HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT JABALPUR

Criminal Appeal No.725/2007

Afzal Ahmand Khan

Vs.

State of Madhya Pradesh

Criminal Appeal No.824/2007

Mohd. Sadab

Vs.

State of Madhya Pradesh

Criminal Appeal No.839/2007

Sheikh Israil alias Gudda

Vs.

State of M.P.

Criminal Appeal No.924/2007

Musammi @ Naushad @ Rinku @ Rohit & another

Vs.

State of Madhya Pradesh

Criminal Appeal No.1140/2007

Kailash Singh @ Guddu & another

Vs.

State of Madhya Pradesh

&

Criminal Appeal No.783/2011

Imtiyaaz Khan @ Raj @ Raja @ Rahul
Vs.
State of Madhya Pradesh.

Date of Judgment	**25.04.2019**
Bench Constituted	Division Bench
Order delivered by	**Hon'ble Shri Justice R.S. Jha** & **Hon'ble Shri Justice Sanjay Dwivedi**
Whether approved for reporting	**Yes**
Name of counsels for parties	For appellants: Shri S.C. Datt, learned Senior Counsel with Ms. Kishwar Khan and Smt. Shobhna Sharma, learned *Amicus Curiae*. For Respondents: Shri H.S. Chhabra, learned Government Advocate
Law laid down	(1) Conviction under Section 395 of I.P.C. is permissible only when ingredients of Section 391 of I.P.C. are fulfilled. (2) Section 120-B of I.P.C.- Merely because certain stolen articles were recovered from the accused, they cannot be held to be dacoits by invoking presumption unless there is recent recovery from them. Possession of stolen property is an evidence of stolen property and in absence of any other evidence, it is not safe to draw an inference that the persons possessing the stolen property were involved in the crime, as the suspicion cannot take place of proof.

	(3) Section 313 of Cr.P.C.- Presumption under Section 114 of the Evidence Act cannot be invoked against the accused for their involvement in the crime only because they have not given sufficient explanation in the statement under Section 313 of Cr.P.C. unless specific circumstances put to them. (4) Section 412 of I.P.C.- If the ingredients of Section 391 of I.P.C. are not fulfilled, conviction on the basis of possession of stolen property under Section 411 of I.P.C. is proper.
Significant paragraph numbers	19, 22, 26, 27, 32, 35, 36, 37, 41 and 42.

Per : Sanjay Dwivedi, J.

(JUDGMENT)

(25.04.2019)

In all these appeals, the legal validity of judgment dated 21.03.2007 passed by 10th Additional Sessions Judge, Jabalpur, in respective Sessions Trial Nos.60/2006, 61/2006 and 258/2006 has been assailed, therefore, they are heard and decided concomitantly.

2. Since, all the appeals arise out of the judgment dated 21.03.2007 passed in S.T. Nos.60/2006, 61/2006 and 258/2006 by 10th Additional Sessions Judge, Jabalpur whereby the appellants have been found guilty of offences punishable under

Section 395/120-B, 412 of IPC and Section 25(1-B)(a) of the Arms Act and while some of them have been sentenced to R.I. for life with fine of Rs.5,000/- for offence under Section 395/120-B, others have been sentenced to 2 years R.I. with fine of Rs.1,000/- for offence under Section 25 (1-B)(a) of Arms Act and some of them have also been sentenced to 5 years R.I. with fine of Rs.5,000/-. All the appeals relate to the same incident of dacoity, which took place on 22.11.2004 at about 09:25 a.m. in Dena Bank, Branch Anand Nagar, Adhartal, Jabalpur, therefore, they are being heard and decided analogously.

3. As per the prosecution story, on 22.11.2004 at about 09:25 a.m., Sharad Kumar Rakesh (PW/1), when the-then Branch Manager of Dena Bank Branch, Anand Nagar, Jabalpur reached the bank, he found it open and there was darkness in the bank. On entering into the bank, he found two boys sitting inside the bank and he did not find any of the bank employees except Cashier Ramavatar Sharma (PW/4). Just then, Girish Mishra (PW/9) entered into the bank for depositing an amount of Rs.1,21,000/-. The moment he entered into the bank, two young men already sitting there, dragged him with Sharad Kumar Rakesh and Ramavatar Sharma, towards the strong room

on gun point. Another employee of the bank namely Arjun Singh Badanga (PW/8) also reached there. The intruders while putting *Baka* over the neck of Sharad Kumar Rakesh, compelled him to open the strong room and on the same being done, took away a total amount of Rs.22,80,000/- in four plastic bags. They also snatched an amount of Rs.1,21,000/- from Girish Mishra. Thus, total amount of Rs.24,01,000/- was looted. Thereafter, they locked Sharad Kumar, Ramavatar Sharma, Arjun Singh and Girish Mishra in the strong room itself. The two of the accused had cut the telephone as well as light connection of the bank. The third accused kept the other bank employees quiet and motionless at gun point giving them life threats. Thereafter, they escaped by the motorcycle of Ramavatar Sharma bearing Registration No.MP20-KK-9198. The said motorcycle was found on the same day near Sharda Mandir. Sharad Kumar (PW/1) and Ramavatar Sharma (PW/4) submitted a written complaint (Ex.-P/1), on the basis of which, an FIR at Police Station Adhartal was registered. The police recorded the statement of witnesses namely Sharad Kumar Rakesh, Prashant Vishwakarma, Ram Kumar, Prashant Singh Kelwa, Arjun Singh Bandaga, Ghanshyam Vishwakarma, Ramavatar Sharma, Purushottam Rao, Gulam

Hussain, Mani Katthal, Ram Kumar Choudhary and Girish Mishra.

4. An information was received on 11.01.2005 from Almoda Kotwali (Uttaranchal) regarding an incident of commission of offence punishable under Sections 302, 394, 224 and 225-B of I.P.C., in which police arrested Musammi @ Naushad @ Rinku, resident of Mandla, with firearms and cartridges and during the course of investigation, he had disclosed the fact that he was involved in bank dacoity committed at Dena Bank Branch, Adhartal, Jabalpur and it was informed by Almoda police vide Ex.-P/60 to Police Station Adhartal, Jabalpur. The Uttaranchal Police also arrested Imtiaz Khan @ Raj @ Raja @ Rahul Verma on 21.03.2005 and Kailash @ Guddu on 23.03.2005 and the house of Kailash was searched on 24.03.2005, where two mobiles and one pistol were seized, it was informed by Kailash that he had purchased a second hand Scorpio out of the looted money from Dena Bank Branch, Adhartal, Jabalpur, which he used in an offence committed by him in the jurisdiction of Police Station-Almoda and after that, sold it to B.K. Motors. The said vehicle was seized and was handed-over to Police Station, Adhartal, Jabalpur. Thereafter,

during the course of investigation, seizures have been made from the present appellants and accordingly, seizure memos were prepared describing articles seized from them which were also related to the robbery committed in Dena Bank Branch, Adhartal, Jabalpur. Accordingly, offences under Section 395/120-B of I.P.C. and under Section 25(1B)(a) of the Arms Act, were registered against the accused persons, as also offence under Section 412 of I.P.C. was registered against some of the accused.

5. During the course of investigation, a register of Nagaud Lodge, Lordganj, Jabalpur, was seized and the statement of the Manager of said lodge namely Anand Rai (PW/10) was recorded under Section 161 of the Cr.P.C. As per the statement given by him, the accused Sultan @ Pappu used to stay in his lodge and from 16.09.2004 to 10.11.2004, 12.11.2004, 15.11.2004 and thereafter from 18.11.2004 to 22.11.2004, he had stayed in his lodge alongwith his four other friends and got recorded their names as Raju, Rajesh, Ravi and Vijay. The entries in the register are as Ex.-P/11 to P/15. The register was seized and the seizure memos are as Ex.-P/9 and P/10. As per the memorandum, accused Sheikh Izrail @ Gudda who was arrested on 23.03.2005, a bundle of Rs.10,000/- with *Katta* were seized

and *Panchnama* (Ex.-P/16) prepared.

6. On 23.03.2005, as per the memo of the accused Zamaluddin Rs.2,000/- were seized from his house and two bundles of Rs.10/- with a slip of Dena Bank and a pass-book of Saving Account No.S.B.G.E.N.6351 of Dena Bank and one sharp edged knife i.e. marked as Article 'H' was also seized. Thereafter, on the same day, three bundles of Rs.10/- with red slip of Dena Bank and one *katta* was seized from accused Afzal, as per seizure memo Ex.-P/22. As per memorandum of accused Sadab, Rs.1,000/- were seized from his house, which contained the slip of Dena Bank and voucher of Kathal Petrol-Pump worth Rs.1,21,900/- dated 22.11.2004 was also seized. It was also informed by him that out of the looted amount which came in his share, he purchased one Hero Honda motorcycle. One knife i.e. Article 'O' and keys of motorcycle of Ramavatar Sharma, two leukoplast were also seized.

7. As per the arrest memo, Kailash was arrested on 24.03.2005 in an offence registered as crime No.707/2004 at Police State Satna. The motorcycle i.e. MP-19-J-2485, which he had purchased out of his share of looted money was seized alongwith other articles. As per the memorandum of accused

Rani Singh, two bundles of Rs.500/-, four gold bangles, one ladies gold chain and other gold items were seized vide seizure memo (Ex.-P/20). As per the memorandum of accused Rani Singh, an amount of Rs.53,000/- was seized from the house of the accused Mirza Irshad situated at Indraji Ward, Mandla and all the bundles were packed in a slip of Dena Bank vide seizure memo (Ex.-P/32). On 18.11.2005, one six-round revolver with three cartridges were seized from accused Sultan, marked as Articles 'C' and 'D' and seizure memo (Ex.-P/35) was prepared.

8. On 22.11.2004 at about 05:00 p.m., Sharad Kumar Rakesh was medically examined and as per his medical report Ex.-P/37, there was a half inch contusion over the neck.

9. The Test Identification Parade was conducted on 29.11.2005 in Central Jail, Jabalpur, in which, witnesses Ramavatar, Arjun Singh, Ghanshyam and Girish Mishra identified the accused Sultan. Two witnesses could not attend the Test Identification Parade on 29.11.2005, therefore, it was again conducted on 02.12.2005 and they have also identified the accused Sultan. Again on 19.06.2006, Test Identification Parade was conducted, in which Sharad Kumar (PW/1), Ramavatar Sharma (PW/4) and Girish Mishra (PW/9) have identified

accused Naushad, but they did not identify Imtiyaz, whereas, Prashant and Ram Kumar have identified Imtiyaz, but they did not identify Naushad. Three accused were identified namely Sultan, Imtiyaz and Naushad. In the statement recorded under Section 313 of Cr.P.C., all the accused persons have simply denied the charges and pleaded their false implication. The accused Rani Singh has also denied the seizure of gold articles seized from her possession as they did not belong to her, but those were belonging to her mother. In support of her contention, she got examined her mother Laxmi Devi (DW/1), who stated that her husband had retired in the year 1996 who was serving in Raulkela Steel Plant and at the time of his retirement, he received double of the amount of Rs.2,30,730/-. He also received funds under different heads towards retiral dues and that some ancestral property was also sold and Rs.2,50,000/- were received therefrom. She also stated that the seized ornaments were received in her marriage.

10. During trial, the prosecution examined as many as 41 witnesses whereas in defence, only one witness namely Laxmi Devi (DW/1) was examined.

11. On the basis of statement of Anand Rai (PW/10),

Sultan alongwith his other four friends had stayed in the lodge till 22.11.2004 i.e. on the date when dacoity was committed, corroborating the entries shown in the register of Nagaud Lodge, presence of five persons has been established.

12. The trial Court after appreciating the evidence and on the basis of statement of witnesses, seized articles and other material, arrived at a conclusion that except Zamaluddin, all other accused persons were also involved in the dacoity and accordingly convicted them. Sheikh Israil @ Gudda, Mohd. Sadab, Afzal Ahmad Khan, Kailash Singh @ Guddu, Musammi @ Naushad @ Rinku @ Rohit, Imtiyaz Khan @ Raj @ Raja @ Rahul and Sultan were convicted under Section 395/120-B, sentenced to life imprisonment with fine of Rs.5,000/- and in default of payment of fine, further R.I. for six months. Ku. Rani Singh and Mirza Irshad Beg were convicted under Section 412 of the I.P.C. and sentenced to R.I. for five years and fine of Rs.5,000/- and in default, further R.I. for six months. Sheikh Israil @ Gudda and Afzal Ahmad Khan have also been convicted under Section 25(1B)(a) of the Arms Act and sentenced to R.I. for two years and fine of Rs.1,000/-and in default, further R.I. for two months.

13. As per the arguments advanced by learned counsel

for the appellants it was stated that on the basis of the material produced by the prosecution and evidence recorded, no case of dacoity is made out as the trial Court although very specifically observed that the loot committed by Musammi @ Naushad @ Rinku @ Rohit, Imtiyaaz Khan @ Raj @ Raja @ Rahul and Sultan, further no evidence against the other accused is available that they entered into the bank but on the basis of recovery of stolen articles, presumption has been drawn that they were part of the conspiracy of dacoity and standing outside the bank. Although, in paragraph-74 of the judgment, the trial Court itself has observed that there was no direct evidence about the conspiracy. The learned counsel for the appellants submit that merely because articles were seized from the appellants that too after 3 to 4 months, presumption cannot be invoked that they were also dacoits. They submit that as per Section 114 of the Evidence Act, suspicion cannot take place of strict proof unless there is evidence to connect the accused with the incident directly but only on the basis of seizure of the stolen property, no inference about their involvement in the crime could be drawn. It is further contended by them that in the statement recorded under Section 313 of the Cr.P.C. giving no explanation

about the stolen property, cannot be used against the accused, unless specific circumstance put to them. It is further argued that Section 27 of the Evidence Act is also not admissible. Instead it is a case of robbery and accordingly, the conviction under Section 395 of the I.P.C. is not proper as the ingredients of Section 391 of the I.P.C. are missing. As per their contention, punishment at the most could be given under Section 393 of the I.P.C. They have also contended that the prosecution has failed to produce any material to make out a case even under Section 120-B of the I.P.C. and as such, they assailed the conviction of the appellants as the same is illegal, perverse and excessive. It is further contended by them that considering the period of custody of the accused persons, they can also be considered to be released taking cognizance of the undergone period. To bolster their contentions, they have relied upon various decisions reported in **AIR 1980 SC 1753 [Nagappa Dondiba Kalal Vs. State of Karnataka], AIR 2012 SC 493 [Sherimon Vs. State of Kerala], AIR 1984 SC 1622 [Sharad Birdhi Chand Sarda Vs. State of Maharashtra], AIR 1993 Cr. Law J. 3669 [Man Singh and another Vs. State of MP], AIR 1970 SC 535 [Sheo Nath Vs. The State of Uttar Pradesh], AIR 1956 SC 54**

[Sanwat Khan and another Vs. State of Rajasthan], AIR 1947 PC 67 [Pulukuri Kottaya and others Vs. Emperor], AIR 1945 Bom 292 [Chavadappa Pujari Vs. Emperor] and 1981 MPLJ 457 [Reechho Hemraj and another Vs. State of MP].

14. *Per contra*, the learned Government Advocate appearing for the respondent/State submits that there is no perversity and illegality in the impugned judgment. He submits that as per the evidence produced by the prosecution and the memorandum and seizure made from the accused, it is rightly presumed by the trial Court that they are connected with the crime and had committed dacoity. The learned Government Advocate submits that in absence of sufficient explanation under the statement of Section 313 of the Cr.P.C., presumption can be drawn against the accused regarding their involvement in the crime.

15. The facts of the present case are analyzed in the light of the arguments advanced by the learned counsel for the parties and also taken note of the law laid-down by the Apex Court as well as by the other Courts relied upon by the parties.

16. Admittedly, the appellants were arrested after 3 to 4 months of the incident and recovery of the stolen currency and

other articles have also been made from them on the basis of their memorandum. The incident occurred on 22.11.2004 and the first arrest was made on 21.03.2005 of accused Imtiyaz Khan @ Raj @ Raja @ Rahul and Kailash Singh @ Guddu only on the basis of information given by the Almoda Police. Another incident took place on 15.01.2005 in Almoda, in which, the accused Musammi @ Naushad @ Rinku @ Rohit was arrested and had disclosed regarding his involvement in a dacoity committed in Dena Bank Branch, Adhartal, Jabalpur on 22.11.2004.

17. As per the statement of Sharad Kumar Rakesh (PW/1) who was the-then Bank Manager of Dena Bank, Anand Nagar Branch, Adhartal, Jabalpur and identification of Sultan and Musammi @ Naushad @ Rinku @ Rohit in Test Identification Parade, Prashant Kumar Vishwakarma (PW/2), the bank employee, who was also present at the time of incident, also identified one i.e. Imtiyaz Khan @ Raj @ Raja @ Rahul and Ramavatar Sharma (PW/4), who was the-then cashier of the bank and was present at the time of incident and has also identified Sultan and Musammi @ Naushad @ Rinku @ Rohit, further stating about presence of two accused. Ghanshyam

Vishwakarma (PW/6) who was also a bank employee present at the time of incident, has also identified Sultan and stated in paragraph-2 of his statement that there were three accused present in the bank and committed robbery. Similarly, Girish Mishra (PW/9) who went to bank for depositing an amount of Rs.1,21,000/- was also looted, who identified the accused Sultan and Musammi @ Naushad @ Rinku @ Rohit. Apart from this, there is no evidence brought on record to indicate that except these three persons, any other accused was available on the spot or even standing outside the bank.

18. The learned counsel for the appellants submit that when there was specific observation made by the trial Court that only three persons entered into the bank and committed dacoity and has further observed that there is no direct evidence linking the other accused to be involved in the conspiracy of dacoity, no case under Section 395 of the I.P.C. is made out as the ingredients of Section 391 of the I.P.C. are not attracted which is as under:-

> 391. Dacoity.- When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing,

attempting or aiding, is said to commit "dacoity".

The learned counsel for the appellants further submit that in view of Section 391, in the present case, the ingredients of dacoity are not fulfilled. As per their contention, there is no evidence brought on record by the prosecution to show that the incident has been committed by five or more persons. There was no incriminating material that other accused were involved in the conspiracy. So far as the seizure is concerned, that is a subsequent stage of the crime and, therefore, only on the basis of seizure, it cannot be said that the persons from whom seizure is made, conjointly committed or attempted to commit a robbery.

19. From a perusal of the record and considering the evidence collected by the prosecution, there is no material available on record to connect that there was any conspiracy between the accused who entered into the bank and the other accused from whom the seizure was made. It is evident that the trial Court, only on the basis of seizure and in absence of sufficient explanation under Section 313 presumed their involvement in the crime and as such, found that it is an offence under Section 395 of the I.P.C. All the seizure witnesses have

turned hostile and Anand Rai (PW/10) identified only Sultan and no other appellants.

20. Appreciating the law on which the appellants have placed reliance in the case of **Nagappa Dondiba Kalal (supra)**, the Supreme Court in paragraph Nos.3 and 4 has observed that recovery of ornaments at the instance of the accused and drawing an inference that he must have been involved in the crime especially when there is no other evidence available to connect him with such crime, he is liable to be punished under Section 411 of the I.P.C., but not the offence committed i.e. murder. The Supreme Court has further observed that in such circumstance, presumption under Section 114 of the Evidence Act cannot be invoked to hold the accused guilty of an offence except an offence of Section 411. The relevant paragraphs 3 and 4 are being reproduced hereinbelow:-

> 3. We have gone through the judgment of the High Court and we find ourselves in complete agreement with the holding that the identity of the ornaments recovered at the instance of the appellant which belonged to the deceased Pashyabi had been fully established. It was also proved that she had been wearing these ornaments when she left the house on the night of 10-4-1973. The recoveries were made on 13-4-1973 that is to say within three days of the occurrence. P. Ws.7, 8, 16 and 17 who are close relations of the deceased and who had full opportunity to see her wearing these ornaments and have identified the ornaments. Their

> evidence is further corroborated by two goldsmiths P .Ws. 9 and 10 who had prepared those ornaments. In these circumstances, therefore, the High Court was fully justified in acting on the evidence of these witnesses and in rejecting the argument of the accused that as no test identification parade was held, the identity could not be established. Taking, however, the evidence as it stands, there is nothing to connect the appellant with the murder of the deceased or even with any assault the accused may have committed on the deceased or having robbed her of her ornaments. At the utmost as the ornaments have been proved to be stolen property received by the appellant knowing that they were stolen property, the accused can thus be convicted on the basis of presumption under Section 114 of the Evidence Act and under Sec. 411 of the Indian Penal Code as a receiver of stolen property knowing the same to be stolen.
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> 4. Counsel appearing for the State submitted that as the accused had given no explanation, therefore, the inference should be drawn that he must have murdered the deceased. We are, however, unable to draw any such inference. It is for the prosecution to prove its case affirmatively and it cannot gain any strength from the conduct of the accused in remaining silent. In these circumstances, we do not find any evidence to support the conviction of the appellant under Section 302 or under Section 394 but having regard to the evidence led by the prosecution, a case under Section 411 of I.P.C. has been clearly made out. We, therefore, allow this appeal to this extent that the appellant is acquitted of the charges under Sections 302 and 394 but is convicted of the minor offence of Section 411, I.P.C. and sentenced to three years' rigorous imprisonment and a fine of Rs.5,000 (Rupees five thousand only) in default one year's rigorous imprisonment.

21. The learned counsel for the appellants have also relied upon a case of **Man Singh (supra)** in which, the Supreme Court in paragraph Nos.7 and 8 has observed that the presumption of dacoity against the accused can be invoked only

when the possession of the articles are recent. Accused arrested after 3 to 4 months cannot be held to be dacoits merely because certain stolen articles recovered from them, they are liable to be convicted under Section 412 of the I.P.C. for receiving stolen property. The relevant paragraph Nos.7 and 8 are being reproduced hereinbelow:-

> 7. However, the recoveries are duly effected and the Sub-Inspector as well as the witnesses spoke about the same. Merely because certain stolen articles were recovered from the accused they cannot be held to be dacoits by invoking the presumption unless there is a recent possession. In this case admittedly, there is a lapse of nearly three or four months. In these circumstances, we think it would be safe particularly when they were acquitted by the trial Court to convict them only for the offence of being in possession of the stolen property.
> 8. A serious dacoity took place and must be known to all the people in the village as well as in the surrounding places. The accused who were found to be in possession of the stolen property which are the subject matter of the dacoity would be held liable under Section 412, I.P.C. In the result the convictions of Narayan Singh and Shiv Ratan in Crl. A. No.573/83 under Sections 395/397, 396, 449, I.P.C., and the sentence of ten years' rigorous imprisonment under each count are set aside. Instead they are convicted under Section 412, I.P.C. and each of them is sentenced to three years' rigorous imprisonment. With regards the appellants Man Singh and Rati Ram in Criminal Appeal No.623/84 their convictions under Sections 395/397, 396 and 449, I.P.C. and the sentence of ten years' rigorous imprisonment awarded under each count are set aside. Instead they are convicted under Section 412, I.P.C., and each of them is sentenced to three years' rigorous imprisonment. The conviction of Rati Ram under Section 25 read with Section 27 of the Arms Act and the sentence awarded thereunder are confirmed. The conviction of Mithlesh one of the appellants in Crl. A. No.573/83

> under Section 412, I.P.C. is confirmed and the sentence is reduced to three years' rigorous imprisonment. His acquittal under Section 216, I.P.C. is confirmed. Sentences are directed to run concurrently.

22. In the case of **Sherimon (supra)**, the Supreme Court has observed that for committing an offence under Section 120-B, there must be meeting of minds resulting in a decision taken by conspirators regarding commission of crime. In the present case, there is only one evidence produced by the prosecution i.e. Anand Rai (PW/10) for substantiating that there were more than five persons stayed in the Nagaud Lodge and as such, there were meeting of minds among the accused before committing robbery, but that evidence is not sufficient to make out a case of Section 120-B especially when Anand Rai (PW/10) had identified only one of the accused namely Sultan. Had Anand Rai (PW/10) identified the other accused, situation would have been different and in that circumstance, an offence under Section 120-B could have been made out.

23. The appellants have also relied upon a case of **Reechho Hemraj (supra)** in which, the Division Bench of the High Court has observed that to bring home the charges under Sections 395 and 391, the accused must be shown to have

conjointly committed robbery. It is further observed that mere presence of an accused amongst the robbers is not sufficient to hold him guilty of dacoity. He must be shown to have conjointly committed robbery or aiding such commission.

24. The learned counsel for the appellants submit that in the present case, there is no evidence brought on record to show that except three accused identified, any other accused/appellants have aided by any means in commission of offence. They submit that Section 391 of the I.P.C. defines "dacoity" and as per the definition "persons present and aiding such commission or attempting, amount to five or more, every person so committing, attempting or aiding, is said to commit dacoity". The learned counsel for the appellants further submit that aiding must be prior to or at the time of commission of offence. As per Section 107 of the I.P.C. which describes the word aiding in the following manner:-

> "Intentionally aids by any act or illegal omission, the doing of that thing and as per explanation 2 who ever, either prior to or at the time of commission of an act does anything in order to facilitate the commission of that act and thereby facilitate the commission thereof, is said to doing of that act."

It also makes it clear that for fulfilling the ingredient as contained in Section 391 of the I.P.C., a person has to aid in such

commission prior to or at the time of commission of an act. Here in this case, there is nothing produced by the prosecution to show that except three identified persons who entered into the bank, others have in any manner aided something in commission of an act of dacoity.

25. The appellants have also relied upon the case of **Sheo Nath (supra)** in which the Supreme Court has observed that recovery of cloth, stolen in dacoity after three days of occurrence, other stolen articles not recovered from an accused, his name not mentioned as one of the participants in dacoity, either by any of witnesses, no evidence that the said accused knew about dacoity. The only presumption that could have been drawn that the goods were stolen but not in dacoity and as such, conviction is permissible only under Section 411 but not under Section 396. The learned counsel for the appellants submit that in the present case also, the prosecution failed to adduce any evidence to indicate that any of the appellants, from whom the articles have been seized, must have been aware about the fact that the same related to the dacoity.

26. The learned counsel for the appellants further relied upon the case of **Sanwat Khan (supra)** in which the Apex Court

has observed that possession of the stolen property is an evidence of stolen property and in absence of any other evidence, it is not safe to draw an inference that the person possessing the stolen property was involved in the crime; suspicion cannot take place of proof. As per the law laid-down by the Bombay High Court in case of **Chavadappa Pujari (supra)**, wherein it is observed by the Court that where a person is merely found in possession of property which is recently stolen in dacoity, it does not necessarily lead to the presumption that he is guilty of offence under Section 412. At the most, presumption could be drawn for lower offence i.e. under Section 411.

27. The Learned counsel for the appellants further placing reliance upon the case of **Sharad Birdhi Chand Sarda (supra),** have contended that if a specific circumstance is not put to the accused in his statement of under Section 313 of the Cr.P.C. then such circumstance cannot be used against him. The learned counsel for the appellants further submitted that from a perusal of statement of the accused/appellants, it is clear that there is no specific question put to them whether they were aware of the fact that the seized articles recovered from them

were stolen property of dacoity or not and as such, in absence of any specific question, no presumption can be drawn against the accused.

28. The Learned counsel for the appellants further submit that Section 27 of the Evidence Act deals with discovered facts and only that information is required to be proved and any confession made by an accused in custody if not related to the fact thereby discovered, is not admissible. The learned counsel for the appellants further submitted that as far as the accused Mohd. Sadab is concerned, a seizure i.e. Article 'S' was also made from him and the said Article 'S' contains description of the amount which was to be deposited in the bank by Girish Mishra (PW/9), an employee of B.M. Katthal Petrol-Pump having an account in Dena Bank and the trial Court found sufficient proof to hold Mohd. Sadab guilty of dacoity. The learned counsel for the appellants submit that as per the evidence, said Article 'S' was written by the Manager of B.M. Katthal Petrol-Pump and he was not examined and nobody has proved such slip i.e. Article 'S' containing details of amount, therefore, drawing presumption against the accused Mohd. Sadab is also not proper.

29. The learned Government Advocate submits that the

trial Court has not committed any illegality in holding the appellants guilty under Sections 395 and 120-B of the I.P.C. because the Supreme Court in series of cases has held that in absence of sufficient explanation in the statement of 313 by the accused regarding stolen articles, presumption of involvement of the accused in the crime can be drawn. He further submitted that the accused, except adducing one witness i.e. Laxmi Devi (DW/1), the mother of Ku. Rani Singh, have neither adduced any evidence to explain as to how they received the stolen property nor they have given any explanation in the statement recorded under Section 313. As such, the trial Court has rightly convicted them under Sections 395 and 120-B of the I.P.C. In support of his contention, he has placed reliance upon the Supreme Court decision in case of **Shivappa Vs. State of Mysore** reported in **AIR 1971 SC 196** wherein the Apex Court has upheld the conviction of accused under Section 395 of the I.P.C. with the aid of Section 114 of the Evidence Act when the sole evidence against them was possession of the stolen property. The relevant paragraph of the said judgment is reproduced hereinbelow:-

> "In our opinion, the law advocated by Mr. Chari is not correct. If there is other evidence, to connect an accused with the crime itself, however small, the finding

> of the stolen property with him is a piece of evidence which connects him further with the crime. There is then no question of presumption. The evidence strengthens the other evidence already against him. It is only when the accused cannot be connected with the crime except by reason of possession of the fruits of crime that the presumption may be drawn. In what circumstances the one presumption or the other may be drawn, it is not necessary to state categorically in this case. It all depends upon the circumstances under which the discovery of the fruits of crime are made with a particular accused. It has been stated on more than one occasion that if the gap of time is, too large, the presumption that the accused was concerned with the crime itself gets weakened. The presumption is stronger when the discovery of the fruits of crime is made immediately after the crime is. committed. The reason is obvious. Disposal of the fruits of crime requires the finding of a person ready to receive them and the shortness of time, the nature of the property which is disposed of, that is to say, its quantity and its character determine whether the person who had the goods in his possession received them from another or was himself the thief or the dacoit. In some cases there may be other elements which may point to the way as to how the presumption may be drawn."

Similarly, in case of **Lachhman Ram Vs. State of Orissa** reported in **AIR 1985 SC 486**, conviction was upheld under Section 395 of the I.P.C. solely on the ground that the stolen articles were recovered on the memorandum of the accused.

30. Insofar as the above referred cases i.e. **Shivappa (supra)** and **Lachhman Ram (supra)** are concerned, they are different on facts as the accused were arrested immediately after the incident and the stolen currency notes have also been

recovered from the accused on their memorandum so they have been convicted under Section 395.

31. In a case of **Ganesh Lal Vs. State of Rajasthan**, reported in **2002 (1) SCC 731**, the Supreme Court has also considered the importance of statement of Section 313 of the Cr.P.C. and has also observed as to when presumption against the accused can be drawn under Section 114 of the Evidence Act. The relevant paragraph is being reproduced hereinbelow:-

> "12. "Section 114 of the Evidence Act provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case. Illustration (a) provides that a man who is in possession of stolen goods soon after the theft may be presumed by the court to be either the thief or one who has received the goods knowing them to be stolen, unless he can account for his possession. The presumption so raised is one of fact rather than of law. In the facts and circumstances of a given case relying on the strength of the presumption the court may dispense with direct proof of certain such facts as can be safely presumed to be necessarily existing by applying the logic and wisdom underlying Section 114. Where offences, more than one, have taken place as part of one transaction, recent and unexplained possession of property belonging to the deceased may enable a presumption being raised against the accused that he is guilty not only of the offence of theft or dacoity but also of other offences forming part of that transaction.
>
> 15. A review of several decisions of this Court, some of which we have cited hereinabove, leads to the following statement of law. Recovery of stolen property from the

> possession of the accused enables a presumption as to commission of offence other than theft or dacoity being drawn against the accused so as to hold him a perpetrator of such other offences on the following tests being satisfied: (i) the offence of criminal misappropriation, theft or dacoity relating to the articles recovered from the possession of the accused and such other offences can reasonably be held to have been committed as an integral part of the same transaction; (ii) the time-lag between the date of commission of the offence and the date of recovery of articles from the accused is not so wide as to snap the link between recovery and commission of the offence; (iii) availability of some piece of incriminating evidence or circumstance, other than mere recovery of the articles, connecting the accused with such other offence; (iv) caution on the part of the court to see that suspicion, howsoever strong, does not take the place of proof. In such cases the explanation offered by the accused for his possession of the stolen property assumes significance. Ordinarily the purpose of Section 313 of the Code of Criminal Procedure is to afford the accused an opportunity of offering an explanation of incriminating circumstances appearing in prosecution evidence against him. It is not necessary for the accused to speak and explain. However, when the case rests on circumstantial evidence the failure of the accused to offer any satisfactory explanation for his possession of the stolen property though not an incriminating circumstance by itself would yet enable an inference being raised against him because the fact being in the exclusive knowledge of the accused it was for him to have offered an explanation which he failed to do."

Considering the legal position enumerated above and considering the facts of the present case, it is clear that Hon'ble the Apex Court even in case of **Shivappa (supra), Lachhman Ram (supra)** and also in **Ganesh Lal (supra)** has observed that presumption can be drawn against the accused if there is no

sufficient explanation given by them about the stolen property found in their possession. But in all these cases, it is clear that the arrest was made soon after the incident and accordingly, seizures were made. As per the case i.e. **Man Singh (supra)** relied upon by the appellants in which the Supreme Court has observed that presumption that the accused are dacoits can be drawn against them on the basis of stolen articles recovered from them, **when arrest is made soon after the incident**, however in case, the accused were arrested after 3 to 4 months, the Supreme Court has said that such presumption cannot be drawn.

32. Now considering the facts of the present case, admittedly as per the arrest memo, the arrest has been made after almost 3 to 4 months of the incident and there is no other evidence available on record as to show that the appellants other than three who have been identified had entered into the bank and were involved in the crime or were involved in hatching the conspiracy and as such, we find substance in the contentions raised by learned counsel for the appellants.

33. The view taken by the Apex Court in the case of **Shivappa (supra)**, gives strength to the contention raised by the

learned counsel for the appellants as the Supreme Court has observed as under:-

> "If there is other evidence to connect an accused with the crime of dacoity itself, however small, the finding of the stolen property with him is a piece of evidence which connects him further with the crime. There is then no question of presumption. The evidence strengthens the other evidence already against him. It is only when the accused cannot be connected with the crime except by reason of possession of the fruits of crime that the presumption may be drawn. In what circumstances the one presumption or the other may be drawn depends upon the circumstances under which the discovery of the fruits of crime are made with a particular accused. **If the gap of time is too large, the presumption that the accused was concerned with the crime itself gets weakened. The presumption is stronger when the discovery of the fruits of crime is made immediately after the crime is committed. The reason is obvious. Disposal of the fruits of crime requires the finding of a person ready to receive them and the shortness of time, the nature of the property which is disposed of, that is to say, its quantity and its character determine whether the person who had the goods in his possession received them from another or was himself the thief or the dacoit. In some cases there may be other elements which may point to the way as to how the presumption may be drawn. They differ from case to case**.
>
> The goods stolen were a large quantity of cloth taken for sale to the market. Those goods were not sold and were being taken back to the dealers by the cartmen. A large number of persons said to be 20 in number pelted stones at the cartmen and looted the property. Immediately afterwards a number of searches were made and the goods were found with various persons."
>
> **[Emphasis supplied]**

34. In the cases in which presumption is drawn against the accused on the basis of the recovery of stolen property, the arrest was made immediately after the incident, therefore, the facts of the present case is similar to that of **Man Singh (supra)**.

35. As per the observations made by the Apex Court in the case of **Sheo Nath (supra)**, in absence of any evidence that the accused knew about the dacoity and also about the stolen property relates to the same, conviction only under Section 411 of the I.P.C. is permissible. In this case, the murder was also committed while committing a robbery and stolen clothes were seized, after three days of the occurrence, but there were no other evidence by any eye witness indicating involvement and knowledge of dacoity to the persons from whom stolen articles were seized. In the present case also, the prosecution failed to adduce any evidence showing that the accused persons were involved and were also aware of the fact that the seized articles related to the dacoity.

36. In view of the above, the finding of the trial Court relating to three persons entering into the bank is correct and undoubtedly, there were evidence against them as they have been identified by the witnesses produced by the prosecution, but so far as the other accused are concerned, the presumption invoked under Section 114 of the Evidence Act against them on the ground that the recovery of stolen articles and other articles relating to the dacotiy have been seized from them and further they failed to

give sufficient explanation in the statement under Section 313 of the Cr.P.C. is incorrect, as per the settled position of law presumption cannot be invoked against the accused only on the basis of the recovery made declaring them dacoits. In absence of any other incriminating circumstances, such presumption should not be invoked. Here in this case, presumption has been invoked against the accused/appellants regarding their conjoint attempt in committing crime on the basis of the statement of Anand Rai (PW/10) and recovery made from them. Analyzing the reasoning assigned by the trial Court, we find that in view of legal position discussed by the Apex Court and other Courts mentioned in preceding paragraphs, the impugned judgment calls for interference. The witness Anand Rai (PW/10) has identified only one accused i.e. Sultan meaning thereby no other accused ever stayed in the lodge alongwith Sultan. The prosecution has not produced any other evidence in this regard. Further, in the statement of accused under Section 313, they have denied seizure made from them and all seizure witnesses have been turned hostile. The trial Court although observed that merely because seizure witnesses have not supported the prosecution case, the statement of the Investigating Officer cannot be ignored. However,

in the facts and circumstances of the present case, when the conviction is based upon recovery, not supporting the case of the prosecution by seizure witnesses carries some value. Especially when no specific circumstance regarding knowledge of dacoity put to the accused in Section 313 statement. The law laid down by the Apex Court in case of **Sharad Birdhi Chandra (supra)** is applicable, which is as follows:-

> "142. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court, viz., circumstances Nos. 4, 5, 6, 8, 9, 11, 12, 13, 16 and 17. As these circumstances were not put to the appellant in his statement under Section 313 of the Criminal Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of Hate Singh Bhagat Singh v. State of Madhya Bharat AIR 1953 SC 468 this Court held that any circumstance in respect of which an accused was not examined under Section 342 of the Criminal Procedure Code cannot be used against him."

In the present case, there is nothing on record to show that the accused from whom recovery of stolen articles is made and presumption has been drawn against them were made aware of that the seized articles related to the dacoity and no specific question has been put to them regarding the fact that despite knowing the seized articles to be of the dacoity, the same have been enjoyed by them. Thus, in absence of any specific circumstances put to the accused regarding their knowledge

about seized articles relating to the bank dacoity, such presumption cannot be drawn against them treating them dacoits. Accordingly, even in absence of explanation as has been given in the present case, same cannot be used against the accused for making them accused of dacoity. At the most, they can be punished for an offence either under Section 411 or 412 of the I.P.C. The Apex Court in **(2014) 9 SCC 299 [Raju @ Devendra Choubey Vs. State of Chhattisgarh]** while dealing with case of conspiracy and Section 120-B of the I.P.C. has observed as follows:-

> "It is settled law that common intention and conspiracy are matters of inference and if while drawing an inference any benefit of doubt creeps in, it must go to the accused."

37. Insofar as the appellant Kailash Singh is concerned, although as per the prosecution, he has confessed that he was involved in the incident of dacoity but as contended by the learned counsel for the appellants that such confession is not admissible as per Section 27 of the Evidence Act. We have considered this aspect and it is relevant to refer the judgment of the Hon'ble Apex Court in **(2015) 11 SCC 31 [Indra Dalal Vs. State of Haryana]** wherein it has been observed as under:-

> 16. The philosophy behind the aforesaid provision is acceptance of a harsh reality that confessions are extorted

by the police officers by practicing oppression and torture or even inducement and, therefore, they are unworthy of any credence. The provision absolutely excludes from evidence against the accused a confession made by him to a police officer. This provision applies even to those confessions which are made to a police officer who may not otherwise be acting as such. If he is a police officer and confession was made in his presence, in whatever capacity, the same becomes inadmissible in evidence. This is the substantive rule of law enshrined under this provision and this strict rule has been reiterated countlessly by this Court as well as the High Courts.

17. The word 'confession' has no where been defined. However, the courts have resorted to the dictionary meaning and explained that incriminating statements by the accused to the police suggesting the inference of the commission of the crime would amount to confession and, therefore, inadmissible under this provision. It is also defined to mean a direct acknowledgment of guilt and not the admission of any incriminating fact, however grave or conclusive. Section 26 of the Evidence Act makes all those confessions inadmissible when they are made by any person, whilst he is in the custody of a police officer, unless such a confession is made in the immediate presence of a Magistrate. Therefore, when a person is in police custody, the confession made by him even to a third person, that is other than a police officer, shall also become inadmissible.

18. In the present case, as pointed out above, not only the confessions were made to a police officer, such confessional statements were made by the appellants after their arrest while they were in police custody. In Bullu Das v. State of Bihar[1], while dealing with the confessional statements made by accused before a police officer, this Court held as under:

> "7. The confessional statement, Ex.5, stated to have been made by the appellant was before the police officer in charge of the Godda Town Police Station where the offence was registered in respect of the murder of Kusum Devi. The FIR was registered at the police station on 8-8-1995 at about 12.30 p.m. On 9-8-1995, it was after the appellant was arrested and brought before Rakesh Kumar that he recorded the confessional statement of the appellant. Surprisingly, no objection was taken by the defence for admitting it in evidence. The trial court also did not consider whether such a confessional

> statement is admissible in evidence or not. The High Court has also not considered this aspect. The confessional statement was clearly inadmissible as it was made by an accused before a police officer after the investigation had started."
>
> 19. Notwithstanding the same, the trial court as well as the High Court had relied upon these confessions on the basis of these statements, coupled with 'other connected evidence available on the record', particularly the recovery of the scooter from the old house of accused Indra Dalal and the disclosure/confessional statement (Mark A) made by Jaibir in another case bearing FIR No. 718 dated November 30, 2001 registered under Sections 420/407/463/471/120-B IPC and Sections 25/54/59 of the Arms Act, 1959 registered at Police Station: Civil Lines, Hisar, which has been proved by Inspector Ram Avatar (PW-15).
>
> [Emphasis Supplied]

furthermore, in **Pulukuri Kottaya (supra)** in paragraph-10 has observed as under:-

> [10] Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The conditions necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argues that in such a case the "fact discovered is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body

> produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the Legislature that a person under police influence must be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasino, and that in practice the ban will lost its effect. On normalprinciples of construction their Lordships think that the proviso to S.26, added by S.27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is nor related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knifeconcealed in the roof of my house" does not lead to the discovery of knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of offence, the fact discovered is very relevant. But if to the statement the wordsbe added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

38. In view of the above, the accused Kailash Singh cannot be said to be involved in committing dacoity alongwith Sultan, Naushad and Imtiyaz and as such, he should also be convicted for the offence committed under Section 411 of the I.P.C. and also under Section 25 (1B)(a) of the Arms Act.

39. The Division Bench of Delhi High Court in one of the cases i.e. Crl. A. No.231/2017 [Deepak Yadav Vs. State (Govt. of NCT of Delhi)], Crl. A. No.317/2017 & Crl. M. (Bail) No.545/2017 [Ravi @ Munna Vs. State] and Crl. A. No.493/2017 & Crl. M.(Bail) No.871/2017 [Babu Musahid @ Ali @ Akram Vs. State NCT of Delhi] while dealing with the offence of Sections 302/34, 392/34 and Section 25 of the Arms Act, 1959 has dealt with the similar circumstance as involved in the present case in which the conviction is also based upon the presumption of recovery that too of mobile phone from one of the accused and there was no sufficient explanation given in the statement under Section 313 of the Cr.P.C. The Division Bench has dealt with the issue of recovery in the following manner:-

> **Recovery**
> 53. The other piece of evidence sought to be relied upon by the prosecution is the recovery of mobile phone of the deceased from Appellant No.1.
>
> 54. The circumstances of the present case indicate that robbery and murder were part of the same transaction. However, mere recovery of stolen property from the accused, in the absence of any other evidence, would not be a safe ground to draw an inference that Appellant No.1 committed the murder. Furthermore, in such a circumstance, conviction would be also be dependent upon the nature of the property recovered, and whether it was likely to pass readily from hand to hand. Suspicion would not take the place of proof. [Ref: State of Rajasthan v. Talevar, reported as (2011) 11 SCC 666].
>
> 55. In the present case, the property recovered from Appellant No.1 is the mobile phone of the deceased. The mobile phone was was likely to be passed readily from hand to hand. It would also

be relevant to note that the recovery was made two months after the date of the incident.

56. Therefore, recovery of the mobile phone of the deceased from Appellant No.1 two months after the incident would not be sufficient to convict Appellant No.1 for the underlying offences and, at most, he can be convicted for the offence punishable under the provision of section 411 IPC, for being in possession of stolen property. [Ref: Nagappa Dondiba Kalal v. State of Karnataka reported as 1980 (Supp) SCC 336].

57. Even though a contention was sought to be raised on behalf of Appellant No.1 that the recovery of mobile phone from Appellant No.1 is tainted since, inter alia, there is no mention either in the PCR form [Ex.PW- 13/A] or the crime team report [Ex.PW-2/A] about the mobile phone being taken away by the assailants; the said contention is liable to be rejected, inasmuch as, relevant witnesses were not examined even in this behalf. No explanation.

58. The Hon'ble Supreme Court in Rajkumar v. State of Madhya Pradesh reported as (2014) 5 SCC 353, observed in relation to duty of the accused to furnish an explanation under Section 313 CrPC regarding any incriminating material produced against him, as follows:

> " 21. Admittedly, the appellant did not take any defence while making his statement under Section 313 CrPC, rather boldly alleged that the family of the deceased had roped him falsely at the instance of the police. However, the appellant could not reveal as to for what reasons the police was by any means inimical to him.
>
> 22. The accused has a duty to furnish an explanation in his statement under Section 313 CrPC regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313 CrPC is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law. (Vide Ramnaresh v. State of Chhattisgarh [(2012) 4 SCC 257 : (2012) 2 SCC (Cri) 382] , Munish Mubar v. State of Haryana [(2012) 10 SCC 464 : (2013) 1 SCC (Cri) 52 : AIR 2013 SC 912] and Raj Kumar Singhv. State of Rajasthan [(2013) 5 SCC 722 : (2013) 4 SCC (Cri) 812].)

> 23. In the instant case, as the appellant did not take any defence or furnish any explanation as to any of the incriminating material placed by the trial court, the courts below have rightly drawn an adverse inference against him. The appellant has not denied his presence in the house on that night. When the children were left in the custody of the appellant, he was bound to explain as under what circumstances Gounjhi died."
>
> (Emphasis supplied)

59. No doubt that failure of accused to furnish an explanation with respect to any incriminating material put to him would entitle the court to draw an adverse inference against him, however, we should not be oblivious of the fact that the initial burden is on the prosecution to prove all the charges against the accused beyond reasonable doubt. The guilt of the accused must be conclusively proved by direct or circumstantial substantive piece of evidence.

60. Further, the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. Although, where all the links in the chain of events are complete, a false plea or a defence may be called into aid but only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that any infirmity or lacuna in the prosecution case could be cured or supplied by a false defence or a plea which is not accepted by the court. [Ref:Sharad Birdhichand Sarda v. State of Maharashtra reported as (1984) 4 SCC 116].

61. The evidence available on record has either been discredited or held to be not sufficient to render a conviction thereupon. The prosecution has failed to bring home the guilt of the accused. Now the prosecution cannot seek to fall back on the statement of the Appellants recorded without oath under.

62. Therefore, in light of the facts and circumstances of the present case, failure on the part of the Appellants to furnish an explanation with respect to the incriminating material put to them, would not come to the aid of the prosecution.

Conclusion

63. A Division Bench of the High Court of Bombay in Geeta Keshav Shankar v. The State of Maharashtra reported as 2009 (111) BomLR 1163 observed as follows:

> "62. The standard of proof in criminal case has to be beyond reasonable doubt. This expression is of higher standard, of course, there cannot be absolute standard stating degree of proof. This could depend

> upon the facts of a given case. Doubts would be called reasonable if they are free from zest for abstract speculation. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence."
>
> (Emphasis supplied)
>
> 64. In the given factual background, the possibility of persons other than the Appellants having committed the underlying offence cannot be ruled out with a fair degree of certainty. Convicting the appellants on the scanty evidence available on record would amount to conviction on mere suspicion and supposition. In our considered view, the offence has not been proved against the Appellants beyond reasonable doubt and lacks the certainty required and mandated by law.

40. The Division Bench relying upon the several decisions of the Apex Court has observed that the prosecution must stand or fall on its legs and it cannot derive any strength from the weakness of the defence and has also observed that merely because sufficient explanation is not given, but any lacuna would not come to aid the prosecution.

41. As has already been discussed hereinabove that the accused were arrested after almost four months from the incident and then seizure, no other person was identified except three accused, presumption under Section 114 of the Evidence Act has been invoked against the other accused treating them part of the incident of dacoity, as recovery of stolen articles

made therefrom and no other incriminating material available on record treating appellant Kailash Singh @ Guddu involved in the dacoity. The ingredients of Section 391 of the I.P.C. are not proved to be fulfilled. It is also clarified, as to why inference cannot be drawn against the accused merely because they failed to give sufficient explanation.

42. Accordingly, we are of the view that in the light of various decisions of Hon'ble Apex Court and also the High Courts as discussed above, we have no hesitation to say that the trial Court has committed material illegality in convicting the appellants under Section 395/120-B of the I.P.C. as the reasoning given by the Court below on the basis of foundation regarding dacoity whereas in view of the discussion made above, no case of dacoity is made out, it is a case of robbery and accordingly, sentence given by the Court below is modified in the following manner:-

(1) Appellants Musammi @ Naushad @ Rinku @ Rohit and Imtiyaaz Khan @ Raj @ Raja @ Rahul are being convicted under Section 393/120-B of I.P.C. and sentenced to undergo 7 years R.I. with fine as awarded by the trial Court.

(2) Appellants Sheikh Israil @ Gudda, Mohd. Sadab, Afzal

Ahmad Khan and Kailash Singh @ Guddu are convicted under Section 411 of I.P.C and sentenced to suffer 3 years R.I. with fine as awarded by the Trial Court.

(3) So far as the conviction and sentence under Section 25(1B)(a) of the Arms Act awarded to the appellants Sheikh Israil @ Gudda and Afzal Ahmad Khan by the trial Court is concerned, the same is hereby maintained/affirmed.

(4) As regards the conviction under Section 412 of I.P.C., the same was made against appellant Rani Singh and accused Mirza Irshad Beg by the trial Court and looking to the reasons discussed in preceding paragraphs, the conviction of Rani Singh and Mirza Irshad Beg is altered to Section 411 of I.P.C. and thus, they are convicted under Section 411 of I.P.C. and sentenced to suffer 3 years R.I. with fine as awarded by the trial Court.

43. Resultantly, the appeals filed by the appellants are **party allowed** to the extent indicated hereinabove. Appellants Kailash, Musammi @ Naushad @ Rinku @ Rohit and Imtiyaaz Khan @ Raj @ Raja @ Rahul are already in jail whereas appellants Rani Singh, Mirza Irshad Beg, Sheikh Israil alias Gudda, Mohd. Sadab and Afzal Ahmand Khan are on bail. Their bail-bonds stand cancelled and they are directed to be taken into custody

forthwith and to surrender before the trial Court for serving their respective remaining part of jail sentence.

(R. S. JHA)
JUDGE

(SANJAY DWIVEDI)
JUDGE

Prachi/ Devashish