

(2011) 02 CAL CK 0097
In the Calcutta High Court
Case No : C.R.A. No. 179 of 2008

Mursalim Shaikh and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 17-02-2011

Acts Referred:

Arms Act, 1959 — Section 25, 25(1AA), 7
Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 120B, 395, 412

Citation : (2011) CriLJ 1840 : (2011) 3 RCR(Criminal) 625 : (2011) 3 RCR(Criminal) 625

Hon'ble Judges : Ashim Kumar Banerjee, J

Bench : Single Bench

Advocate : Jayanta Narayan Chatterjee, Sufi Kamal and Prithviraj Sinha Roy, for the Appellant; Swapan Kumar Mallick, for the Respondent

Final Decision : Dismissed

Judgement

Ashim Kumar Banerjee, J.—Back Drop

On or about September 6, 2004 the Principal of Ludhar Institution in the district of Mursidabad made a complaint to the Officer in-charge, Samserganj Police Station to the effect that he had come back from Kolkata on the said day via Janasatabdi Express after his medical treatment being accompanied by Abul Hossain. While he was proceeding towards his house from the station through a rickshaw some armed miscreants stopped his rickshaw in front of the godown of the station road. They brandished a dagger and a chisel and demanded all valuables. The miscreants held a dagger at his neck as well as at the neck of Abul. One of them held a pistol on their chest and ultimately snatched away the VIP suitcase and fled away towards the railway track on the right side. There was load shedding at that time. He however, could see four miscreants. He was not sure about any other miscreant being present. He gave a list of the articles which he lost due to snatching of his suitcase.

The Police acted on the said complaint and made a search. PW-14 was entrusted with the investigation. He consulted the available police records to find out who were involved in the like incident in the recent past. He also interrogated the complainant as well as his companion Abul. He also examined other witnesses u/s 161 of the Code of Criminal Procedure and then conducted raid to apprehend the suspects. The names of the suspects came out during investigation. On September 7, 2004, PW-14 conducted a raid at the house of the suspects and other probable hide out and ultimately arrested Mosalim Sk., Tarikul Sk., Samaul Ali and Ansar Ali. He interrogated the accused and recorded their statements u/s 161. Taking a clue from their interrogation he recovered stolen articles as well as arms from the respective houses of the accused. The prosecution charge-sheeted all the four accused who pleaded not guilty and faced trial.

2. Evidence

PW-1 (Mojammel Hq.)

The complainant himself corroborated what he had stated in his complaint. He gave detailed narration of the incident including the utterance of the accused. He could not be shaken during cross-examination. He also identified the five hundred rupee note which he used to keep in his purse for emergency. Needless to mention, the said note was also a part of the robbed articles and recovered from the custody of the accused.

PW-2 (Azim Sk.)

The witness was a seizure witness. He identified his signature appearing on the seizure list. He was declared hostile as he failed to identify the seized articles. In cross-examination, he however admitted that he was present during preparation of five seizure lists and admitted to have put his left thumb impression "on some papers".

PW-3 (Munna Sk.)

The witness was also declared hostile as he could not recollect about the incident. He however identified the three accused whom he knew.

PW-4 (Saiful Sk.)

The witness was at the Tea Stall at the station. He heard about the snatching. The Officer in charge enquired from them about who could be involved in the crime. Dilip Saha, in his presence, had informed the Police that he had seen Tarikul, Bahadur and Samaul going by a rickshaw van. On 8th day of the month at night Police could find Bahadur, Tarikul and Samaul at their home and arrested them. On the next day i.e. on 10th the Police took them on remand. He however could not see the articles seized by the Police. He could identify the Chopper (Hasua) having Tarikul's name engraved on its handle. In cross-examination, he deposed that a Pistol, Bhojali and Hasua were recovered from the backside of the house. He was a seizure witness. He deposed that being a member of the

Surakkha Bahani he put his signature. The witness was given a chance to clarify his statement. He clarified that the Pistol, Hasua and Bhojali were recovered from the house of Samaul, Tarikul and Bahadur.

PW-5. PW-6 and PW-7 (Madhusudan Saha. Ataur Rahaman and Dokari Ghosh)

Madhusudan accompanied by Ataur, went to the room of Jamuna Chowdhury who used to sell country liquor. He witnessed a quarrel between Kazirul and his four companions and gathered that they were involved in a snatching. The dispute arose regarding share of the booty. Four persons were of the view that since Kazirul was not involved in snatching he would not be entitled to any share. He however deposed that the Kazirul and his companions were in inebriated condition. However, he came back without taking any liquor. Ataur supported Madhusudan and deposed that Kazirul threatened his companions that in case he was deprived of his share he would inform the Police about the incident. Dokari (PW-7) was also present at the liquor shop. He corroborated PW-5 and 6.

PW-8 (Amal Rajak)

The witness was a washer-man by profession. He identified his mark on the wearing apparel seized from the custody of the accused and certified that those wearing apparel belonged to PW-1.

PW-9 (Mukul Sk.)

The witness was a post occurrence witness. He could not recollect to have signed the seizure list.

PW-10 (Nirmal Sarkar)

The witness was the Deputy Superintendent of Police. He was an arms expert. He examined the arms and submitted his report. He proved his report that was admitted in evidence.

PW-11 (Adam Sk.)

The Witness was also a post occurrence witness. He deposed that Dilip had informed him that he had seen three persons going by a van having muddy wearing apparel. Those three persons were Bahadur, Tarikul and Samaul.

PW-12 (Safikul Islam)

The witness was the rickshaw puller in whose rickshaw PW1 along with his companion Abul was returning from the station when the snatching took place.

PW-13(Abul Hossein)

Abul corroborated PW-1.

PW-14 (Dipak Kumar Das)

The witness was the Officer-in-charge at the relevant date. He conducted the

investigation. He gave details of the investigation which got corroboration from the other witness.

The learned Judge put the incriminating evidence to each of the accused who did not offer any explanation and/or clarification except pleading their innocence.

3. Judgment

The Additional Session Judge, 2nd Fast Track Court, Jangipur considered the evidence and found all the accused guilty of the offence. The learned Judge however observed that the prosecution failed to satisfy the requirement of Section 395 as there was less than five accused as per the complaint lodged by the complainant. He was also of the opinion that the criminal conspiracy alleged as against the accused for committing dacoity u/s 395 could not be proved in absence of adequate evidence on the role of Kazirul coming out during trial. On the issue of possession of stolen property he found accused Morsalim @ Bahadur. Tarikul, Ansar and Samaul having received the properties stolen in dacoity within their knowledge. Hence, he convicted them u/s 412 of the Indian Penal Code. On the issue of possession of arms since Morsalim could not satisfactorily answer or produce any valid licence for possession of the country made pipe gun and live cartridge recovered from his possession he was held to have contravened the provisions of Section 7 of the Arms and convicted u/s 25 thereof. In short, the learned Judge held that neither the conspiracy nor the dacoity could be proved. Since the stolen properties were recovered from the possession of four accused they were charged u/s 412 whereas for illegal possession of arms Morsalim was convicted u/s 25 of the Arms Act. The learned Judge sentenced Morsalim for rigorous imprisonment for five years along with a fine of rupees five thousand and in default to undergo rigorous imprisonment for one year more u/s 412. He was also convicted for seven years coupled with a fine of rupees ten thousand and in default to undergo rigorous imprisonment for another two years for the offence committed under Arms Act. The other accused were however imposed punishment of five years" rigorous imprisonment coupled with a fine of rupees five thousand and in default further rigorous imprisonment for one year u/s 412. I am told that Tarikul, Ansar and Samaul already served out the sentence and were set at liberty. Morsalim almost served out his period of sentence except the in-default period.

4. Appeal

Being aggrieved, the accused preferred the instant appeal.

5. Contention of the Appellant

Mr. Jayanta Narayan Chatterjee learned Counsel appearing for the Appellant contended as follows:

- (i) The prosecution evidence was self contradictory and full of anomalies.
- (ii) Without dacoity being proved the conviction u/s 412 was not maintainable.

- (iii) There was material discrepancy with regard to the date of arrest.
- (iv) PWs-5, 6 and 7 were habitual drunkard and their evidence should not be given credence as not reliable.
- (v) The custodian of the stolen articles were not arrested and/or charged.
- (vi) PW-10 claiming to be an arms expert did not have the requisite qualification to examine the arms. Hence, his report could not be taken as expert report.
- (vii) With regard to recovery of arms, no Test Identification Parade was held.
- (viii) Place of seizure was in dispute as would appear from the evidence of the seizure witness being PW-4.

Elaborating his argument, Mr. Chatterjee contended that the entire incident allegedly took place when there was load shading as would appear in the deposition of PW-1. Hence, it was not possible for the PW-1 or PW-13 to recognize the dacoits. In any event, the learned Judge ultimately held that neither the conspiracy nor dacoity could be proved and as such acquitted all the accused u/s 395 as well as Section 120-B. Once the dacoity was not proved the accused could not have been charged u/s 412. According to him, if there was no dacoity question of recovery of articles involved in dacoity would not arise. He prayed for acquittal of all the accused including Morsalim who is still languishing in jail.

6. Contention of the Prosecution

Mr. Swapan Kumar Mallick, learned Counsel appearing for the prosecution while opposing the appeal contended as follows:

- (i) Once the dacoity was proved involving five persons the number of arrested persons would be of no importance.
- (ii) The stolen articles were recovered from the possession of the accused. Hence, they were rightly convicted u/s 412.
- (iii) No suggestion was given by the defence relating to recovery of articles.
- (iv) No allegation of duress was made as against the Police. " "
- (v) The accused went absconding until they were arrested.
- (vi) The accused were arrested on September 8, 2004 and not on September 7, 2004.
- (vii) Neither any explanation was offered by the accused with regard to possession of the stolen articles or the arms, as the case may be, nor any previous enmity was alleged during their examination u/s 313 of the Code of Criminal Procedure .
- (viii) Merely, because PWs-5, 6 and 7 were regular visitors, of country liquor pub

their evidence could not be discarded.

Mr. Mallick prayed for dismissal of the appeal.

7. Our View

I have considered the rival contentions. I have carefully perused the judgment and order impugned herein. The State did not prefer any appeal against the order of acquittal u/s 395 as well as 120-B of the Indian Penal Code. Hence, I refrain from dealing with the part of the evidence leading to such order of acquittal. I am only concerned with the conviction of all the accused u/s 412 and an additional conviction of Morsalim u/s 25(1AA) of the Arms Act. I am unable to find out any logic so advanced by Mr. Chatterjee that a conviction could not be signed u/s 412 merely because the dacoity u/s 395 could not be established. From the complaint so corroborated by PW-1 and 13 the incident of snatching was amply proved. It might have been committed by four persons or it could be an act of five or more persons attracting Section 395. Fact remains, PW-1 suffered the incident of snatching. Physical loss was caused to him due to snatching of articles which were subsequently recovered by the Police. The complaint of PW-1 got full corroboration from his own evidence as well as the evidence of PW-13. Hence, the fact, that his goods were robbed, was proved. Subsequent recovery of those articles were thus "stolen articles" within the meaning of Section 412. The learned Judge considered the evidence so discussed above and ultimately came to conclusion that the accused were responsible for possession of those stolen articles. I do not find any scope of interference on that score. Mr. Chatterjee did not demonstrate how the recovery could be disputed. His objection was on a technical issue to the effect that when the dacoity was not proved there could be no offence u/s 412. As observed before, such submission does not have any legal basis. Hence, the challenge to the conviction u/s 412, in my view, does not sustain.

With regard to the offence being committed u/s 25 of the Arms Act, I am of the view that once the illegal arms were recovered from the possession of Morsalim and he could not offer any plausible explanation with regard to possession the learned Judge rightly convicted him under the said provision. Such conviction, in my view, should not be interfered with.

On the issue of sentence Mr. Chatterjee contended that the punishment so inflicted upon Morsalim was disproportionate. I am unable to find out any logic. The learned Judge convicted Morsalim under the Arms Act after finding him guilty of the offence and imposed a punishment after giving adequate opportunity to him to offer his explanation with regard to the conviction as well as sentence. I do not find any scope of interference on that score.

8. Result

The appeal fails and is hereby dismissed.

9. Direction

Morsalim is languishing in jail. Let a copy of this judgment be sent to the correctional home where he is now suffering sentence.

Let the Lower Court Records along with a copy of this Judgment be sent down at once.

Urgent xerox certified copy will be given to the parties, if applied for.