants cannot be accepted because of the reason that minimum sentence of 7 years is prescribed under Section 398 IPC. Since it is an offence of committing robbery with deadly weapons, therefore, this Court cannot extend the benefit of probation to the appellants.

In view of the above reasons, all the appeals are disposed of to the extent indicated above.

14/12, 2022
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(KULDEEP TIWARI)
JUDGE

Whether speaking/reasoned.	:	Yes/No
Whether Reportable.	:	Yes/No