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Oudh Ram and Others Vs. the State

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Court : Delhi

Decided On : Mar-31-1982

Reported in : 1982CriLJ1656; 22(1982)DLT20

Judge : J.D. Jain, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 149, 395 and 397; Evidence Act - Sections 27 and 114

Appeal No. : Criminal Appeal No. 176 of 1981 (From order of S.M. Aggarwal, Addl. Sessions, J., Delhi, D/- 21-8-19

Appellant : Oudh Ram and Others

Respondent : The State

Judgement :

1. Shri Oudh Ram, Ram Narain Vijay Pal, Videshi and Samarjit, appellants in Criminal Appeal No. 176/81, Sh. Toofani, appellant, in Criminal Appeal No. 187/81 and Sh. Shiv Poojan, appellant in Criminal Appeal No. 198/81 along with one Birbal have been convicted of an offence under S. 395/149, Penal Code, by an Additional Sessions Judge vide his judgment dated 21st August, 1981. Toofani, appellant, has also been convicted of an offence under S. 397, Penal Code, for having stabbed one Rattan Chand with a chhuri with which he was armed at the time of commission of dacoity. All of them have been sentenced to rigorous imprisonment for five years and a fine of Rs. 500/- each for offence under S. 395

read with S. 149, Penal Code. Further Toofani has been sentenced to rigorous imprisonment for seven years and a fine of Rs. 100/- for offence under S. 397, Penal Code. However, both the substantive sentences awarded to him have been made to run concurrently. Feeling aggrieved all of them excepting Birbal have preferred appeals against their conviction and sentence. Since common questions of law and fact are involved, this judgment shall dispose of all these appeals.

2. The prosecution case succinctly is that on the night intervening 12th & 13th April, 1975, Smt. Raj Kumari (P.W. 6) was sleeping in the courtyard of her house at Lakhi Park, Police Station Kingsway Camp. Her son Pradeep Kumar, then aged about 8 1/2 years and her daughter Veena Kumari, aged about 18 years, were also sleeping close by her on separate cots. At about mid-night Veena suddenly woke up and found that 8 to 10 persons were standing outside their house. One of them was holding chhuri while others were armed with lathis. She shouted, 'Look Mummy, who these persons are ?' and awakened Smt. Raj Kumari. The latter then enquired form those persons who they were and what they wanted. Thereupon. Shiv Poojan-appellant, dealt two kicks on her back and also throttled her. Pradeep Kumar was also awakened and both the children started weeping and crying. This attracted their neighbour Rattan Chand and he grappled with those persons and the one who was holding chhuri stabbed him with the result that he sustained an injury on his right hand. On receipt of injury Rattan Chand went away and the aforesaid persons again came to the court-yard. Then, they broke open the lick of the door of her rooms and took away all her belongings and household effects. In the meanwhile, one Dalbir Singh (P.W. 11), who was living at some distance from the house of Smt. Raj Kumari came there on hearing the noise. He was carrying a sword (Kirpan) in one hand and a flash torch in the other. However, the dacoits exploded a cracker outside the house and on hearing the explosion Dalbir rushed back to his house. The dacoits them decamped with the booty which comprised, inter alia, one sewing machine (Usha Make) without base, one time-pice. One camera, a pair of gold tops, one gold ring, one gold chain and some trunks etc. full of clothes of Smt. Raj Kumari and her children.

3. Someone informed the Police Control Room that a dacoity was being committed at Lakhi Park. This information was flashed to Police Station Kingsway Camp and

the same was then communicated to S.I. Shri R. S. Khurana, who was then in charge, Police Post, Azadpur and happened to be on patrol. He reached the spot and recorded the statement Ex. P.W. 6/A of Smt. Raj Kumari. It was sent by him at about 3.45 a.m. on that very night for registration of a formal case.

4. During the course of investigation the police found on 14th April, 1975, one attache-case in broken condition (Ex. P. 11), two registered documents executed in favor of Smt. Raj Kumari and one photo-frame etc. containing the photograph of Smt. Raj Kumari (Ex. P. 7) from under a tree in Shalimar Park. The glass frame of the photograph had some chance prints which were developed by applying a powder and the same was sent to Central Record Office R. K. Puram. On the same night Vijay Pal, appellant, was traced and nabbed at Sabzi Mandi Chowk. It was as a sequel to the suspicion expressed by Smt. Raj Kumari about his involvement in the dacoity because he had been working earlier as a mason at her house for about a month and a half. On interrogation Vijay Pal made a disclosure that he could get a part of the case property recovered from the jhuggi which was near Hindu Rao Hospital and in which he was living. His statement was reduced to writing (P.W. 21/D) and the appellant Vijay Pal then led the police party to his jhuggi near Hindu Rao Hospital and got recovered a gunny bag duly stitched which contained sewing machine without base (Ex. P. 14), lady night suit of pink colour (Ex. P. 46,) one terrycot cloth piece (Ex. P. 68), one cotton cloth piece (out of Exs. P. 64 to P. 67) and the same were duly seized and put into a sealed parcel vide memo Ex. PW 21/E.

5. Vijay Pal also disclosed that he could get his other companions arrested. Accordingly. Oudh Ram, Ram Chand, Ram Narain, Videshi and Birbal were apprehended on the pointing out of Vijay Pal while they were sleeping on different Pharsa (pucca platforms) in Old Sabzi Mandi and the following articles were seized from their possession. Oudh Ram, a tin (Ex. P. 12), containing some clothes, viz., printed saree (Ex. P. 15), one pink blouse (Ex. P. 27), one petticoat (Ex. P. 36), one piece of cotton cloth (out of Exs. P. 64 to P. 67). The same were taken into possession vide memo Ex. P.W. 21/F.

Ram Chand - not relevant as he died during committal proceedings.

Ram Narain - He was having a nylon thaila (Ex. P. 82) which contained a pillow cover (Ex. P. 44), one rexine topa (Ex. P. 45) one towel (Ex. P. 57) and a small pair of pants (Ex. 53). These articles were seized vide memo Ex. P.W. 21/H.

Videshi - He was having a small blue colour trunk (Ex. P. 8) which contained a lady woolen coat (Ex. P. 58), one printed saree (Ex. P. 16), one nylon saree (Ex. P. 17), one petticoat (Ex. P. 37), one blouse (Ex. P. 28), one small sweater (Ex. P. 59), one sweater green colour (old one) (Ex. P. 40) and one handkerchief (Ex. P. 60). All these articles were taken into possession vide memo Ex. P.W. 21/J.

Birbal - He was having a trunk of blue colour (Ex. P. 9) containing one white cotton saree (Ex. P. 18), one nylon saree (Ex. P. 19), one blouse (Ex. P. 29), one small sweater (Ex. P. 41), one green printed saree (Ex. P. 20), one more white cotton saree having stripes (Ex. P. 21), one old shirt of a child (Ex. P. 61) and one white blouse (Ex. P. 30). All these articles were taken into possession vide memo Ex. P.W. 21/K.

6. On the same night at about 4.30 a.m. (on 15-4-1975) the police arrested Toofani from a place called Kela godown (market of bananas) at Paharganj at the instance of Vijay Pal, appellant. On interrogation he disclosed that he could get a part of the case property recovered from a Phar situated in Kela godown. The disclosure was reduced to writing (Ex. P.W. 21/L) and he then led the police party to the Phar and got recovered a potli (a small packet) containing one dhoti (Ex. P. 23), one cotton petticoat (Ex. P. 38), on piece of cloth (out of Exs. P. 64 to P. 67), one torn sweater (Ex. P. 42), and one scarf (Ex. P. 47). These articles were taken into possession vide memo E. P.W. 21/M.

7. Similarly at the instance of Vijay Pal. The police arrested Shiv Poojan from a jhuggi near over-bridge Sarai Rohilla at about 5.30 a.m. on 15th April, 1975. He was having a rexine attache-case (Ex. P. 10) in a jhuggi and the same contained Kodak Camera (Ex. P. 70), on nylon saree (Ex. P. 22), one blouse (Ex. P. 33), one woolen shawl red colour (Ex. P. 48), one cotton jersey white (Ex. P. 49), one purse (Ex. P. 63), one child's pant (Ex. P. 69), one woollen jersey (Ex. P. 57), one table cloth (Ex. P. 51), one red colour blouse (Ex. P. 35) and one blouse having full sleeves of light blue colour (Ex. P. 34). All these articles were taken into

possession vide memo Ex. PW 21/N, Ex. P.W. 21/L being his disclosure statement.

8. At about 6.30/7.00 a.m. on the same day, the police arrested Magharbut we are not concerned with him as he is a proclaimed offender. At about 7.30 a.m. on the same day, the police arrested Samarjit Singh, appellant, at the instance of Vijay Pal. He was found present in his jhuggi at Seemapuri. From underneath the gunny cloth spread over the floor were recovered one cotton saree, (Ex. P. 26). One bush-shirt nylon of a child (Ex. P. 54), one black blouse made of sanil (Ex. P. 31), and one blouse sky colour (Ex. P. 32), and the same were taken into possession vide memo Ex. P.W. 21/P.

9. It is the further case of prosecution that on interrogation both the appellants Ram Narain and Shiv Poojan made a disclosure that they could get gold chain and ear-rings, i.e., tops being the case property of this case recovered from a goldsmith in Sabazi Mandi near Clock Tower. Their joint disclosure statement was reduced to writing (Ex. P.W. 17/A) and both of them then led the police to the shop of Jagdish, who was one of the co-accused of the appellants, at Clock Tower, Sabzi Mandi. Jagdish produced gold earrings weighing 5.400 gms. (Ex. P. 83/1-2) which were taken into possession vide memo Ex. P.W. 17/B.

10. On the same day, the Investigating Officer made application (Ex. P 18/A) to a Metropolitan Magistrate requesting him to hold test, identification parade of the accused Ram Narain, Birbal, Toofani, Oudh Ram, Videshi, Samarjit, Maghar, Ram Chand, Vijay Pal and Shiv Poojan. Simultaneously with the application all these persons were produced in Court with their faces muffled. However, all the accused declined to participate in the test identification parade on the ground that they were already known to everyone.

11. It may be pertinent to mention another piece of evidence which has been placed on the record by the prosecution. It is an ordinary photo duly framed which was found by the police, as stated above, and finger impression on the glass were taken by Mahabir Prasad, Photographer of the Crime Branch on 21st April, 1975, the same being Ex. P.W. 12/5 & P.W. 12/6. It would appear that the same were sent to the Director, Finger Print Bureau, Phillaur and report Ex. P.W. 21/8 of the

Director was received showing that impression marked A on the photograph No. 1 even though partly smudged was otherwise comparable and there existed sufficient (more than 12) points of similarity i.e. matching ridge characteristic details in their identical sequence without any discordances between its comparable portion and the corresponding portion of the right thumb impression of Videshi marked A/A on a search slip. Unfortunately, however, no evidence seems to have been adduced to show that the search slip bore the thumb impression of Videshi, appellant and as such the thumb impression found on the photo frame could be said to be his with an element of certainty.

12. Smt. Raj Kumari unfolded the prosecution narrative with regard to the factum of dacoity and she has identified the articles Ext. P. 8 to P. 79 to be the same which had been stolen from her house on the fateful night. Since all these articles are household goods being ladies and children clothes, sewing machine, time-piece and camera etc., I see no reason to disbelieve her testimony as regards the identity of these stolen goods. Surely, she does not appear to have any motive to falsely implicate anyone of the appellants or claim these articles to be hers. It was canvassed before me by the learned counsel for the appellant that the details of these articles were not given in the F.I.R. I do not think it was at all possible or feasible for the complainant Smt. Raj Kumari to give detailed particulars of each and every garment stolen from her house. However, she specifically mentioned some costly items like sewing machine, camera, time-piece and gold ornaments etc., in the F.I.R. So, want of detailed particulars in the F.I.R. regarding clothes etc. could hardly be fatal to the prosecution case, especially when none of the appellants claims these items to be his. Indeed all the appellants have denied in toto the recoveries of the stolen articles from their respective possession, as alleged by the prosecution and none of them has furnished any Explanationn for being in possession thereof.

13. A submission was made by the learned counsel for the appellants that the identity of the various appellants as the real culprits has not been established beyond reasonable doubt. It is pointed out that as admitted by none other than Smt. Raj Kumari herself it was dark at the time of the occurrence. Even Pradeep Kumar, P.W. 5, admitted that it was pitch dark and he could not see the faces of

the culprits. So, he was unable to say if any of the accused persons present in the court on the day of his examination as a witness was one of them or not. It has also been canvassed that refusal of the appellants to participate in the test identification parade was absolutely justified because they had been shown to the material witnesses at the Police Station before application for holding test identification was moved. Support for this contention is sought to be derived from the statement of Smt. Veena Kumari, P.W. 14, that she had gone to Police Station either on the 2nd or 3rd day of the occurrence to identify the culprits. She was then accompanied by her aunt, namely, Smt. Raj Kumari. At that time all the accused persons were standing in a room of the Police Station and no other person was present in that room. The prosecution version, however, as divulged by Smt. Raj Kumari and Dalbir Singh, P.Ws., is that they were called to the Police Station on 16th April 1975, i.e. after the appellants had declined to participate in the test identification parade and they identified all the ten persons present there to be the culprits. Of the ten persons identified by them at the Police Station, eight were present in Court on the dates of their respective examination as P.Ws., Dalbir Singh explained that he could identify the accused persons to be the culprits because he had seen them in torch light which he was carrying. Similar is the Explanationn given by Smt. Veena Kumari. It is rather doubtful that these witnesses would have been able to see all the culprits in the flash light so well as to have vivid recollection of their faces and other identity particulars. No doubt, all the appellants were unanimous in telling the Magistrate that they were already known to everyone and, thereforee, they were not agreeing to join the test identification parade and they did not spell out the subsequent theory of their having been shown to the prosecution witnesses at that time. So, even though their stand in Court may appear to be an afterthought the prosecution case has to be judged on its own merits. Identification of the appellants by the ocular witnesses at the Police Station is of no consequence as the same would be hit by the provisions of S. 162, Criminal P.C. Even otherwise it appears to be just farcical because only 10 persons who were subsequently arraigned as accused were shown to the witnesses at the Police Station for identification. It could well have the effect of inducing a belief in the witnesses that the persons shown to them by the police were in all probability the culprits who had committed dacoity on the

fateful night, especially when certain stolen articles were alleged to have been recovered from each one of them. Thus, the evidence of these witnesses as regards the identity of the appellants cannot be accepted at their face value and the Court must look for some kind of corroboration from other reliable evidence to connect them with the commission of the crime. At the same time, it will be wrong to discard the evidence of these witnesses unceremoniously. Significantly, the complainant Smt. Raj Kumari did mention some identity particulars of one of the culprits in the F.I.R. and she also described them as rustics who were wearing kurtas, dhotis and pyjamas. This fact itself lends some support to her assertion in Court that she was able to see the culprits despite the fact that darkness was pervading all around as there was no electric light. I now proceed to examine the case of each appellant in dividually.

Vijay Pal

14. It is common ground that appellant Vijay Pal was known to Smt. Raj Kumari and members of her family prior to this occurrence, for he had worked as a mason at her house for about a month and a half. The contention of the appellant, however, is that he has been falsely implicated in this case because Smt. Raj Kumari had not paid all his wages and some amount was still due from her. He went to her house to demand payment of the balance amount but she put him off on one pretext or the other and ultimately she refused to pay his dues. It led to exchange of hot words between him and Smt. Raj Kumari. The latter then threatened that she would teach him a lesson. A suggestion to this effect was made to Smt. Raj Kumari during the course of her cross-examination but she vehemently denied the same. On the contrary she was fair enough to say that during the period Vijay Pal, appellant, worked at her house she had no complaint of any kind against him and when he finished the work he was paid his wages in full and nothing remained due from her. She asserted that in her statement to the police she named Vijay Pal as one of the culprits. No doubt, the name of the appellant does not find place in the F.I.R. but as stated by the Investigating Officer and observed by the learned Additional Sessions Judge there is a mention of his name in the case diary as the person suspected of complicity in the commission of dacoity and it was on account of suspicion expressed by Smt. Raj Kumari that he

was traced out by the Investigating Officer. However, this circumstance in itself is not of much consequence and the real shot in the armory of the prosecution is the disclosure made by him in consequence of which certain incriminating articles which were subject-matter of dacoity were recovered from his jhuggi. Apart from other articles recovery of sewing machine without base is of great significance. He has not furnished any Explanationn for being in possession of the same. It is pertinent to note that in the F.I.R. itself the complainant had mentioned theft of one Usha sewing machine and the base of the sewing machine (Ex. P. 2) was taken into possession by the Investigating Officer at the time of his first visit to her house on 14th April, 1975 vide memo Ex. P.W. 6/C. Besides the investigating Officer, Smt. Raj Kumari has testified to this fact and their evidence has been rightly accepted by the trial court as worthy of credence. It is now well settled that recent and unexplained possession of stolen articles can be taken to be presumptive evidence of the charge of dacoity. Further the recovery was made from the jhuggi of the appellant in consequence of the disclosure made by him and, thereforee, so much of the information given by him which relates distinctly to the fact thereby discovered i.e. the concealment of stolen property, would be admissible under S. 27 of the Evidence Act. The discovery as well as recovery has been amply proved by the investigating Officer as well as S.I. Raj Kishan, P.W. 23, who was then posted at Police Station Kingsway Camp and joined the investigation of this case with S. I. Sh. R. S. Khurana on 14th April, 1975. It is true that Rahis Ahmed, who was associated by the police as an independent witness has not supported the prosecution story and has turned completely hostile but that would hardly detract from the credit-worthiness of the police officials. Indeed, as observed by the Supreme Court in Himachal Pradesh Administration v. Om Prakash, : 1972 CriLJ606

'...... the evidence relating to recoveries is not similar to that contemplated under S. 103 of the Criminal Procedure Code where searches are required to be made in the presence of two or more inhabitants of the locality in which the place to be searched is situate. In an investigation under S. 157 the recoveries could be proved even by the solitary evidence of the Investigating Officer if his evidence could otherwise be believed.'

15. Thus, it goes to the credit of the Investigating Officer that he tried to act fairly during the course of investigation by associating with him a member of the public. Surely, if the member of the public turns round and does not support the prosecution version, the testimony of the Investigating Officer and for that matter of S.I. Raj Kishan cannot be looked upon with suspicion as being tainted on account of their being police officials and their apparent interest in the success of the prosecution case. On a perusal of evidence of both these witnesses, there can be no shadow of doubt that they conducted the investigation in a very fair and upright manner and they have stated the facts without any embellishment or distortion. Hence, the conviction of Vijay Pal, appellant, being well-founded calls for no interference.

Shiv Poojan

16. The evidence against Shiv Poojan is that he was arrested from a jhuggi near the over-bridge Sarai Rohilla at the instance of Vijay Pal at about 5.30 a.m. on 15th April 1975. A rexine attache (Ex. P. 10) was recovered from his jhuggi. It contained, inter alia, Kodak camera (Ex. P. 70). The said camera has been identified by Smt. Raj Kumari to be hers. There is also mention of a camera in the F.I.R. having been stolen on the night of the dacoity. Besides that some ladies cloths were also recovered from Shiv Poojan. No Explanationn for possession of the same has been furnished. So raising of presumption under S. 114 (illustration (a) will be well warranted against him too. Further there is evidence of Smt. Raj Kumari that he dealt two kicks on her back and also throttled her. It is true that in the F.I.R. there is no mention of her having been throttled by anyone but she specifically stated that one of the culprits who exhorted that they should be shot at and beaten with lathis also dealt two kicks to her on the back. Identification of this appellant by Smt. Raj Kumari appears to be quite natural and convincing because he was quite close to her when he was shouting and exhorting his fellow dacoits and dealt kicks to her. Another piece of evidence relied upon by the learned Additional Sessions Judge against this appellant is the joint disclosure made by him along with Ram Narain and consequent recovery of the gold tops (Ex. P. 83/1-2) from their co-accused Jagdish. However, as shall be presently seen neither the joint disclosure statement nor the recovery of the gold tops in consequence thereof

is admissible under S. 27 of the Evidence Act and the learned Sessions Judge slipped into error in acting upon it. All the same, even excluding that evidence the factum of possession of stolen property coupled with his identification by Smt. Raj Kumari would amply establish his complicity in the commission of dacoity. Hence, his conviction too is well founded.

Oudh Ram, Ram Narain & Videshi :

17. As stated above, Oudh Ram, Ram Narain and Videshi, appellants, were arrested from different Pharsa i.e. puce platforms in the Old Sabzi Mandi where they were sleeping on the night intervening 14th April, 1975 and 15th April, 1975. During cross-examination the Investigating Officer stated that accused Ram Narain and Oudh Ram were arrested while sitting on a Phar of Old Sabzi Mandi but in the next breath he explained that Oudh Ram had a tin containing case property underneath his head whereas Ram Narain had a nylon thaila beneath his head when they were sleeping. Both of them were sleeping on the same Phar and 5/7 more persons were also sleeping on that platform. The trunk recovered from the possession of Videshi too had been kept under his head while he was sleeping on a platform. He further explained that there were several such platforms in Old Sabzi Mandi and several person were sleeping on those platforms too. He admitted that these accused used to work as labourers in day time and sleep on the platforms at night. These platforms are easily accessible to all and sundry. He did not see any other article belonging to these accused on the platform and they did not see any other article belonging to these accused on the platform and they did not have anything of their own in the trunk or the tin. On enquiry the accused told him that they had nothing and they have not saved anything from their wages. This being the position, it cannot be concluded with an element of certainty that these appellants were in exclusive possession of the articles recovered from them. Admittedly, the two tins seized by the police were not stolen property. Oudh Ram was found in possession of just a few clothes, viz., printed saree (Ex. 15) pink blouse (Ex. 27) petticoat (Ex. 36) and a piece of cotton cloth (out of Exs. P. 64 to Ex. P. 67). These clothes were of no use to him whatsoever, they were hardly of any value in terms of money. Similarly, the nylon thaila found with Ram Narain contained a pillow cover (Ex. P. 44), one rexine topa (Ex. P. 45), a towel (Ex. P.

57) and small pant (Ex. P. 53). Videshi too was found having a small blue coloured trunk (Ex. P. 8) which contained lady woollen coat (Ex. P. 58), one printed saree (Ex. P. 16), one nylon saree (Ex. P. 58), one petticoat (Ex. P. 37), one blouse (Ex. P. 28), one small sweater (Ex. P. 59) one old sweater green coloured and one handkerchief (Ex. P. 60). The possibility of their having come by these articles at the place, where they were working and they used to spend their days and nights after someone had thrown away the same as being useless stuff cannot be altogether ruled out. It appears that being poor people they succumbed to the temptation of picking them up. Indeed, it does not appeal to reason that they would have been content with these apparently useless clothes as their share of the booty had they been involved in the commission of dacoity. Some money or other valuable articles would have been found with them in the natural course of events if they had shared the sale proceeds of the gold ornaments or they had got any gold ornaments etc. The circumstance appearing against them, thereforee, do not warrant drawing of a presumption under Illustration (a) of Section 114, Evidence Act, which is an optional presumption. The words 'may presume' appearing in that Section leave it to the Court to make or not to make the presumption according to the circumstances of the case. As observed by the Supreme Court in Mohan Lal v. Ajit Singh, : 1978 CriLJ1107

'The question whether a presumption should be drawn against the accused under Illustration (a) of Section 114 of the Evidence Act is a matter which depends on the evidence and the circumstances of each case. The nature of the recovered articles, the manner of their acquisition by the owner, the nature of the evidence about their identification, the manner in which the articles were dealt with by the accused, the place and the circumstances of their recovery, the length of the intervening period and the explain the recovery, are some of those circumstances.'

18. There being no iota of corroborative evidence against those appellants, it would be highly unsafe to sustain their conviction merely on the strength of the recovery of some stolen clothes etc. from each of them. In other words, they are entitled to benefit of doubt.

Toofani :-

19. The evidence against Toofani, appellant, appears to be equally deficient. As deposed to by the Investigating Officer, he was found present outside Kela godown (market of bananas) in Paharganj. On interrogation he disclosed that he could get recovered part of the case property from a Phar situated inside the godown. His statement Ex. P.W. 21/L to this effect was recorded and he then led the police party to shop No. 9 inside Kela godown and he got recovered one potli, i.e. a small packet containing one dhoti (Ex. P. 23) one cotton petticoat (Ex. P. 38), one piece of cotton cloth (out of Exs. P. 64 to P. 67), one torn sweater (Ex. P. 42) and one scarf (Ex. P. 47). The Investigating Officer admitted during cross-examination that several other persons were present in Kela godown which does not have any door. It has an open entrance and there are separate shops inside. The appellant Toofani had taken them to shop No. 9 which was bolted from outside but there was no lock on it. A perusal of the seizure memo Ex. P.W. 21/M would show that these articles were recovered from beneath a Phar which wrapped in the form of a potli. They are just rags being torn and old clothes. So, the possibility of Toofani having come by these articles otherwise than by way of share in the booty cannot be ruled out. Hence, an adverse presumption under Section 114 (Illustration (a) of the Evidence Act against him too will not be well warranted in the absence of any other evidence to connect him with the commission of crime. Smt. Veena has, inter alia, deposed that the appellant Toofani was one of those 3 or 4 culprits who had gone out. He had a chhuri with him and he gave a chhuri blow to Rattan Chand. The learned Additional Sessions Judge has accepted this part of her testimony. However, the circumstances of the case do not justify the conclusion that she would have seen Toofani inflicting a knife injury on the person of Rattan Chand. It bears repetition that the prosecution case is that on hearing the noise Rattan Chand came towards the house of Smt. Raj Kumari and on seeing him some of the culprits went out and one of them dealt a knife blow on his arm. It does not appeal to reason that Smt. Veena would have seen the assailant from such, a distance when it was all dark around. It may also be borne in mind that Dalbir Singh happened to reach there afterwards. According to Smt. Veena herself, Dalbir Singh cane there after about half an hour of the arrival of Rattan Chand. Further according to her, Rattan Chand was at a distance of 10-15 paces from her house when he was stabbed. Although she asserted that

she had gone out of the house when Toofani accused stabbed Rattan Chand but it is highly doubtful that she could see the assailant so well from such a distance when it was quite dark. Since Dalbir Singh reached there subsequent to Rattan Chand leaving the scene of occurrence, the question of Smt. Veena seeing Toofani inflicting the Chhuri blow in the flash light of the torch would not arise. It may be pertinent to add here that she did not name Toofani as the person dealing the knife blow to Rattan Chand even in her subsequent statement made on her visit to the Police Station for identification of the accused persons (Ex. DC). Needless to say that Rattan Chand has not been examined at all, the reason assigned being that he is not traceable. Anyhow, the testimony of Smt. Veena in this respect fails to carry conviction. Hence, conviction of Toofani, appellant, too cannot be sustained.

20. As stated above, only four clothes of routine type were recovered from the jhuggi of Samarjit Singh. These are, one cotton saree (Ex. P. 26) nylon bush-shirt of a child (Ex. P. 54), one black blouse made of sanil (Ex. P. 31) and one blouse sky colour (Ex. P. 32). On a parity of reasoning these articles could have been picked up by Samarjit Singh from anywhere and this circumstance alone does not warrant the presumption that he was either a thief or a receiver of stolen property. So, I am not persuaded to raise adverse presumption under Section 114 of the Evidence Act against him too. It may, however, be noticed that during her cross-examination Smt. Veena uttered a stray sentence that lathi blow was given to Rattan Chand by Samarjit Singh, accused. Strangely enough she did not say so during her examination-in-chief and even Smt. Raj Kumari is absolutely silent about it. Indeed, the latter does not even speak of any lathi blow having been given to Rattan Chand. His medico-legal certificate, Ex. P.W. 9A, which has been duly proved by Dr. R. P. Sarawat who had examined him at the Police Hospital on 13th April, 1975, shows that the following injuries were sustained by him :-

(1) CIW - dorsum of right upper arm lower part size 1/2' x 1/6' x 1/4'.

(ii) Bruise over right wrist size 2' x 1'

(iii) Bruise over right shoulder size 2' x 1'

21. No doubt injuries at Nos. (ii) & (iii) could have been caused by some blunt weapon but it is nobody's case that he was given two lathi blows. Hence, evidence regarding injuries to Rattan Chand is absolutely inadequate to connect any of the appellants with the same. It is also noteworthy that Smt. Veena did not state even in her police statement, Ex. DC, about Samarjit Singh dealing lathi blow to Rattan Chand. Hence, the prosecution has failed to bring home the charge even against this accused beyond reasonable doubt.

22. Lastly, there is evidence of joint disclosure made by Ram Narain and Shiv Poojan during the course of interrogation that they had sold the gold chain and ear-rings/tops to a goldsmith of Sabzi Mandi and that they could get the same recovered (Ex. P.W. 17/A). It was consequent upon this disclosure that they led the police party to the shop of their co-accused, Jagdish and the latter produced gold ear-rings weighing 5.400 gms. (Ex. P. 83/1-2) which have been identified by Smt. Raj Kumari to be hers. Jagdish-accused has already been let off and acquitted by the trial court by giving him benefit of doubt. The question would naturally arise that in the absence of any evidence to show which of the accused made the disclosure first, will it be permissible to the prosecution to press the joint disclosure made by both Ram Narain and Shiv Poojan under Section 27 of the Evidence Act It is well settled that Section 27 must be very strictly construed. The expression 'form a person accused of any offence' appearing therein is significant and it seems to have been used designedly because a joint statement of a number of persons cannot be said to be an information received from any particular one of them. As a necessary corollary, facts discovered in consequence of joint information cannot be used as against any one of them. This proposition received the seal of approval of the Supreme Court in Ramkishan Mithanlal Sharma v. State of Bombay, : 1955 CriLJ196 . In the said case, reference was made to the observations made by the Bombay High Court in Rex v. Gokulchand Dwarkadas Morarka (Appeals Nos. 454 & 464 of 1949). An exception was taken before the Bombay High Court to the statement of the police officer that in consequence of certain statements made by accused Nos. 1 & 2 in that case, he discovered the missing pages of the Bombay Samachar of 23rd April, 1948 and it was contended that that statement was inadmissible in evidence. This objection was sustained by the learned Judges on the ground that :-

'..... this is a round about and objectionable way of attempting to prove the statements made by the accused without actually proving them. When the police officer speaks of 'in consequence of a statement made by an accused a discovery was made,' he involves the accused in the discovery. Whether he gives evidence as to the actual words used by the accused or not, the connection between the statement made by the accused and the discovery of the relevant fact is clearly hinted at. In our opinion, thereforee, evidence cannot be given of any statement made by accused which results in the discovery of a fact unless it satisfies the conditions laid down under Section 27 and this would be so even if the actual statement is not attempted to be proved by the prosecution. Even if the statement is not proved, the statement is not proved, the statement must be such as can be proved under Section 27.'

23. Their Lordships of Supreme Court while disagreeing with the line of argument put forth by the learned Judges of the Bombay High Court said that :-

'The question that really arose for the consideration of the Court there was whether the joint statement attributed to the accused 1 and 2 in that case was admissible without specifying what statement was made by a particular accused which led to the discovery of the relevant fact and it was rightly held that a joint statement by more than one accused was not contemplated by S. 27 and the evidence of Mistry, the Police Officer, in that behalf should, thereforee, have been excluded.'

24. Reference in this context be also made to Babu v. State. (a Bench decision of Allahabad High Court) and Prem Bahadur Rai v. State of Sikkim, .

25. Thus, the recovery of the gold tops from Jagdish cannot be said to have taken place in consequence of the disclosure made by either of these appellants as contemplated by Section 27 of the Evidence Act. At best, it may be admissible to prove their conduct, namely, that they had knowledge about the gold tops being with Jagdish but in view of the defense raised by the latter and the benefit of doubt granted to him, this circumstance is hardly of any evidentiary value.

26. To sum up, thereforee, the prosecution has not been able to bring home the charge against the appellants Oudh Ram, Ram Narain, Videshi, Toofani and Samarjit Singh beyond reasonable doubt. However, there is ample reliable evidence to sustain the conviction of the appellants Vijay Pal and Shiv Poojan for the aforesaid offence. Hence, conviction as well as sentence of all the appellants other than Vijay Pal and Shiv Poojan is set aside and they are acquitted. However, the conviction as well as sentence of Vijay Pal and Shiv Poojan appellants is maintained and their appeals are dismissed.

27. Order accordingly.

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