

(2013) 08 P&H CK 0918

High Court Of Punjab And Haryana At Chandigarh**Case No:** CRA No. S-1086-SB of 2011

Dharminder Singh @ Sonu

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision: Aug. 31, 2013**Acts Referred:**

- Arms Act, 1959 - Section 25, 27
- Criminal Procedure Code, 1973 (CrPC) - Section 173, 221, 221(2), 232, 313
- Evidence Act, 1872 - Section 114
- Penal Code, 1860 (IPC) - Section 120B, 378, 383, 390, 391

Hon'ble Judges: S.S. Saron, J**Bench:** Single Bench**Advocate:** Chanan Singh, for the Appellant; S.S. Dhaliwal, Addl. AG, Punjab, for the Respondent**Final Decision:** Partly Allowed

Judgement

S.S. Saron, J.

This appeal has been filed by Dharminder Singh alias Sonu against the judgment and order dated 29.03.2011 passed by the learned Additional Sessions Judge (Ad hoc) Fast Track Court, Hoshiarpur whereby the appellant has been convicted for the offence punishable u/s 395 read with Section 397 of the Indian Penal Code ("IPC - for short). By a separate order passed on the same day, he has been sentenced to undergo rigorous imprisonment for seven years; besides, pay a fine of Rs. 5000/- for the offence u/s 395 read with Section 397 IPC. The FIR (Ex. PD/1) has been registered on the statement (Ex. PC) of Bansilal (PW-4), Cashier of the Sugar Mill at Mukerian. The complainant stated that he was working as a Cashier at the Sugar Mill, Mukerian. The previous night i.e. on 30.11.2004, he was on duty in the shift from 12 midnight till 8.00 am with Mukhtiar Singh (PW-5) an Assistant and Sewa Singh (PW-1) a Guard. At about 2-2.30 am at the dawn of the day, he (complainant) sent the guard (Sewa Singh PW-1) for getting tea from the canteen. The guard (PW-1) while leaving

bolted the cash cabin from outside. Bansilal complainant (PW-4) was about to bolt the cash cabin from inside and at that time all of a sudden three young men in the age group of about 24-25 years wearing caps on their head, with trimmed beards and one of them clean shaven and of medium height speaking in Punjabi stormed into the cabin. On getting in the cabin, two of them held their revolvers towards the complainant and the Assistant. They in a forceful voice threatened them to remain quiet. The third person cut off the telephone cables and opened the trunk which was lying there and containing cash. They put cash amount of about Rs. 10 lacs in a white colour bag lying nearby after taking it out from the trunk. They further held out threats for not raising an alarm or else they would be killed. After robbing the cash, they ran out. The complainant Bansilal (PW-4) and Mukhtiar Singh (PW-5), Assistant raised an alarm that a robbery had been committed. On this other workers of the mill and the farmers who had come there and were standing for collecting payment and the Security Guards chased the culprits but it was quite dark at that time. On an alert being sent, all the outer gates of the Mill were closed by the Security Guards. The complainant and Mukhtiar Singh (PW-5) Assistant then informed Shri Anil Kumar Sharma, Personnel Manager of the Mill who further informed the police. A heavy force rushed to the spot immediately and after cordoning the Mill from all sides with the help of the complainant side, started a search of the Mill. The statement (Ex. PC) of the complainant was recorded by SI Swaran Singh, SHO of Police Station, Mukerian (PW-6). It was signed by Bansilal complainant (PW-4) in English and he asked for action being taken. Police proceedings (Ex. PD) were recorded by SI/SHO Swaran Singh (PW-6) at 5.10 am on 1.12.2004 which are to the effect that he was present at the Police Station and DSP, Mukerian informed him on telephone that payment for the sugarcane produce was being disbursed at the Sugar Mill, Mukerian and in the office a robbery had been committed. He (PW-6) was asked to immediately reach there along with a heavy force and cordon the Mill from all the sides and a search of the Sugar Mill yard be started because it had been informed that the robbers were amongst the farmers in the yard of the Mill. SI/SHO Swaran Singh (PW-6) on receipt of the said information gathered the force and along with Police officials in Government vehicles left for the place of occurrence. MHC at the Police Station was directed to send more force at the spot. On reaching the Mill, the place was cordoned and a search started. SI/SHO Swaran Singh (PW-6) himself inspected the place of occurrence and recorded the statement (Ex. PC) of Bansilal (PW-4) and as per his description of the incident, his statement was recorded which was read over to him and heard by him. He on accepting his statement signed the same in English, which was attested by SI/SHO Swaran Singh (PW-6). From the said statement, offence under Sections 395 /397 IPC; besides, Section 25 and 27 of the Arms Act were found to be made out. The writing containing the statement of Bansilal for registration of a case (FIR) was sent to the Police Station through Head Constable Gurdev Singh. On registering the case, the number of the case was asked to be informed. Special reports were asked to be sent to the officers concerned. The control room was also asked to be informed; besides,

finger print expert and the dog squad were asked to reach the spot. SI/SHO Swaran Singh (PW-6) was busy at the spot in connection with the investigations. In terms of endorsement (Ex. PD/2) recorded by ASI Surinder Kumar, P.S. Mukerian FIR No. 216 dated 01.12.2004 (Ex. PD/1) was registered for the offences u/s 395 read with Section 397 IPC; besides, Sections 25 and 27 of the Arms Act.

2. During search of the Mill, Dharminder Singh (appellant) was arrested near gate No. 3 of the Sugar Mill. He tried to sit in a car bearing No. DL-8CJ-6895 make "Santro" but he was apprehended and the car was taken in possession by the Police. Site plan (Ex. PE) of the place of occurrence was prepared by SI/SHO Swaran Singh (PW-6). The dog squad and finger print expert were also called. During search of Dharminder, one 9 mm pistol bearing No. 2121 (Ex. P1) along with three live 9 mm cartridges (Ex. P2 to Ex. P4) which were loaded in the pistol, made in England were recovered. Separate parcels of the pistol (Ex. P1) and the cartridges (Ex. P2 to Ex. P4) were prepared which were sealed with seal bearing impression "SS" of SI/SHO Swaran Singh. These were taken in police possession vide memo (Ex. PF) in the presence of witnesses. The pistol (Ex. P1) was on the right side of the belt of the appellant. Currency notes of Rs. 80,000/- were also recovered from a polythene bag, which was carried by the accused (appellant) in his right hand. The same were taken in police possession vide memo (Ex. PG). As per details given in Ex. PG, the notes were Ex. P5. During search of the car two live .32 bore cartridges (Ex. P5/A and Ex. P6) (Exhibit P5 has been put on the currency notes and then again put on one of the .32 cartridge. Therefore, the cartridge is now described as Ex. P5/A) were recovered from the dash board of the car bearing No. DL-8CJ-6895. The same were taken in police possession vide memo Ex. PH. A parcel was prepared and it was sealed with the seal impression "SS". Three pieces of iron rods (Ex. P-9 to Ex. P-11) and two brass brushes (Ex. P-7 and Ex. P-8) were also recovered from the car. On arrest of the accused, arrest memo (Ex. PJ) and memo of personal search (Ex. PK) were prepared. Sketch of the above pistol before making its parcel (Ex. PL) was prepared. Site plan (Ex. PM) of the place from where the appellant was arrested was separately prepared. The statements of PWs were also recorded. One telephone receiver and a rear view car mirror were also taken in police possession vide memo (Ex. PN) from the place of occurrence which were produced before SI/SHO Swaran Singh (PW-6) by SI Balwinder Kaur, Finger Print Expert. Statements of witnesses were recorded. The "Santro" car (Ex. P-12) that was recovered was taken in police possession vide memo (Ex. PO) in the presence of other witnesses. Recovery witnesses also signed the above said entire memos. On 05.12.2004 during interrogation the appellant Dharminder Singh, made a disclosure statement (Ex. PO/a) (mentioned as Ex. PO/a as earlier recovery memo is also mentioned as Ex. PO) which was recorded by SI/SHO Swaran Singh (PW-6) and was attested by ASI Surinder Kumar. After the investigation by SI/SHO Swaran Singh (PW-6), the investigation was conducted by another investigating officer.

3. After completing the investigation, police report (challan) in terms of Section 173 of the Code of Criminal Procedure ("Cr.P.C." -for short) was filed in the Court of learned Judicial Magistrate Ist Class, Dasuya on 28.02.2005 against (1) Dharminder Singh alias Sonu (appellant), (2) Rajiv Wadhwa, (3) Kuldeep Chand alias Sonu, (4) Jagdip Singh alias Jagga, (5) Narinder Singh alias Sonu and (6) Kulwinder Singh @ Raju. At that time the accused Narinder Singh and Kuldeep Chand were in custody, the accused Jagdip Singh alias Jagga, Dharminder Singh (appellant) and Rajiv Wadhwa were on bail and Kulwinder Singh accused had been declared a proclaimed offender.

4. The learned Judicial Magistrate Ist Class, Dasuya vide her order dated 15.05.2006 from the police report found that a prima facie case for the offences under Sections 397, 395, 412 and 120-B IPC; besides, Sections 25 and 27 of the Arms Act appeared to be made out. The offences under Sections 397, 395 and 412 IPC were exclusively triable by the Court of Session. As such, the case was committed to the learned Sessions Judge, Hoshiarpur for trial. The accused were directed to appear before the learned Sessions Judge, Hoshiarpur on 29.05.2006. The accused Manjit Singh alias Monu and Kulwinder Singh alias Raju were produced before the learned Judicial Magistrate Ist Class, Dasuya and a police report was filed against them on 18.8.2006. The case against them was also committed to the Court of Sessions Judge, Hoshiarpur by the learned Judicial Magistrate Ist Class, Dasuya on 23.08.2006 for 05.09.2006.

5. The learned Sessions Judge, Hoshiarpur vide order dated 20.11.2006 framed charges against (1) Dharminder Singh (appellant), (2) Rajiv Wadhwa, (3) Jagdip Singh, (4) Kulwinder Singh alias Raju (PO), (5) Narinder Singh alias Sonu (PO), (6) Kuldeep Chand and (7) Manjit Singh (the latter two were in custody) for committing dacoity to the tune of Rs. 10 lacs from the premises of Mukerian Sugar Mill and that at the time of committing dacoity, the accused it was alleged used deadly weapons i.e. pistols/revolvers and attempted to cause death or grievous hurts to Bansi Lal complainant (PW-4) and Mukhtiar Singh (PW-5) in case they raised an alarm and thereby they all committed an offence punishable u/s 395 read with Section 397 IPC within the cognizance of the Court. The statements of accused Dharminder Singh (appellant), Rajiv Wadhwa, Jagdip Singh, Kulwinder Singh alias Raju (PO), Narinder Singh alias Sonu (PO), Kuldeep Chand and Manjit Singh are shown to have been recorded without oath. They all are said to have stated that they had heard the charge and pleaded not guilty to the same but claimed trial. In fact the statements are not signed or thumb marked by any of the accused and the statements of those who were POs could not have been recorded. In any case, the present case concerns Dharminder Singh only and he was present.

6. The prosecution in order to establish its case examined Sewa Singh (PW-1) who was the guard at the place of occurrence, the complainant Bansi Lal Cashier (PW-4) and Mukhtiar Singh an Assistant in the Sugar Mill (PW-5). Sewa Singh (PW-1) who

was working as Security Guard at the Sugar Mill stated that he was on duty during the intervening night of 30.11.2004 and 01.12.2004 from 12 midnight to 8.00 am. His duty was in the cabin of Bansilal (PW-4). Bansilal (PW-4) asked him (Sewa Singh PW-1) to bring tea from the canteen. By bolting the cabin of the Cashier from outside he went to the canteen for bringing tea. When he returned he heard the noise from other guards and the Cashier that a theft had been committed. Nothing more had happened in his presence. He was not cross-examined.

7. Bansilal, Cashier of the Sugar Mill (complainant) (PW-4) in his deposition reiterated his earlier statement (Ex. PC). In cross-examination, he stated that the accused were not got identified from him and he did not know them earlier. There were three gates in the Mill. It is stated that one can reach the cabin from the gate No. 3 in about 10 minutes. There were lights. The passage was a cemented one. Except a passage there was no other passage for entering the Mill. It was incorrect to suggest that the currency notes bear the stamp of the Mill.

8. Mukhtiar Singh (PW-5) was posted as Assistant Cashier in the Sugar Mill. He stated that at about 2.30 am, Sewa Singh (PW-1) was sent to bring tea from the Canteen. He bolted the door from outside and went to the canteen. In the meantime three persons came inside the cabin after opening the door from outside. Two of them were armed with revolver. They put the revolver on him and Bansilal (PW-4) while the third person cut the telephone cables. They took about Rs. 10 lacs which was lying in the trunk. They had put this amount in a bag and then ran away from the place of occurrence. While going they threatened that if the matter was reported they would be killed. They raised an alarm and the persons gathered there. In cross-examination he stated that the accused were not got identified from them and did not know the accused earlier.

9. SI/SHO Swaran Singh (PW-6) was examined and he deposed that he was posted as SHO Police Station Mukerian on 01.12.2004. He further deposed regarding the investigations conducted by him and regarding apprehending Dharminder Singh (appellant) near gate No. 3. Besides, he took in possession car No. DL-8CJ-6895 from Dharminder Singh (appellant). In cross-examination he stated that he did not send the finger prints for comparison. He voluntarily stated that these were taken by Finger Print Experts SI Balwinder Kaur. He did not arrest the accused Rajiv Wadhwa, Dharminder Singh (appellant), Jagdeep Singh, Kuldeep Singh nor any evidence was collected against them during the period when the investigation remained with him. Dog squad was also pressed into service by him. The dog squad could not trace any clue of the dacoits. He traced chassis number and engine number of the "Santro" car on a slip and the same was seized. He did not remember whether the slip was part of the report u/s 173 Cr.P.C. or not. The car produced in Court had the registration No. DL-4CR-4821. It was the same car, which was seized by him during investigation and was seen by him in the Court premises on the date of his deposition (i.e. 09.06.2010). It was correct that at the time when the car was seized it had the

number DL-8CJ-6895 but on the date of his deposition the number was different. It was voluntarily stated that the car had a fake number plate at the time it was seized and a separate FIR was registered at Delhi. He had not checked the chasis number of the car. The witness was directed to check the engine number and chasis number of the car. He checked the engine number and chasis number of the car produced in Court and mentioned them. He never conducted any test identification parade of the accused arrested by him. It was incorrect that the accused had been falsely implicated. It was correct that Kuldip Singh accused was working in Punjab Police earlier. The Sugar Mill was having two gates which opened at the same time. At the time of recording disclosure statement of Dharminder Singh (appellant) he was in police custody. He did not get any test identification parade in respect of Dharminder Singh (appellant). It was denied that the signatures of Dharminder Singh were not obtained by him on the recovery memo (Ex. PJ) of the currency notes. He did not prepare subsequent challan for the offence u/s 25 of the Arms Act in respect of Dharminder Singh (appellant). He did not know how many finger prints were traced out by the Finger Print Expert. Pistol was converted into a parcel and sealed by him. Finger Print Expert reached the spot at 5.00/6.00 am. During investigations he did not obtain copy of the FIR registered at Delhi for theft of car. He denied that no recovery was effected from Dharminder Singh (appellant) and the recovery of car had been planted upon him.

10. Amrita Pritam Kaur wife of Manjit Singh was examined as PW-7. She was member Gram Panchayat of her village Chak Bamu, Police Station Dasuya, Distt. Hoshiarpur in the year 2004. She inter alia stated that the accused Jagdip Singh alias Jagga never approached her on 02.12.2004 or at any other time. He never confessed any guilt before her. She did not know Jagdip Singh alias Jagga in the year 2004. She did not make any statement with the police in connection with this case. The public prosecutor after seeking permission of the Court cross-examined the witness as according to him she was suppressing the truth. The statement relates to Jagdip Singh alias Jagga who is not the appellant in the present case. The prosecution then closed its evidence.

11. A perusal of the trial Court record shows that in terms of the charge framed by the learned Additional Sessions Judge, Hoshiarpur on 20.11.2006, seven accused were charged. During trial Kulwinder Singh was declared proclaimed offender on 23.11.2007. Supplementary challan was filed against Narinder Singh on 27.08.2010 which was out come of present FIR and was ordered to be heard with the main case. On request of learned defence counsel the case was adjourned to 15.03.2011 for recording the statements of the accused in terms of Section 313 Cr.P.C. By order dated 15.03.2011, the learned trial Judge perused the statements of witnesses to find out incriminating evidence and he found that there was no incriminating evidence against accused Rajiv Wadhwa, Jagdip Singh alias Jagga, Narinder Singh alias Sonu, Kuldip Chand and Manjit Singh. Therefore, their examination in terms of Section 313 Cr.P.C. was dispensed and by detailed judgment of the said date, the

said accused namely Rajiv Wadhwa, Jagdip Singh alias Jagga, Narinder Singh alias Sonu, Kuldeep Chand and Manjit Singh were acquitted in terms of Section 232 Cr.P.C. The statement of the appellant in terms of Section 313 Cr.P.C. was recorded and the substance of the evidence appearing against him was put to him. In his defence he stated that he was innocent and the recovery had been planted by the police of Police Station Mukerian at the instance of the complainant and no recovery had been effected from him. He had been falsely implicated in the present case. Dharminder Singh accused was directed to produce his defence on 16.03.2011. The appellant closed his evidence on 29.03.2011.

12. The learned trial Court after considering the evidence and material on record by its impugned judgment and order dated 29.03.2011 convicted the appellant Dharminder Singh alias Sonu for the offence u/s 395 read with Section 397 IPC. He was sentenced to imprisonment for seven years.

13. Mr. Chanan Singh, Advocate appearing for the appellant has submitted that the appellant along with the other accused was tried for the offence u/s 395 IPC but he alone had been convicted while the others have been acquitted. Therefore, conviction of the appellant alone was unsustainable as assembly of five persons is necessary to make out the offence u/s 395 IPC. In support of his contention he has placed strong reliance on [Ram Lakhan Vs. State of U.P.](#), [Raj Kumar @ Raju Vs. State of Uttaranchal](#), and State of Haryana versus Balvinder Singh and another, 2003 (4) RCR (Cri) 645 (P&H). It is also submitted that the other accused having been acquitted the conviction of the appellant for the offence u/s 397 I.P.C. is also not sustainable.

14. In response learned State counsel has submitted that the appellant was found in possession of Rs. 80,000/- currency notes and, therefore, he being found in possession of Rs. 80,000/- in cash soon after occurrence, therefore, even if his conviction u/s 395 IPC is held to be not sustainable, his conviction for the offence u/s 397 IPC is sustainable.

15. I have given my thoughtful consideration to the matter. In order to appreciate the contentions of the learned counsel for the parties, it may be noticed that Section 395 IPC provides for punishment for committing the offence of dacoity. It is envisaged therein that whoever commits dacoity shall be punished with imprisonment for life or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. Section 397 IPC relates to robbery or dacoity with attempt to cause death or grievous hurt. It is provided therein that if at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years. Chapter XVII of the IPC relates to offences against property. Section 378 IPC defines "theft" and Section 383 defines "extortion". Section 390 defines "robbery" as follows:-

390. Robbery.-- In all robbery there is either theft or extortion.

When theft is robbery.-- Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

When extortion is robbery.-- Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person, so put in fear then and there to deliver up the thing extorted.

Explanation.- The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

Section 391 IPC defines "dacoity" which reads 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".

16. Section 395 IPC provides for punishment for dacoity. However, the definition of dacoity shows that 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. Therefore, if the other accused as mentioned above have been acquitted for the offence of dacoity, the appellant indeed cannot be held liable for dacoity. In, *Ram Lakhan versus State of UP* (supra), the position was that nine persons named in the FIR were alleged to have participated in dacoity. Ram Lakhan was left alone and the others had been acquitted. Five accused had been acquitted by the trial Court and three by the High Court. It was held that before an offence u/s 395 IPC can be made out, there must be an assembly of five or more persons. On findings of the Courts below it was manifest that only one person was left. In the said circumstances, the appellant therein, it was held, could not be convicted for an offence u/s 395 IPC. The judgment in *Ram Lakhan's* case (supra) was followed by the Supreme Court in *Raj Kumar alias Raju versus State of Uttaranchal* (supra) wherein it was held that in case of dacoity with murder by six accused persons where two of them were acquitted by the trial court, the remaining four could not be convicted for an offence of dacoity being less than five which is an essential ingredient for commission of dacoity. It was also held that moreover all the

six accused were acquitted for the offence of conspiracy u/s 120-B IPC as also for receiving stolen property in the commission of dacoity punishable u/s 412 IPC. The conviction of the accused for the offence punishable u/s 396 IPC, therefore, would not stand and must be set aside. In State of Haryana versus Balvinder Singh and another (supra), robbery of Rs. 3-4 lacs was committed. The description of the accused was not given in the FIR nor the police collected their description during investigation. The police arrested three accused persons and recovered part of the robbed money. The police could not link the accused with the robbery and they were acquitted.

17. In the present case, the appellant Dharminder Singh alias Sonu has indeed been left alone and the other accused have been acquitted, it cannot, therefore, be said that he conjointly committed or attempted to commit a robbery with five or more persons. In the circumstances, his conviction for the offence u/s 395 IPC indeed is not sustainable. It is, however, to be considered as to whether the offence u/s 397 IPC is made out. Section 397 IPC reads as under:-

397. Robbery or dacoity, with attempt to cause death or grievous hurt.-- If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

18. A perusal of the above shows that if at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years. It has already been held that the offence for dacoity is not made out. Therefore, it is to be ascertained if at the time of committing robbery, the appellant used any deadly weapon, or caused grievous hurt to any person, or attempted to cause death or grievous hurt to any person. As has already been noticed the persons who had committed the actual robbery were not identified. Bansi Lal (complainant) who was Cashier and appeared as PW-4 has stated that he did not identify the accused. Similar is the position deposed by Mukhtiar Singh (PW-5) who was the Assistant Cashier. There is only the evidence of SI/SHO Swaran Singh (PW-6) who apprehended the appellant in the precincts of the sugar mill. He was found in possession of Rs. 80,000/- in cash. The recovery of the stolen cash had been effected from the appellant and he was apprehended at the spot with Rs. 80,000/- in cash. The recovery of cash from the appellant was soon after it was stolen, which is indeed a circumstance which shows his involvement and inculcates him. Section 114 of the Evidence Act relates to presumption of certain facts. It is envisaged 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 the facts of the particular case.

Illustration (a) of Section 114 of the Indian Evidence Act reads as under:-

The Court may presume-- (a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.

19. A Division Bench of this Court in *State v. Jita Ram*, ILR (1953) 1 (P&H) 313 with regard to Illustration (a) of Section 114 of the Evidence Act held as under:-

The law as to presumption u/s 114 of the Indian Evidence Act has been discussed at some length by a Division Bench of the Calcutta High Court in *Keshab Deo Bhagat v. Emperor* ILR (1944) 1 Cal 595, and in the head-note the law is put as follows:--

(i) Under ill (a) to section 114 of the Indian Evidence Act, the Court may, but is not obliged to, make the presumption therein mentioned.

(ii) Even if the Court makes the presumption under ill. (a) to section 114, the onus on the general issue is still on the prosecution.

(iii) The accused is entitled to acquittal, if "he can give an explanation which may reasonably be true, although the jury may not be convinced that it is true.

20. The appellant indeed was found in possession of Rs. 80,000/- soon after it was stolen from the cashier of the Sugar Mill which was recovered from him. The police had reached the Sugar Mill soon after the robbery had been committed. The gates of the Mill were cordoned and the movement of the persons was stopped. After the cash had been stolen, the appellant was found in possession of Rs. 80,000/- in cash which was recovered at the spot. There is no explanation by him as to how the cash came in his possession and in fact he was aware that it was the stolen cash. Besides, such a recovery could not be planted on him by the Police as has been alleged. It may, however, be noticed that apart from the appellant there were other accused namely Rajiv Wadhwa, Kuldip Chand alias Sonu, Jagdip Singh alias Jagga, Narinder Singh alias Sonu and Manjit Singh; besides, Kulwinder Singh @ Raju who was declared a proclaimed offender. Out of them which three went into the cabin of the Cashier Bansi Lal (PW-4) is not established. Therefore, benefit of doubt is to be given as regards the actual robbery or theft that was committed and it cannot be said that the appellant had at the time of committing robbery used deadly weapon or caused grievous hurt to any person or attempted to cause death or grievous hurt to any person so as to make out an offence u/s 397 IPC. The actual robbery having being not established as against the appellant but he had received the cash knowing it to be stolen. Therefore, the presumption in terms of illustration (a) of Section 114 of the Evidence Act applies and it is to be taken that he received the cash knowing it to be stolen for which he could not account for or give any explanation. Besides, the time gap between the robbery and recovery of cash is quite soon and rather proximate to the incident of robbery that occurred. Therefore, he would be liable for the offence u/s 411 IPC for dishonestly receiving stolen property. "Stolen property",

has been defined in Section 410 IPC which reads as under:-

410. Stolen property.-- Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as "stolen property", whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

21. A perusal of the above shows that property which has been transferred by theft, or by extortion, or by robbery is designated as "stolen property". Section 411 IPC provides for punishment for dishonestly receiving stolen property. It envisages that whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

22. Section 412 IPC relates to dishonestly receiving property stolen in the commission of a dacoity. The offence of dacoity as already held is not made out. As already noticed, the actual robbery was committed by three persons and involvement of more than five persons is not established. The robbery having been committed and the stolen cash recovered from the appellant, therefore, the offence u/s 411 IPC is made out against him.

23. The question that he was not charged for the said offence u/s 411 IPC is inconsequential in view of the provisions of Section 221(2) Cr.P.C. Section 221 Cr.P.C. which reads as under:-

221. Where it is doubtful what offence has been committed- (1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

(2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

24. Therefore, in terms of Sub Section (2) of Section 221 Cr.P.C., if an accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it. Therefore, the fact that the accused was not

charged for the offence u/s 411 IPC but it is shown that he has committed the said offence then he is liable to be convicted for the same. Accordingly, the conviction of the appellant for the offence u/s 395 read with Section 397 IPC is liable to be set aside. However, he is liable to be convicted for the offence u/s 411 IPC.

25. As regards the sentence for the offence u/s 411 IPC, the maximum sentence provided is upto 3 years of imprisonment.

26. Learned counsel for the State has filed affidavit dated 10.07.2013 by Shri Baljinder Singh Gill, PPS Superintendent District Jail, Hoshiarpur mentioning the period of imprisonment undergone by the appellant. In terms of the said affidavit, the appellant has undergone actual imprisonment of three years, two months and twenty three days as on 09.07.2013. He is involved in three other cases of dacoity, robbery and retaining stolen property etc. He has been acquitted in two cases on 10.06.2011 and 16.05.2012 and he was discharged in the third case on 12.06.2012.

27. In the present case he has been held liable for the offence u/s 411 IPC. Therefore, his sentence of imprisonment for three years which as per affidavit of Baljinder Singh Gill, PPS, Superintendent District Jail, Hoshiarpur he has completed. In the circumstances, the appeal is partly allowed and the appellant is acquitted of the offences under Sections 395 and 397 IPC. However, he is convicted for the offence u/s 411 IPC and sentenced to imprisonment for three years. Since he has undergone three years of imprisonment, no sentence of fine is being imposed. In case the appellant has completed the requisite sentence of imprisonment in this case be set at liberty, if not wanted in any other case.