

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A 266 of 2001

Gora Chand Das & Anr.

-Vs-

The State of West Bengal

For the Appellants : Mr. Tapan Dutta Gupta
Mr. Subrata Bhattacharya
Ms. Shipra Santra

For the State : Mr. Avishek Sinha

Heard on : 30.01.2024

Judgment on : 22.03.2024

Ananya Bandyopadhyay, J. :-

1. This appeal is preferred against the judgment and order dated 30.06.2001 passed by the Learned Additional Sessions Judge, Durgapur in Sessions Case No. 15/98 (Sessions Trial No. 35/99), thereby convicting the appellants for committing offences punishable under Section 402 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for three years and to pay a fine of Rs. 2,000/- each, in default, to suffer rigorous imprisonment for a period of six months.
2. The appellants were placed on trial to answer a charge under Sections 399/402 of the Indian Penal Code and Sections 25(1B)(a)/27/35 of the Arms Act before the Court of the Learned Additional Sessions Judge, Durgapur in Sessions Case No. 15/98 (Sessions Trial No. 35/99).

3. The prosecution story in brief is that on 07.01.1992 at about 18:25 hours, the then Officer-in-Charge of Faridpur P.S., received a secret information through his source that 4/5 miscreants under the leadership of Sk. Selim had assembled in an abandoned damaged house near Kendula Danga Bus Stop with a view to commit dacoity in the last trip of Burdwan-Shibpur bound bus. Thereafter, on the same day, i.e. 07.01.1992, at about 19:05 hours, the Officer-in-Charge of Faridpur P.S., accompanied by other officers and force went near the said damaged abandoned house at Kendula Danga and on reaching there, they heard certain whispers. Immediately the police force surrounded the house and intercepted the miscreants. The miscreants started to escape but the police force was able to catch hold of two miscreants while 3/ 4 others managed to escape through the jungle under cover of darkness at night. Thereafter, two of the apprehended accused persons were interrogated and search was conducted on their persons. The miscreants disclosed their identity as Gorachand Das and Pagal @ Salem Bagdi. It was further alleged that one improvised pipe gun about 10" in length with a wooden butt around 3" loaded with one round live cartridge with inscription K.F.-64, 7 on his back side was recovered from the possession of accused Gorachand Das while one broken iron daw measuring 13" length was recovered from the possession of Pagal @ Salem Bagdi. It was stated that one seizure list was prepared in respect of those three seized articles duly signed by the witnesses and the accused persons. The further case of the prosecution was accused Gorachand Das failed to produce any valid document or authority for

possessing such improvised pipe gun as well as its ammunition. The said accused also failed to give any satisfactory account for possessing the same. It was also alleged that on further interrogation, the accused persons disclosed that they along with Sk. Abu Hossain of Rangamati, Sk. Mainul of Rangamati assembled there under the leadership of one Sk. Selim of Kailashpur preparing themselves for dacoity in Burdwan-Shibpur bound bus.

4. On the basis of the said complaint, the instant case was initiated.
5. After completion of investigation, the Investigating Agency submitted charge-sheet before the Learned Court below vide Charge-sheet No. 15 dated 03.09.1993 under Sections 399/402 of the Indian Penal Code and Sections 25(1B)/27 of the Arms Act.
6. Subsequently, charges were framed against the appellants to which they pleaded not guilty and claimed to be tried.
7. In order to prove its case, the prosecution examined as many as 5 witnesses and exhibited certain documents.
8. The Learned Trial Judge, after perusing the evidence on record and after hearing both the parties, by an order dated 30.06.2001 determined the appellants guilty for the offence under Section 402 of the Indian Penal Code while found them not guilty for the offence under Section 399 of the Indian Penal Code and Sections 25(1B)(a)/27/35 of the Arms Act and sentenced them as specifically mentioned hereinabove.

9. Learned Advocate for the appellants submitted that:

- i. The impugned judgment and order of conviction and sentence is a product of non-application of judicial mind on the part of the learned Judge and as such the same is liable to be set aside.
- ii. The prosecution did not examine the Investigating Officer of the instant case which had been fatal considering the fact that the prosecution witnesses did not give any corroboration recorded by the Investigating Officer and, thus, it would be just and proper to interfere by this Hon'ble Court.
- iii. Section 402 of the Indian Penal Code related to an assembly for the purpose of committing dacoity and for the purpose of committing dacoity 5 or more persons were required. In the instant case to show that the appellants including three others who were absconding were assembled on the spot should not have been considered by the Learned Trial Court.

10. The Learned Advocate for the State submitted that the investigating officer expired to the detriment of the prosecution.

11. In ***Shihab Vs. State of Kerala Rep. by Public Prosecutor and Anr.***¹, the Hon'ble High Court of Kerala at Ernakulam observed as follows:

“10. Section 402 of IPC contemplates a stage when the whole project still lies in the realm of design and intention without there being any intent to give concrete shape to intention. Before it can be attracted, it must be shown that the assembly was for committing dacoity. Mere assembly of five or more

¹ 2023 SCC OnLine Ker 1243

persons or mere arrest of the accused at the spot and recovery of weapons from their possession are not sufficient to attract the offence under Section 402 of IPC. The prosecution has to further prove that the said assembly was for the purpose of committing dacoity. The purpose of assembly, of course, could be deduced from the circumstances. Thus, in order to sustain a conviction under Section 402 of IPC, the prosecution must establish beyond reasonable doubt by acceptable evidence, either direct or circumstantial, that there had been an assembly of one of five or more persons constituted for the purpose of committing dacoity and that the accused persons were members of that assembly.”

12. It would appear from the impugned judgment and order that the Learned Trial Judge categorically opined that the offences falling under Section 402 of the Indian Penal Code and Section 399 of the Indian Penal Code would probably involve almost similar ingredients but surprisingly he on the one hand held the view that with regard to the allegations under Section 399 of the Indian Penal Code, the prosecution had failed to fulfill the ingredients of such offence as there was no evidence to show that the appellants resorted to any additional steps in course of preparation for committing dacoity and accordingly acquitted the appellants from the charges under Section 399 of the Indian Penal Code, while on the other hand, the Learned Judge had categorically held that the appellants consequently were liable to be convicted under Section 402 of the Indian Penal Code. The Learned Trial Judge failed to

consider that in order to sustain a conviction under Section 402 of the Indian Penal Code, there must be substantial evidence direct or indirect to justify the constitution of an assembly of one or five or more persons in order to commit dacoity. In the instant case the prosecution failed to establish the occasion of an assembly of five persons constituted for the purpose of dacoity. Vague proposition that there were more than five persons out of which two could be apprehended and the rest dispersed could not be considered to be a constitution of five persons or more for the purpose of committing of an offence under Section 402 of the Indian Penal Code.

13. Under the facts and circumstances of the case in absence of proof of commission of the offences by the appellant beyond reasonable doubt, the prosecution has failed to prove its case and accordingly the appeal is allowed.
14. Accordingly, the instant criminal appeal stands disposed of.
15. There is no order as to costs.
16. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
17. 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.)