Afzal Ahmand Khan & Anr Vs State Of Madhya Pradesh

Criminal Appeal No. 725, 824, 839, 924, 1140 Of 2007, 783 Of 2011

Court: Madhya Pradesh High Court

Date of Decision: May 10, 2019

Acts Referred:
Code Of Criminal Procedure, 1973 â€" Section 161, 313#Indian Penal Code, 1860 â€" Section 34, 107, 120B, 224, 225B, 302, 391, 393, 394, 395, 396, 397, 411, 412, 449#Arms Act, 1959 â€" Section 25, 25(1B)(a), 54, 59#Evidence Act, 1872 â€" Section 25, 27, 26, 114

Hon'ble Judges: R.S. Jha, J; Sanjay Dwivedi, J

Bench: Division Bench

Advocate: Ghanshyam Pandey, Js. Patel, Rb. Gautam, R.N.Rai, Ku. Prabha Vishwakarma

Final Decision: Partly Allowed

Judgement

1. 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 Ã¢â‚¬ËœHÃ¢â‚¬â„¢ 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 Ã¢â‚¬ËœOÃ¢â‚¬â„¢ 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 Ã¢â‚¬ËœCÃ¢â‚¬â„¢ and Ã¢â‚¬ËœDÃ¢â‚¬â„¢ 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.

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]A, IR 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]. contra, the learned Government Advocate

14.appearing Perfor 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 Ã¢â‚¬Å“dacoityÃ¢â‚¬â€‹.

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.

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 yearsÃ¢â‚¬â„¢ rigorous imprisonment and a fine of Rs.5,000 (Rupees five

thousand only) in default one yearÃ¢â‚¬â„¢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 yearsÃ¢â‚¬â„¢

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

yearsÃ¢â‚¬â„¢ 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 yearsÃ¢â‚¬â„¢ 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 yearsÃ¢â‚¬â„¢ 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 yearsÃ¢â‚¬â„¢ 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

Ã¢â‚¬Å“dacityÃ¢â‚¬ and as per the definition Ã¢â‚¬Å“persons present and aiding such commission or attempting, amount to five or more, every person so

committing, attempting or aiding, is said to commit dacityÃ¢â‚¬. 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:-

Ã¢â‚¬Å“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.Ã¢â‚¬â€‹

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 Ã¢â‚¬Ëœâ‚¬â„¢ was also made from

him and the said Article Ã¢â‚¬Ëœâ‚¬â„¢ 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 Ã¢â‚¬Ëœâ‚¬â„¢ 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 Ã¢â‚¬Ëœâ‚¬â„¢ 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 19 6wherein 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:-

Ã¢â‚¬Å“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.Ã¢â‚¬â€‹

Similarly, in case of Lachhman Ram Vs. State of Orissa reported in AIR 1985 SC 48,6 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 Raccusedm(supra) are concerned, they are different on facts as the

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 73,1 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:-

Ã¢â‚¬Å“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 HonÃ¢â‚¬â„¢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 (suprhas) relied upon by the appellants in which the

Supreme Court observed that presumption that the accused are dacoits can be drawn against them on the basis of stolen articles recovered from

them, , however in case,whenthearrestaccusedis weremadearrestedsoon after 3theto 4incidentmonths, 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:-

Ã¢â‚¬Å“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 Thefromgoodscase stolencasewere 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.Ã¢â‚¬‹

34. In the cases in which presumption[Ephasis supplied]isdrawn 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. view of the above, the finding of the trial Court relating to Inthree 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 to36. 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:-

Ã¢â‚¬Å“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.Ã¢â‚¬â€‹

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:-

Ã¢â‚¬Å“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.Ã¢â‚¬â€‹

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 HonÃ¢â‚¬â„¢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:

Ã¢â‚¬Å“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.Ã¢â‚¬â€‹

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 Ã¢â‚¬Å“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 LordshipsÃ¢â‚¬â„¢ view it is

fallacious to treat the Ã¢â‚¬Å“fact discoveredÃ¢â‚¬ 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 Ã¢â‚¬Å“I will produce a knifeconcealed in the roof of my houseÃ¢â‚¬ 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 Ã¢â‚¬Å“with which I

stabbed AÃ¢â‚¬â€‹ these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.Ã¢â‚¬â€‹

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.Theryother 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.

63Conclus.ADivision 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 HonÃ¢â‚¬â„¢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 to the extent indicated hereinabove. Appellants Kailash,prtyallowedMusammi @ 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.