

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Before: Hon'ble Justice Sugato Majumdar

CRA 391 of 2012

Ujjal Rajbanshi @ Ujjwal & Ors.

Vs.

The State of West Bengal

For the Appellant : **Ms. Sreyaashee Biswas,
Ms. Puja Goswami.**

For the State : **Mr. Swapan Banerjee,
Mr. Anindya Sundar Chatterjee.**

Hearing concluded on : **05/01/2023**

Judgment on : **02/02/2023**

Sugato Majumdar, J.:-

The instant criminal appeal is preferred against the Judgment dated 27/04/2012 and Order of sentence dated 30/04/2012 passed by the Additional District and Sessions Judge, FTC 1, Ranaghat, Nadia, whereby the accused persons were convicted under Sections 395 and 412 of the Indian Penal Code.

The genesis of the prosecution case is the written complaint dated 18/01/2007 made by the de-facto complainant, Netai Mondal, a resident of Nrishinghapur Madhya Colony, Santipur Police Station. In the written

complaint he stated that on 17/18.01.2007 at about 02:15 a.m. four persons entered into his home, woken up his son, Gopal Mondal from sleep and then entered into the room of the de-facto complainant with his son at gun-point. They snatched away Rs. 40,000/-, 6 bhories of gold in the form of one necklace, one bangle, ear ring, ring of gold plated conch and mobile handset and then fled away. The matter was informed to the police authority by his brother Sunil Mondal and within a short period police reached the spot. The village people chased the culprits but they fled away. After sometimes the de-facto complaint heard sound of bomb explosion. Out of the four persons the de-facto complainant gave description of two of them whom he would be able to identify; the other two culprits covered their face with clothes. One of the culprits sustained bomb injury and was admitted into hospital.

The written complaint was registered as Santipur Police Station case No. 14 of 2007 dated 18/01/2007 under Section 395 of IPC read with Section 3/4 of Explosive Substances Act. Investigation was entrusted with the Sub-Inspector Biplab Ganguly. In course of investigation the said Investigating Officer arrested the accused persons and recovered articles, arranged for test identification parade, also arranged for test identification parade of articles recovered and did other incidental and necessary acts in connection with the investigation. Charge sheet was filed against the accused persons. Since the case was exclusively triable the Court of Sessions matter was committed to the

Sessions Judge by the Additional Chief Judicial Magistrate. Thereafter, the matter was transferred to the Trial Court.

Charges were framed under Section 395/412 of the Indian Penal Code as well as under Section 3/4 of Explosive Substances Act. Charges were read over and explained to each of the accused persons to which they pleaded not guilty and claimed to be tried. Thereafter, trial began.

In course of trial thirty witnesses were examined on behalf of the prosecution; different documents were adduced in evidence and were marked as exhibits; different articles were also adduced in evidence and were marked as material exhibits.

The accused persons were also examined under Section 313 of the Indian Penal Code. Defense of the accused persons, as appears from the trend of cross-examination as well as from reply given in course of examination under Section 313 of the Code of Criminal Procedure, is false implication.

The Trial Court convicted all the present Appellants along with the other accused persons under Section 395 of the Indian Penal Code. The accused persons except the Appellant No. 2 Sadhan Mondal were also convicted under Section 412 of the Indian Penal Code. However, they were acquitted of the charges under Section 3/4 of Explosive Substances Act. In terms of the impugned order of sentence, the Appellants and the other convicts were sentenced to suffer rigorous imprisonment for period of seven years each and to

pay a fine of Rs. 5,000/- each in default to suffer simple imprisonment for a further period of three months. All the convicts except Sadhan Das were found guilty of offence punishable under Section 412 of the Indian Penal Code and were sentenced to suffer rigorous imprisonment for a term of seven years each and to pay a fine of Rs. 5,000/- each, in default to suffer simple imprisonment for a further period of three months for the said offence both the sentences were to run concurrently.

On being aggrieved and dissatisfied the instant appeal is preferred by some of the convicts being the Appellant No. 1 - 3.

Ms. Goswami appearing for the Appellants raised several points.

Firstly, it is argued that the written complaint itself speaks of presence of four persons only on the spot. There is no evidence to establish or indicate that five persons were involved in this alleged offence. On this score only, according to Ms. Goswami, conviction under Section 396/412 is liable to be set aside in respect of the Appellant No. 1 & 3 and conviction under Section 396 in respect of the Appellant No. 2.

Secondly, it is argued by Ms. Goswami that presence and involvement of the Appellant No. 1 & 3 in the offence is not at all established. Test identification parade of the Appellant No. 2 was erroneously done at the instance of the police to implicate the Appellant No. 2 falsely. The other inmates of the residence did not identify the Appellant No. 2. They are supposed to see all the culprits on

spot. Had the Appellant No. 2 been on the spot, the other witnesses must have identified him. Instead, only the de-facto complainant namely PW 1 identified the Appellant No. 2. Identification of the Appellant No. 2 was done superficially at the instruction of the police. According to Ms. Goswami, it is not only a case of benefit of doubt, but it is rather a case where the prosecution was unable to establish their case beyond reasonable doubt.

Thirdly, it is argued by Ms. Goswami that all the accused persons were arrested on the basis of statement made by the Appellant No. 2 who was apprehended first by police because of his bomb injury. But there is no confessional statement of the Appellant No. 2. All the stolen articles were recovered, according to the prosecution, on the basis of statements of the concerned accused persons, under Section 27 of the Indian Evidence Act leading to recoveries of the stolen articles. No such statements leading to recoveries are there on record. Even the alleged witnesses of such recoveries either turned hostile or could not state properly the facts of recoveries. Exiguous evidence failed to bring home the charges under Section 411/412 of the Indian Penal Code, according to Ms. Goswami.

Fourthly, it is argued by Ms. Goswami that the brothers of the de-facto complainant informed police over phone about the incidence on that very night when the incident took place. Police came to the spot, chased the accused persons and intercepted one of them. In fact police intervened into and started investigation on that very night. But the written complaint was lodged on the

next day after investigation began. The written complaint is an afterthought and a concocted one, according to Ms. Goswami. The written complaint is also not the first information report since the first informant is the brother of the de-facto complainant who informed the police for the first time on the night of the incident, as stated by the de-facto complainant in his oral testimony.

Fifthly, Ms. Goswami argued that there is a delay by two months of recovery of stolen articles. There were every possibilities of planting articles in order to falsely implicate the present Appellants. Although argued, the Trial Court did not take into consideration these aspects furthermore. The Trial Court failed to take into consideration that absence of the statement of the Appellant No. 2 leading to alleged recovery of articles vitiated the trial.

Seventhly, Ms. Goswami relies upon the decision of the Supreme Court in **Hari Om Vs. State of U.P. (2021) 4 SCC 345 [291]** to sinuate her argument that in absence of written memorandum of statement leading to recovery charges under Section 395 of the Indian Penal Code, cannot be established and an accused cannot be guilty of such charge.

Mr. Banerjee, learned Additional Public Prosecutor, submitted:

Firstly, that the accused persons were identified by the witnesses on dock. PW 1 being the de-facto complainant not only identified the Appellant No. 2 in test identification parade but the other witnesses also identified accused persons on

dock. Therefore, according to him it cannot be said that the accused persons are falsely implicated or that they were not present at the place of occurrence.

Secondly, Mr. Banerjee argued that seizure witnesses who witnessed seizure of articles were cross-examined extensively. Their version given in examination-in-chief or their credibility were not eroded or contradicted in course of cross-examination. The Trial Court rightly relied upon their evidences to conclude that the Appellants were guilty of the offences charged. According to him, there is no fault on the part of the Trial Court and the impugned judgment and the order of conviction should be upheld.

Thirdly, it is argued by Mr. Banerjee that there are sufficient explanations for delay, if any, in conducting such seizure. The evidence of the Investigating Officer is convincing enough in this respect which explained such delay ruling out any possibility of false implication.

Fourthly, it is argued by Mr. Banerjee that the Trial Court did not commit any error in appreciating the evidence and came to the right conclusion. According to him, the impugned Judgment of conviction and Order of sentence need not be interfered into.

I have heard rival submissions.

Genesis of the case is the written complaint dated 18/01/2007. The fourth point of argument of Ms. Goswami demands consideration at this point.

Provision of a first information report is in Section 154 of the Code of Criminal Procedure. Under Section 154(1), every information relating to the commission of a cognizable offence, if given orally to an officer-in-charge of a police station, shall be reduced into writing by him or under his direction, and be read over to the informant; and every such information whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. Lodging information is necessary for setting the criminal law in motion. As the section makes it clear, if it is given orally must be reduced into writing and must be signed must be given it. A first information report, so defined, must be distinguished from a telephonic message given to the police station craving for immediate rescue from peril. In **Ramsinh Bavaji Jadeja Vs. State of Gujarat [(1994) 2 SCC 685]**, the point of law was amply explained by the Supreme Court of India. If it is a cryptic message given to police and the officer-in-charge proceed to the place of occurrence on the basis of that information to find out the details of the nature of offence itself then it cannot be said that information so received shall be treated as the first information report. The object and purpose of giving such telephonic message is not to lodge the first information report but to request the officer-in-charge of the police station to reach the place of occurrence. It was further explained that if the information giving off telephone is not cryptic and on the basis of information the officer-in-charge is,

prima facie, satisfied about the commission of a cognizable offence and he proceeds from the police station after recording such information, to investigate such offence then any statement made by any person in respect of the said offence including details about the participants shall be deemed to be a statement made by a person to the police officer “in the course of an investigation”, covered by Section 162 of the Code of Criminal Procedure that statement cannot be treated as the first information report also. Any telephonic information about commission of a cognizable offence irrespective of the nature and details of such information, thus, cannot be treated as FIR. It was further explained in the following language:

“Any person in the market, including one of the shop-owners, telephones to the nearest police station, informing the officer in charge, about the murder, without knowing the details of the murder, the accused or the victim. On the basis of that information, the officer in charge, reaches the place where the offence is alleged to have been committed. Can it be said that before leaving the police station, he has recorded the first information report? In some cases the information given may be that a person has been shot at or stabbed. It cannot be said that in such a situation, the moment the officer in charge leaves the police station, the investigation has commenced. In normal course, he has first to find out the person who can give the details of the offence,

before such officer is expected to collect the evidence in respect of the said offence.”

Earlier similar was the observation of the Supreme Court of India in **Tapinder Singh v. State of Punjab [(1970) 2 SCC 113]** wherein it was observed that anonymous telephone message at police station that firing had taken place at a taxi stand; does not by itself clothe it with character of first information report, merely because the said information was first in point of time and the said information had been recorded in the daily diary of the police station, by the police officer responding to the telephone call. This point is further reiterated in **Manu Sharma Vs. The State (NCT of Delhi) 2010 6 SCC 1**. It was observed by the Supreme Court of India:

“113. The information about the commission of a cognizable offence given “*in person at the police station*” and the information about a cognizable offence given “*on telephone*” have forever been treated by this Court on different pedestals. The rationale for the said differential treatment to the two situations is, that the information given by any individual on telephone to the police is not for the purpose of lodging a first information report, but rather to request the police to reach the place of occurrence; whereas the information about the commission of an offence given in person by a witness or anybody else to the police is for the purpose of lodging a first information report. Identifying the said objective difference between

the two situations, this Court has categorically held in a plethora of judgments that a cryptic telephonic message of a cognizable offence cannot be treated as a first information report under the Code.”

In **Surjit Sarkar Vs. State of West Bengal [(2013) 2 SCC 146]** it was observed:

“35. In the case of a telephonic conversation received from an unknown person, the question of reading over that information to the anonymous informant does not arise nor does the appending of a signature to the information, as recorded, arise.”

In view of this settled position of law an information over telephone to the police station about commission of robbery does not partake the character of FIR. It is an information given to the police station to obtain their presence in the place of occurrence in order to rescue the distressed and imperiled persons from the clutch of the criminals. When the police officer responded and rushed to the spot without knowing any details they cannot be said to do that in the course of investigation. Therefore, it is not correct to say that at the time of lodging the written complaint investigation had already begun. The fourth argument of Ms. Goswami, therefore, is not acceptable.

The written complaint speaks of presence of four persons as offenders in the place of occurrence. There is no whisper in the written complaint that five persons were present who committed the offense. No evidence is there to indicate that five persons were involved in the alleged incident. The Trial Court

held it axiomatically a case of dacoity without applying mind and considering the version of the written complaint. Consequently, the Trial Court failed to appreciate evidence on record. One or two witnesses vaguely suggested that there might be four or five persons but such vague allusions cannot be relied on as trustworthy piece of evidence. It is pertinent to mention that these witnesses are inmates of the house who confronted the act alleged but none of them identified any of the accused persons. Therefore, even going with the face value of the written complaint, it is very clear that not more than four persons were present on the place of occurrence. Therefore, conviction under Section 396 in respect of Appellant No. 2 and Section 396/412 in respect of the other Appellants are not tenable. I agree with the argument made by Ms. Goswami.

The De-facto Complainant/P.W.4 stated in the written complaint that he would be able to identify at least two persons who committed the alleged robbery. He identified the Appellant No. 2 in test identification parade as well as on dock. The second point of argument demands consideration at this point. It is stated by PW 4 in course of examination-in-chief that he identified the Appellant No. 2 by putting his hand on his head. P.W.4 explained in course of cross-examination that he cannot read any writing from distance. That is why he proceeded up to the dock to identify the Appellant No.2. Although suggestion was given to P.W.4 in course of cross examination that the face of the Appellant No.2 was shown to him by police prior to test identification parade, he denied such suggestion. No question was put specifically to P.W.4

that he was taken to hospital by the police to identify the Appellant No.2 there, which had been stated by the later in course of examination under section 313. Had such questions being put specifically to P.W.4, he could have given explanation or made clarification. In absence of anything more, a statement recorded under section 313 of the Code of Criminal Procedure, 1973 without being put in cross-examination for verification cannot be relied upon as gospel truth since such statements were not made on oath. This rather accommodates for a presumption that the statements of P.W.4 on this specific point is not challenged at all.

Delay in holding the test identification parade is also highlighted by Ms. Goswami. P.W.30, the Investigating Officer explained in course of cross-examination the reasons of delay. It is in the evidence of P.W.30 that test identification parade of Appellant No.2 was conducted after his release from the hospital. It is in the evidence of P.W. 21 Dr. Rahul Gupta, under whose supervision the Appellant was treated in District Hospital, that the Appellant No.2 was released from hospital on 18/03/2007. Test identification parade of the Appellant No.2 was held on 27/03/2007. Delay is sufficiently explained and has neither any material bearing nor corrosive to the prosecution case. The second argument of Ms. Goswami is not acceptable, therefore. Mr. Banerjee's first argument also demands consideration. It is only P.W.4 who identified the Appellant No.2 as one who was present on the place of occurrence and committed robbery. Other accused persons were not identified as present on

spot. Either they were identified by the witnesses as known face or from whom stolen articles were recovered. There is no evidence to implicate the Appellant No.1 & 3 with the alleged act. I cannot, therefore accept the first point of argument of Mr. Banerjee.

PW 1, 2, 4, 5 and 15 were the in-mates residence where the incident took place. In their mutually corroborative testimonies they stated in details the incident and all the statements are in tandem with the case set out in the written complaint. There may be minor discrepancies in their testimonies but such discrepancies are not contradictory to each other so as to render testimonies and the prosecution case unreliable. Extensive cross-examination could not shake or cast any doubt on the statements so made. Therefore, beyond reasonable doubt, it established that on 17/18.01.2007 at night four persons entered into the residence of PW 1, 2, 4, 5 and 15 robbed them of jewelries, mobile handset and cash money and fled away. PW 4 identified Appellant No. 2 as the person who was one of the accused who committed the alleged act with others on 17/18.01.2007. Identification of the Appellant No.2 was made in test identification parade first and then on dock subsequently. Such identifications could not be assailed on behalf of the Appellant No.2. Therefore, it can safely be concluded that the Appellant No 2 is one of the perpetrators of the robbery and is guilty of offence under Section 392 of the Indian Penal Code.

There is no *iota* of evidence against Appellant No. 1 and 3 to indicate that they were involved in the offence of robbery along with Appellant No. 2. No

witness identified Appellant No. 1 and 3 as present on the place of occurrence and committed robbery. It is fact that some of the witnesses identified Appellant No. 1 and 3 but those identifications no way connected them with the act of robbery. It is clear that the Appellant No. 1 and 3 were not connected with the offence of robbery. Therefore, their conviction under Section 396 of the Indian Penal Code is liable to be set aside. The first argument of Ms. Goswami is accepted in part.

One golden chain (Mat. Ext. 11) and one padlock (Mat. Ext. 10) were recovered from the room of Appellant No. 3. PW 9, 10 and 14 were seizure witnesses and identified the articles recovered from the room of Appellant No.3. Oral testimonies given in course of examination-in-chief by the witnesses were not contradicted in course by cross-examination casting or creating any doubt or introducing any inconsistency therein. Recovered articles were identified by PW.4 in test identification parade. These articles were again identified by PW 4 identified on dock as belonging to him. The factum of seizure was also evidenced by the seizure witnesses. The Magistrate in whose presence test identification parade was conducted for identifications of articles were examined as PW 19 and reports were identified as exhibits.

One mobile handset was recovered from the room of the Appellant No. 1. PW 22 and 27 were seizure witnesses. Although not exhibited and marked at that time, P.W.5 identified the recovered mobile handset as one belonged to his brother and used by his father. PW 22 identified the recovery and the recovered

article namely, Mat. Ext. XV on dock. The Investigating Officer also identified recovery of Mat. Ext. XV from the room of the Appellant No.1. He also identified the Appellant No. 1 as one from whose room the same article was recovered. PW 27 identified his signature in the seizure list but he was declared hostile. Mat Ext. XV was identified by PW 4 in test identification parade in a same manner and test identification parade reports is also exhibited and marked as Ext. 26. The Magistrate who conducted test identification parade deposed as PW 19; he was cross-examined. Nothing is there in the testimony of the witnesses which belies the veracity of their depositions. It is not a case that the articles were kept and recovered from some open or public place. Had that been the situation there could be a doubt whether those articles were hidden or planted. None of the Appellants claimed the properties belonging to them. Ms. Goswami vehemently canvassed that there was inordinate delay in recovery of articles, a conduct importing strong suspicions of planting incriminating articles. The incident took place on 18/01/2007. Delay was explained by the Investigating Officer, P.W.30. It was stated by him, in course of cross examination that he was engaged in other investigation for which he could not recover the articles before 05/02/2007. So there is explanation for such delay. Therefore, the fifth argument of Ms. Goswami holds no ground. Rather, the third argument advanced by Mr. Banerjee is acceptable. Delay in recovery of articles is not fatal for the prosecution case.

The third argument of Ms. Goswami should be considered also. When there are cogent and convincing evidence of recovery of stolen articles from the possession of Appellant No.1 and 3 absence of any recorded written statement leading to recovery under section 27 of the Indian Evidence Act would not vitiate such recovery. The principle was succinctly elaborated by the Supreme Court of India in **Prakash Chand v. State (Delhi Admn.)** [(1979) 3 SCC 90] it was explained

“There is a clear distinction between the conduct of a person against whom an offence is alleged, which is admissible under Section 8 of the Evidence Act, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a Police Officer in the course of an investigation which is hit by Section 162 of the Criminal Procedure Code. What is excluded by Section 162, Criminal Procedure Code is the statement made to a Police Officer in the course of investigation and not the evidence, relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a Police Officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a Police Officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under

Section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act (vide *Himachal Pradesh Administration v. Om Prakash* [(1972) 1 SCC 249 : 1972 SCC (Cri) 88 : AIR 1972 SC 975]).”

Subsequently in **A.N. Venkatesh v. State of Karnataka** [(2005) 7 SCC 714] it was observed by the Supreme Court of India:

“Even if we hold that the disclosure statement made by the accused-appellants (Exts. P-15 and P-16) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW 4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as the conduct of the accused.”

In **Hari Om v. State of U.P.**, (2021) 4 SCC 345 although the accused were acquitted from the charges under section 396 of the Indian Penal Code, the facts of the case was different from the present one. The third argument, therefore, also does hold any ground.

Recovery of stolen articles from the possession of Appellant No. 1 and 3 is established beyond reasonable doubt. Those stolen articles were identified by

the de-facto complainant/PW 4 as one, which were robbed of in course of robbery. Those stolen articles were recovered from the residence of the Appellant No. 1 and 3. They failed to explain in any manner how the stolen articles came into their possession. They did not claim that those articles belonged to them. The witnesses testified recoveries of the articles, among others, from the residences of the Appellant No.1 and 3. All these articles, recovered from the room of the Appellant No.1 & 3 were identified by P.W.4 both in test identification parade and on dock. There is no inordinate delay in recovery of goods. Any delay is explained by the Investigating Officer. The act of robbery took place on 17/18. 01.2007 whereas recovery began on 05/02/2007. There is proximity of time between the act of robbery and recovery. It is a fit case where presumption under illustration (a) of section 114 of the Indian Evidence Act can be drawn.

In nutshell, the Appeal is partly allowed.

For reasons, and discussions as aforesaid, it is safe to conclude that the Appellant No. 1 and 3 are guilty of receiving stolen property. Since it is not proved to be a case of dacoity, but proved to be one of robbery, therefore, their conviction under Section 395/412 of the Indian Penal Code is modified as conviction under Section 411 of the Indian Penal Code only. Conviction of Appellant No.2 is modified under section 392 of the Indian Penal Code. Consequently sentences of Appellant No.1 & 3 are reduced to rigorous imprisonment of three years only with fine, as imposed. Sentence of the

Appellant No.2 is reduced to rigorous imprisonment for six years, with fine as imposed. Imprisonments in default of payment of fine shall remain the same, if not paid.

The unserved part of sentence be served out, if any.

The instant Appeal is accordingly disposed of with pending application, if any.

The lower court record be sent back forthwith along with a copy of this judgment.

(Sugato Majumdar, J.)