

IN THE HIGH COURT AT CALCUTTA**Criminal Revisional Jurisdiction****Present: - Hon'ble Mr. Justice Subhendu Samanta.****C.R.A. No. - 397 of 1989****IN THE MATTER OF****Ahindra Kumar Majhi & Anr.****Vs.****State of West Bengal.**

**For the Appellant : Mr. Swapan Kumar Mallick, Adv.,
Ms. Sudeshna Das, Adv.**

For the State : Ms. Faria Hossain, Adv.,

Judgment on : 06.02.2023

Subhendu Samanta, J.

This is an appeal against the order of conviction u/s 412 of IPC passed by learned Additional Sessions Judge, 2nd Court Medinipur in Sessions trial No. XVI August, 1984 arising out of GR No. 142 of 1972 sentencing the accused/appellants to suffer rigorous imprisonment for 5 years each and to pay a fine of Rs. 2000/- in default to suffer rigorous imprisonment for a period of further six months.

In a nutshell the prosecution case is that on 06.02.1972 at about 6/7 p.m. a gang of dacoits raided the house of Kalipada Samanta (P.W. 1) when he was returning along with his sons and

daughters (P.W 2 and P.W. 3) to their house from the cow-shed. The dacoits decamped with some household articles and a gun (MAT Exhibit- I) and some cartridges. Hearing hue and cry other persons of the locality came. Later police was informed and FIR was registered.

On suspicion 10 persons including the present appellants were arrested and out of them three persons were identified in the T.I Parade held by a Judicial Magistrate (PW 11).

It is the further case of the prosecution that pursuance to the statement made before S.I Gopal Ghosh by the accused/appellant No. 1 the gun was recovered at the instance of accused/appellant No. 2 from near-by field which was seized in presence of one seizure witness (P.W 6) who was also witness to the statement made by appellant No. 1 leading to the discovery of the gun. After completion of investigation police submitted charge sheet against all the ten accused persons. The appellants along with other eight accused were committed to the Court of Sessions and charge was framed against them u/s 395 of the IPC and u/s 412 of IPC only against accused/appellant No. 2 the accused person on query pleaded not guilty and claim to be tried.

During the trial prosecution examined 12 witnesses PW 1 was the owner of the house whose house was raided by the dacoits. PW 2 and PW 3 were the daughters and sons respectively of PW 1 who were the witnesses of the occurrence. PW 4 and PW 5 are the Para People who reached the place of occurrence after commission of dacoitees and heard about the incident from PW 1, P.W 2 and PW 3. PW 6 was an witness of the recovery of the seized gun and statement of accused/appellant No. 1 made before the police leading to the discovery of the gun. P.W 7, PW 8 and PW 9 are the other seizure witnesses. PW 10 drew the formal portion of the FIR, PW 11 was the Judicial Magistrate before whom TI Parade was conducted and PW 12 was the Arms clerk of the office of the District Magistrate, Medinipur.

During the examination of the accused persons u/s- 313 Cr.P.C they all pleaded innocence.

Learned Sessions Judge, heard the arguments of P.P. as well as the Defence Counsel and after considering materials on record acquitted all the accused persons from the charge u/s 395 of the IPC but found the appellant No. 1 and 2 be guilty for the offence punishable u/s 412 of the IPC and sentenced them to suffer rigorous imprisonment for 5 years each and to pay fine of Rs. 2000/- in default to suffer RI for a period of further 6 months.

Hence this appeal.

Learned Advocate for the appellant submitted before this court that the impugned judgment and sentence passed by the Learned Sessions Judge, is illegal and improper it is not based on the evidences on the record. The Learned Court has failed to appreciate the facts and circumstances of this case and came to an erroneous finding. He again argued that though no charge has been framed against the appellant No. 1 u/s 412 IPC but he has been convicted under the same Section though he has been acquitted from the charge u/s 395 of IPC. He again argued that the Learned Judge made an erroneous approach in evaluating the evidences of the prosecution witnesses and arrived at a conclusion of guilty of the accused/appellant loosing sight of the Defence version of innocence.

He again argued that the order of conviction against appellants recorded by the Learned Judge, has been principally based on the evidence of PW 6 in whose presence purportedly the accused/appellant No. 1 made the statement which laid to the recovery of the seized gun (MAT Exhibit (I))near the house of the appellant No. 2. It would be pertinent that the same PW 6 while deposing before the Learned Judicial Magistrate 1st Court Medinipur in GR Case No. 268 of 1972 as PW 2 against the appellant in the case u/s 25/27 of Arms Act arising out of the same incident deposed in his cross examination

that he could not remembered who actually brought the gun from the field while in his evidence as PW 6 in the present sessions trial, he stated that the seized gun was recovered by the accused appellant No. 2 from the bank of the tank and handed the same over to the police officer. He also stated the gun was recovered from the midst of standing wheat, though in his cross examination he admitted that he had also deposed in the Arms Act case for which the present appellants were also accused. Learned Advocate for the appellant further argued that the deposition and evidence of PW 6 can not be believable as he has deposed otherwise on the basis of same set of facts before another court of law.

He concluded his argument with a point that the accused/ appellant has suffered the agony of a very long and a protected criminal trial as well as the instant appeal is pending over a decade which has caused immense hardship and suffering of their mind and body.

He specifically argued that the examination of the accused appellants u/s 313 Cr.P.C was not in accordance with law and opportunity was not given to the appellants to explain of and any circumstances appearing against them in the trial so he prayed for setting aside the impugned order of conviction and prayed for an acquittal of the present appellants.

Learned Advocate appearing on behalf of the state filed of written notes of arguments. He submitted that as many as 12 witness were examined on behalf of the prosecution; after considering the materials on record the Learned Sessions Judge has rightfully convicted the accused persons/ appellants u/s 412 of the IPC. The statement of PW6 Ramapati Bhattacharjee was recorded by the I.O. and before whom the PW 1 has disclosed the statement on the basis of which a recovery of gun was made. The statement of the appellant No. 1 is acceptable u/s 27 of Evidence Act. In the presence of the PW 6

the appellant No. 2 himself took out the gun (Mat Exhibit I) from the wheat field. Thus the ingredients u/s 412 of IPC has very well proved. The case of the prosecution has proved against the appellants beyond reasonable doubts the order of conviction sentences passed by the Learned Sessions Judge, can not be set aside.

Heard the Learned Advocate perused the materials on record. I have also perused the judgment passed by the Learned Sessions Judge. It appears that after evaluating the witnesses and materials produced before him Learned Trial Judge was of opinion that the offence punishable u/s 395 IPC can not be proved against the accused persons though same accused were identified in the TI Parade. In his elaborate judgment he is of opinion that the recovery of gun (MAT Exhibit (I)) including the gun licence (Exhibit 5) had a great value. During the course of investigation the statement of appellant No. 1 was recorded which laid to the discovery of the gun. PW 6 is the person, in presence of whom the appellant No. 1 has made the statement. The portion of the statement recorded by the police was exhibited before the Sessions Judge. Learned Sessions Judge is also of a view that the statement of appellant No. 1 has admissible u/s 27 of Evidence Act. The PW 6 also deposed that the appellant No. 2 took them to the wheat field and himself took out the gun within the field. The Sessions Judge, did not disbelieve the statement of PW 6 and was of opinion that the accused that the appellants are guilty of offence punishable u/s 412 of IPC.

Let me consider whether the offence punishable u/s 412 IPC has been sufficiently proved by the prosecution in this case. Section 412 of IPC is read as follows:

Dishonestly receiving property stolen in the Commission of a dacoity.- whoever dishonestly receives or retains any stolen property, the possession whereof he knows or

has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

The essential ingredients of the offence u/s 412 are as follows:

- 1) The property in question was stolen property*
- 2) It was concerned with dacoitee.*
- 3) The accused knew or a reasons to believe from the possessions thereof was transferred by commission of dacoitee.*
- 4) He received or written the same.*
- 5) He did fraud or dishonestly.*

Section 27 of the Evidence Act made appellant to look into it dedicated Section 27:

How much of information received from accused may be proved.- *Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information,*

whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Section 27 of the Evidence Act is an exception of Section 25 and 26 of the Act. Section 25 is discussed about the confession to police officer not to be proved; and Section 26 disclosed the confession of accused while in custody of police not to be proved against him.

Basically the appellant No. 1 was in police custody when he made the statement and his statements relates distinctly to the fact thereby discovered.

PW 6 disclosed before the court that the appellant No. 1 made the statement while he is in the custody of police in presence of him and it laid to the discovery of the gun (MAT Exhibit (I)). Let me see how far the statement of PW 6 is justifiable. Learned Advocate for the appellant submits that the PW 6 in other proceeding before the Magistrate u/s 25/27 of Arms Act stated otherwise. Such statement of the PW 6 was not confronted by the defence for the purpose of corroboration or contradiction. It further appears that the appellant No. 1 while made his statement before the Sessions Judge, which was recorded u/s 313 Cr.P.C., never disclosed any other circumstances for which it can be assumed that the statement of PW 6 is false. The entire statement of appellant No. 1 made under the custody of the police was not exhibited but the portion of the statement only exhibited. Learned Sessions Judge, has dictated the statement in his judgment and is of opinion that the statement of appellant No. 1 is acceptable u/s 27 of Evidence Act. The distinct portion of the statement appears to be lead the police party as well as the PW 6 to the discovery of the gun (MAT Exhibit 1).

The statement of a person in police custody cannot be proved against him, because such statement may be obtained by force or fraud; but when this statement leads to the discovery of an item allegedly used in the crime, can be believed. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such discovery is a guaranty that the information supplied by the prisoner is same.

In this case, P.W- 6 ascertained that appellant No. 1 while in police custody, made the statement which lead to the discovery of the gun (MAT-Ext-I). During examination u/s 313 Cr.P.C. Appellant No. 1 did not specifically denied regarding such disclosure. Thus, I find no infirmity in the opinion of Learned Sessions Judge, to believe the statement of P.W. 6.

In considering the submission of the Learned Advocate for the appellant regarding the pendency of the trial of this case as well as the pendency of the instant appeal, I am of a view- it is true that the incident happened in the year 1972 and we are in the 2023; long time has already been elapsed but that does not itself disprove the notion of Justice and invalidate criminal justice delivery system. The proverb need be read out like that- "Justice may be delayed but may not be denied". Civilized the society is always searching and demanding justice; it cannot be denied due to some lapse of time.

Appellant No-1 and Appellant No-2 were jointly facing the trial same evidence were adduced by the prosecution. Thus, by virtue of provision 464 Cr.P.C., failure of framing charge u/s-412 IPC against the Appellant No-1 is not fatal as no failure of justice is occasioned because of such error.

Considering the entire aspect and considering the arguments of advanced by the both sides I am of a view that the impugned Judgment passed by the Learned Sessions Judge, suffered no illegality or impropriety. The judgment of conviction passed by the

Learned Sessions Judge is on the basis of correct appreciations the facts and circumstances of this case; and it is hereby affirmed.

Accordingly, I find no merit to entertain the instant appeal thus it is liable to be dismissed.

In result thereof the Criminal appeal is dismissed. Any order of stay a suspension of sentence passed by this Appellate Court during the pendency of the appeal is hereby vacated.

The appellants are on bail. They are directed to appear before the Learned Sessions Judge, Paschim Medinipur on 23rd February 2023 to serve out their remaining portion of sentences subject to the portion thereof to be set off u/s 428 of Cr.P.C.; failing which the Sessions Judge, to issue warrant of arrest against the convicts/appellants for compliance of the order.

Connected pending CRAN applications if any, are also disposed of.

Parties to act upon the server copy and urgent certified copy of the judgment be received from the concerned Dept. on usual terms and conditions.

(Subhendu Samanta, J.)