

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 45 of 2005
Ashoke Shit
-Vs-
The State of West Bengal

For the Appellant : Mr. Malay Bhattacharyya
Mr. S. Ghosal
Ms. Sudipa Sengupta

For the State : Mr. Avishek Sinha

Heard on : 23.11.2022

Judgment on : 25.01.2023

Ananya Bandyopadhyay, J. :-

1. This appeal is preferred against the judgment and order of conviction dated 30.11.2004 passed by Sessions Judge, Bankura in Sessions Trial no. 3(3)/2002 arising out of Sessions Case no. 1(1)/2001 convicting the appellant under Section 412 of the Indian Penal Code sentencing him to suffer rigorous imprisonment for 2 ½ years and to pay a fine of Rs. 500/- in default to suffer further rigorous imprisonment for six months.
2. The prosecution case emanated on the basis of a complaint filed by project director WB CADC Sonamukhi Project Bankura inter alia stating that on 16.08.1987 at about 6.30 hours in the morning, Sri

Pranab Kumar Mukherjee son of Sri Bhupati Mukherjee of Shiromonipur under Police Station Sonamukhi, a master roll worker of the project, came to his house and informed him of unknown dacoits being armed with bombs, lathi and other weapons who forcibly entered the office through the grilled veranda and severely assaulted the night guard Narayan Gopal Mondal. They broke open the rolling shutter of the godown of the project and took away 5HP electric motors, pumps etc. of the shallow tubewells kept in that godown. The dacoits also exploded bombs at the time of dacoity. He further submitted the details of the property stolen and sought for necessary action.

- 3.** Based on the complaint Sonamukhi PS Case no. 5/50 dated 16.08.1987 was instituted after drawing a formal FIR and investigation was initiated which culminated in the submission of charge sheet under Section 395/412 IPC against the accused persons. Charges were framed under Section 395 of IPC against the appellant Ashoke Shit and Bachhu alias Gouri Sankar Saha Choudhury and under Section 412 IPC against the appellant Ashoke Shit to which the accused persons pleaded not guilty and claimed to be tried.
- 4.** The prosecution in order to establish its case cited 15 witnesses and exhibited certain documents.
- 5.** Ld. Advocate, Mr. Malay Bhattacharyya for the appellant submitted the Ld. Trial Court misjudged the entire evidence adduced by the prosecution and acquitted the co-accused persons charged under

Section 395 IPC. It was strenuously argued that a charge under Section 412 IPC cannot sustain unless a charge under Section 395 IPC was proved. The Ld. Trial Court did not consider the deposition of seizure list witnesses viz. PW 7, PW 10 and PW 11 who were not present at the time of seizure at the spot. No T.I. parade was conducted with regard to the identity of the appellant or the stolen goods to prove the same to be identical with the seized goods. Moreover, the alleged recovery of stolen goods from the courtyard of the appellant's house was not admissible under Section 27 of the Indian Evidence Act. There was a disparity in the Nos. of HP Electric Motors stolen as mentioned in the FIR to be 5 in contrast to 29 as deposed by PW 14. The prosecution failed to prove the alleged goods recovered from the Courtyard of the appellant to be stolen and under such circumstances the appeal should be allowed.

- 6.** The Ld. Advocate for the State, Mr. Avishek Sinha submitted the credibility of the sole eyewitness i.e. the nightguard to witness the dacoity is in disputable. The recovery of the goods from the custody of the appellant in presence of the witnesses is established, which amply constitutes the offence to have been committed by the appellant knowingly, confessing to have destroyed the number plate of the electric motor before the police at the time of seizure. The Jimmanama lists the items stolen and predominantly justifies the dacoity committed and the prosecution has succeeded in

proving its case beyond reasonable doubt and accordingly prayed for dismissal of the appeal.

- 7.** A circumsppection of the prosecution evidence revealed PW 1 Shri Narayan Gopal Mondal to be recruited as Night Guard of CADC building situated at Nanchanhati, a project office. On 15.08.1987 at 12 midnight/1 am certain people arrived at the gate of the office and abused him. Consequently, PW 1 screamed. Those people exploded bombs, disconnected electric and telephone connection resulting in darkness. Four to five persons entered the office breaking one gate and four other persons placed a telephone pipe across the chest of PW 1 restraining and assaulting him whereby he lost his senses and regained the same at Sonamukhi Hospital after 24 hours. The dacoits assaulted him and left with shallow tubewell motor from the office. PW 1 could not recognize any of the dacoits.
- 8.** PW 2 Shri Sankar Mondal was declared hostile by the prosecution who stated to have heard about the dacoity in the CADC office which was not visited by him thereafter.
- 9.** PW 3 Pranab Mukhopadhyay was declared hostile by the prosecution who stated to have known about the dacoity at the godown of CADC project at Sonamukhi taken place in his absence. PW 3 went to the place of occurrence being informed of the dacoity and found PW 1 lying unconscious. He denied the theft of electric motor and pump as well as the persons involved in such dacoity.

- 10.** PW 4 Shri Rabi Bauri resided adjacent to the CADC Project at Nanchanhati. He had been to the office of the project being informed of the dacoity and found the theft of the motor. He was unaware of anybody's arrest.
- 11.** PW 5 and PW 6 Prasanta Bauri and Sadhan Mohanta respectively did not see the dacoity but learnt about the same to have taken place at the CADC project at Nanchanhati.
- 12.** PW 7 Prakash Chandra Nag was a Commissioner of the Sonamukhi Municipality who went inside the ceramic factory at the instance of Darogababu and one Rahababu Project Officer, of the CADC Project. He had seen certain pumps and motors kept at a place and others being excavated in the presence of Barababu, Rahababu and Municipal Chairman Radhagobinda Barat. He denied the presence of any of the accused persons. He was declared hostile by the prosecution. He identified his signature on the seizure list marked as Ext. 1, prepared at the police station where the articles had been shifted.
- 13.** PW 8 Shri Nani Gopal Ghosh heard about the incident of the dacoity committed at CADC Office of Nanchanhati. He saw the curved, damaged collapsible gate and the night guard Narayan Mondal crying.
- 14.** PW 9 Asis Kumar Mondal was declared hostile by the prosecution who stated to have heard about the dacoity and denied visiting the place of occurrence or his personal knowledge about the incident or the persons involved in the dacoity.

- 15.** PW 10 Shri Pradip Kumar Shit identified his signature on the seizure list marked as Ext. 2.
- 16.** In his cross-examination he stated to have signed a blank paper at the direction of the police without knowing anything about the incident.
- 17.** PW 11 Tarun Kumar Ghar was called at the poice station by Barobabu and asked to sign the seizure list at the police station. He identified his signature on the seizure list marked Ext. 2/1. He also heard about the dacoity.
- 18.** In his cross examination he stated that police took his signature on a blank paper at the police station.
- 19.** PW 12 Shri Sourindramohan Mukherjee signed the seizure list relating to the dacoity at the police station and identified his signature marked as Ext. 2/2.
- 20.** During his cross-examination he stated to have heard about the dacoity but could not say the contents written in the seizure list.
- 21.** PW 13 Sri Pratap Chandra Das was posted as OC Sonamukhi police station on 16.08.1987 and identified his endorsement marked Ext. 3 on a written complaint received from project director T. Raha on 16.08.1987 initiating Sonamukhi PS case no. 5 dated 16.08.1987 under Section 394 IPC. He filled up the formal FIR and signed the same marked as Ext. 4. In the course of investigation he visited the place of occurrence and prepared the rough sketch map with index signed by him marked as Ext. 5. He examined the available witnesses and seized one electric motor register, certain

splinters of bomb marked as Ext. 6. He further seized two broken locks and one bamboo lathi under a seizure list marked as Ext. 7. On 21.09.1987 he seized one truck bearing no. WGC-2048, its papers and one chit on which Ashoke Shit wrote to one Bachhu to deliver five pieces of articles to the owner under a seizure list marked Ext. 1/1. PW 13 seized one five horsepower electric motor excavated from the courtyard of the appellant Ashoke Shit as identified by him in presence of witnesses and his signature was marked as Ext. 2/3. On 21.09.1987 he seized 17 pieces of five HP electric motor unearthed from the compound of Iswari Ceramic Industry, Sonamukhi as shown by accused Bacchu Saha Chowdhury in presence of witnesses. Those articles were covered by eight small bags. The bags were seized along with one spade, one iron jack under the same seizure list at the same place. Item No. 15 to 17 of the seizure list were recovered and seized from the godown of Iswari Ceramic Industry, Sonamukhi shown by accused Chandrika Ram and the said seizure list prepared and signed by him was marked Ext. 8. One electric motor register was left in the jimma of Tarapada Raha, the Project Director. The carbon copy of the said jimmanama prepared and signed by him under carbon process was marked as Ext. 9. The project Director submitted a list of articles with numbers that were stolen during dacoity. The injury report of the injured night gurd PW 1 Narayangopal Mondal was collected from Sonamukhi Hospital which was marked X for identification. On 24.08.1987 he arrested Ajit Mondal and Akhil

Mondal and forwarded them to the Court. On 27.08.1987 he arrested Ashoke Shit and forwarded him to the Court. On 21.09.1987 he arrested Bacchu Saha Chowdhury and forwarded him to the Court. He examined the witnesses of the seizure and the accuseds on 21.09.1987. On 18.10.1987 he examined the accused Ashoke Shit who revealed the names of other involved accused persons. On 25.11.1987 he arrested Dhananjay @Dhanu and forwarded him to the Court. On 29/30.1.88 he arrested Malik @Akbar Shah. On 18.07.1988 he was transferred and he made over the case to his successor S.I. Dilip Bhattacharaya for further investigation. PW 10 stated that witness Sankar Mondal stated to have seen Narayan Mondal at the veranda of the office in injured condition and the dacoits loaded mine motors on the truck from the godown and went away. Witness Pranab Mukhopadhyay stated to him that Akhil Mondal, Ajit Mondal and Ashoke Shit were instrumental in the dacoity. Witness Prakash Chandra Nag stated to him that Bacchu Saha Chowdhury confessed in his presence that the articles stolen from CADC Office had been concealed and pointed out the place where the electric pumps were kept along with fourteen motors covered with gunny bags. He also stated that 13 number plates and other number plates had been removed from the recovered motors. Witness Ashis Mondal had stated that nightguard Narayan Mondal was lying on the veranda of the office room in injured condition, the grill gate and the office room were broken and the dacoits looted 5 HP electric motors.

22. PW 14 Tarapada Raha was the Project Director of the West Bengal Comprehensive Area Development Project at the relevant date and time. On 16.08.1987 he received the investigation of the dacoity taking place on 15/16.08.1987. He, thereafter, submitted a written intimation to the police station and reached the place of occurrence along with the Police Officers and found 29 motors to be stolen and further submitted a list of stolen articles to the police. The written complaint was marked as Ext. 3/1 and his signature on the register and books seized under a seizure list was marked as Ext. 6/1. His signature on the seizure list marked as Ext. 8/1 concerning recovery of the motors shown by Bacchu Saha Choudhury. He received the custody of the 18 motors through a Jimmanama marked as Ext. 10. The list of 29 motors submitted by him seized by the Police Officer was marked as Ext. 11. The list of staff was marked as Ext. 12. The signature of PW 14 on the seizure list in connection with seizure of a truck bearing no. WBC2048 and along with other relevant papers was marked as Ext. 1/2.

23. PW 15 Nirmalendu Talukdar submitted the chargesheet being no. 9 dated 12.03.1989 under Section 395/412 of the IPC.

24. PW 13, the Investigating Officer in his testimony stated to have seized one truck bearing no. WGC-2048, its papers and one chit on which Ashoke Shit, the appellant wrote to one Bachhu to deliver five pieces of articles to the owner under a seizure list marked Ext 1/1. Prosecution did not take any steps to verify the handwriting of the author of the chit to be that of the appellant Ashoke Shit. The

five articles to be delivered was not described in its exactitude. The said chit was not produced before the Court to ascertain its originality. Reliance was placed on the document marked Ext. 2/1 whereby one 5 HP electric motor was excavated from the courtyard of the appellant Ashoke Shit as identified by him in presence of the witnesses with his signature marked as Ext. 2/3. PW 10, PW 11 and PW 12 were the seizure list witnesses who were not declared hostile by the prosecution. PW 10 in his cross-examination stated to have signed a blank paper at the direction of the police and denied to know anything about the incident. PW 11 in his cross-examination deposed to have signed a blank paper at the police station. PW 12 in his cross-examination stated his ignorance of the contents written in the seizure list. The manner in which the seizure list was prepared doesn't render its creation to be infallible, that too the seizure was conducted on 18.10.1987 after a considerable time being elapsed from the date of the arrest of the appellant on 27.08.1987. The entire process of seizure of the excavated 5 HP electric motor appears to be shoddy and reckless, reckoning the same to be untrustworthy and unreliable.

- 25.** Section 412 of the Indian Penal Code states that any person who dishonestly receives or retains any stolen property, the possession of which, after having knowledge and reason to believe, has been transferred by the commission of dacoity, or has dishonestly received from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, a

property which he has knowledge or has reason to believe that the property is a stolen one, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend up to ten years and shall also be liable for a fine. Following ingredients must be satisfied to make a person liable under Section 412 of I.P.C.:

- That the property is stolen property;
- That such property was concerned with dacoity;
- That the accused dishonestly received it; and
- That accused had knowledge or reason to believe that the said property was stolen in dacoity.

26. The prosecution has failed to substantiate either of the ingredients cited above. The extrajudicial confession of the appellant before the police to have destroyed the number plate of the 5 HP Electric motor received as a stolen article is an inadmissible piece of evidence. The prosecution further failed to establish the source wherefrom the appellant received the disputed article dishonestly knowing the same to be a usufruct of dacoity. The prosecution failed to prove the ingredients of dacoity and the co-accused and the appellant himself was acquitted of the charge under Section 395 I.P.C. When the incident of dacoity cannot be proved the charge under Section 412 I.P.C. to indict the appellant cannot sustain.

27. In the case of **K. Venkateshwara Rao @ Venkatal @ I. Rao vs.**

State represented by Inspector of Police, A.P.,¹ the Hon'ble Supreme Court observed that,

“Therefore, we are of the opinion that the prosecution in this case having failed to establish the charge of dacoity against the appellant and assuming that the documents Ex. P-36 to P-40 were recovered lawfully from the appellant, still has not established the fact that the appellant had received these documents knowing that the same or having believed that these documents were involved in a dacoity. Since the onus of proving this knowledge lay on the prosecution and the prosecution having failed to discharge this onus on the material on record we are not satisfied that the appellant could be held guilty of the offence under [Section 412 IPC](#), more so when he has specifically denied the recovery.”

28. Under the facts and circumstances of the case the prosecution has failed to establish its case and accordingly the appeal is allowed.

29. It is informed that the appellant is on bail. Bail bond of the appellant shall be discharged after expiry of six months in terms of Section 437A of the Code of Criminal Procedure.

30. Lower court records along with a copy of this judgment be sent down at once to the learned trial court for necessary action.

31. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)

¹ (2002) 6 SCC 247