

A.F.R.

Reserved on :- 04.08.2021

Delivered on :- 19.08.2021

Court No. - 76

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Case :- CRIMINAL APPEAL No. - 1534 of 2020

Appellant :- Vinod Mali

Respondent :- State of U.P.

Counsel for Appellant :- Shiv Vilas Mishra, Vinod Kumar Sharma

Counsel for Respondent :- G.A.

Hon'ble Ajai Tyagi, J.

1. Heard learned counsel for the appellant and learned A.G.A. for the respondent.

2. This criminal appeal has been preferred by the appellant-Vinod Mali, who was convicted and sentenced in S.T. No.503 of 2019 (State Vs. Vinod Mali), arising out of Case Crime No.137 of 2016, registered under Sections 177, 171, 419, 417, 411 and 413 I.P.C. at Police Station G.R.P., District Gorakhpur, in which the accused-appellant was convicted for six months under Section 177 I.P.C., for three months under Section 171 I.P.C., for two years under Section 419 I.P.C., for one year under Section 417 I.P.C., for two years under Section 411 I.P.C. and for six years under Section 413 I.P.C. alongwith fine in all above offences and imprisonment for default of fine.

3. The relevant facts of the case are that on 12.03.2016 police party of Police Station G.R.P., District Gorakhpur was checking at the railway station and platform, when they were present at platform no.2, the informer informed the police party that some persons were standing near the gate no.1; they were suspected and were talking about theft and robbery. Police party went to that place and found that two persons were sitting on different motorcycles and others were standing there; one person was sitting on motorcycle no. U.P. 53 AS 7764 in police uniform; when he was inquired he told his name as Vinod Mali S/o Late Phooldev Mali, R/o Loharpurwa, P.S.

Kaimpiarganj, permanent resident of village Pandit Purwa, P.S. Dohari Ghat, District Mau and he told that he was a constable and posted in Kotwali Maharajganj. He was asked to produce identity card, which was produced by him; prima facie identity card was looking suspicious, hence, accused Vinod Mali was asked to tell the name of S.P., Maharajganj but he could not tell name of S.P., Maharajganj and after that he was asked to tell the name of Inspector Kotwali, Maharajganj but he also could not tell the name of Inspector, Kotwali Maharajganj; when he was strictly inquired, he told that he was not a constable but rather he has running a gang of which he was a leader and other persons are his gang members. They used to make theft or robbery of passengers travelling in train and by that, they earn the bread and butter of their family. Vinod Mali also told the police that if some member of his gang is caught by the people, he helps them in the name of being in the police department. All the persons standing there, were arrested by the police and they confessed that they were having Alprazolam powder, stolen motorcycles and stolen mobile phones etc.

4. From the possession of accused-appellant 120 grams of Alprazolam powder, two stolen mobile phones, one stolen motorcycle were recovered and a fake identity card of U.P. Police was also recovered at the time of arrest. The police uniform of appellant-Vinod Mali was also found fake.

5. Alongwith appellant-accused, other co-accused persons Santosh, Chauhan, Nand Lal @ Nandu Chauhan, Ram Darash Nishad and Ram Kishore @ Raj Kishore were also arrested and from their possession also Alprazolam powder, stolen mobile phones, stolen tablets and stolen motorcycle were recovered. As per the recovery memo, all the above persons were booked under Section 8/21/22 of Narcotic Drugs and Psychotropic Substance Act, 1985 and also under Sections 411, 413, 414, 417, 419 and 171 I.P.C. All the recovered articles were sealed on the spot and sample seal was prepared.

Recovery memo was also prepared on the spot and the cases were registered against above accused persons.

6. The learned trial court has commenced the trial of above accused persons after framing different charges against them and after examination of P.W.-1 and P.W.-2, the case file of appellant-Vinod Mali was separated from other co-accused persons.

7. The learned trial court framed charges under Sections 177, 171, 419, 417, 411 and 413 I.P.C. against the accused-appellant and he was convicted for all the above offences. Aggrieved by the impugned judgment and order of learned trial court, the appellant preferred this appeal.

8. Learned counsel for the accused-appellant said that as per the prosecution case, 120 grams of Alprazolam powder was said to be recovered from the possession of the applicant for which separate case under relevant Sections of N.D.P.S. Act was registered and in this present case, two stolen mobile phones and one stolen motorcycle were said to be recovered from the possession of accused-appellant. Apart from that it is said that he was having fake identity card of U.P. Police and wearing fake uniform of U.P. Police; posing himself as police constable and on making inquiry by the police of G.R.P., Gorakhpur, he falsely told them that he was a police constable and posted in Kotwali, District Maharajganj.

9. Learned counsel for the appellant submitted that P.W.-1, constable Ram Pravesh Bharti and P.W.-2 Head Constable Abhay Pandey were examined before the learned trial court and at that time accused-appellant moved a confession application before the learned trial court and his file was separated. In his statement under Section 313 Cr.P.C. accused-appellant confessed his guilt and on the basis of that confession, learned trial court held him guilty for all the charges framed against him and convicted.

10. Learned counsel for the appellant also submitted that apart from the conviction of offences under Sections 177, 171, 419, 417

and 411 I.P.C., the accused-appellant was also convicted and sentenced under Section 413 I.P.C. It is next submitted that he had nothing to say regarding the conviction and sentence of all the other offences except offence under Section 413 I.P.C. because Section 413 I.P.C. relates to the habitual offender.

11. Learned counsel for the appellant argued that in its impugned judgment, learned trial court has given finding regarding the appellant being habitual offender only in one line by saying that accused was habitual offender used to deal in stolen property while for being habitual, the accused should have been convicted twice or more than twice under Section 411 I.P.C. No person can become habitual by a single act. Learned counsel for the appellant in this regard relied upon the case law of Delhi High Court *Ajay Sethi Vs. State 2017 (4) JCC 2495* by saying that in this case Delhi High Court has held that for being habitual, the accused should have been convicted twice or more than twice under Section 411 I.P.C. Learned counsel also submitted that in above said judgment, Delhi High Court has followed the case of *Banne Singh @ Pahalwan Vs. State of Rajasthan, 2014 SCC Online Raj 169*. In this case Rajasthan High Court has also held that for being habitual, a person should have been convicted twice or more than twice under Section 411 I.P.C.

12. Learned counsel for the appellant has submitted that if the appellant had made confession before the learned trial court under Section 413 I.P.C., even then he could not have been held guilty for that offence rather at that time learned lower court should have asked for at least two judgments of conviction of accused-appellant under Section 411 I.P.C. There is no evidence on record that accused was ever convicted for the offence under Sections 411 I.P.C.

13. Per contra, learned A.G.A. has submitted that accused himself made confession of his offences with freewill before learned trial court and there is nothing under Section 413 I.P.C. that accused should have been convicted more than once for offence under Section

411 I.P.C. There is no such requirement in the Section 413 I.P.C. Learned counsel for the appellant made rival submission in this regard that judicial interpretation of Section 413 I.P.C. is there through the judgment of **Ajay Sethi Vs. State (Supra)**.

14. I have perused the judgment of **Ajay Sethi Vs. State (Supra)**, which was referred by learned counsel for the appellant. In this case, it is held by Delhi High Court as under:-

“49. Something more is required to establish that the offender is in the habit of dealing with or receiving stolen property. Since the offence under Section 413 I.P.C. is inter-related with and is an aggravated form of Section 411 I.P.C., the State would have to prove and establish that the offender was convicted repeatedly, twice or more than twice, for offence under Section 411 I.P.C. so as to establish beyond a reasonable doubt that he is in the habit of dealing with or receiving stolen property. Therefore, the conviction under Section 413 I.P.C. is based on repeated convictions for offence under Section 411 I.P.C. Due to previous conviction, a punishment of different kind is prescribed in Section 413 I.P.C. which the accused is required to undergo.

50. Hence, while prosecuting a person for offence under Section 413 I.P.C., the prosecution has to prove the following factors: firstly, the property in question has been stolen from a place. Thus, the prosecution must bring the property within the ambit of Section 410 I.P.C. within the definition of stolen property. Secondly, the offender has been dealing with or receiving stolen property. Thirdly, the offender knew or had a reason to believe the property to be stolen. Fourthly, he has been repeatedly convicted, i.e. twice or more than twice, of offence under Section 411 I.P.C. It is only after the prosecution establishes these factors that the court would be legally justified in concluding that the offender is habitually dealing with or receiving stolen property and in imposing the punishment as prescribed by Section 413 I.P.C.”

15. These are the above observations made by the Rajasthan High Court, which were followed by Delhi High Court in above said judgment but the facts of above cases decided by Delhi High Court and Rajasthan High Court do not apply to this case because in the cases of Delhi High Court and Rajasthan High Court, several FIRs/Charge Sheets were pending against the concerned accused persons and Delhi and Rajasthan High Court held that concerned accused has not been yet convicted under Section 411 I.P.C. In the concerned case of **Banne Singh @ Pahalwan Vs. State of Rajasthan**

High Court (Supra), Rajasthan High Court said that appellant was involved in six different FIRs “*undoubtedly so far the appellant has been convicted only by the learned trial court at Jaipur. He continues to face trials and other FIRs mentioned above, hence prior to his conviction by the learned Judge, the appellant was never convicted for offence under Section 411 I.P.C.*” In the case before Delhi High Court in **Ajai Sethi Vs. State (Supra)**, there were also several FIRs pending against the accused-appellant and Delhi High Court held that in order to convict a person under Section 413 I.P.C., the most important ingredient is that a person must be a habitual offender or receiver of stolen goods. He must be a person who is in the habit of receiving stolen properties and this Section cannot be applied in case of a single offence. The element of repetition is mandatory. Merely on the basis of pendency of FIRs or a person facing trial, a conviction under Section 413 I.P.C. would be unjustifiable in absence of accused previous conviction(s).

16. In this present case, facts are entirely different from the facts which were before the Delhi High Court and Rajasthan High Court because in this case appellant-accused was held guilty and sentenced by the trial court on the basis of his confessional statement made before the learned trial court. Although, the learned counsel for the appellant has argued that learned trial court could not hold him guilty on the basis of confession of appellant. Perusal of record shows that accused-appellant was arrested on 12.03.2016 along with other accused persons at railway station Gorakhpur and during trial, prosecution examined two witnesses as P.W.-1 and P.W.-2.

17. P.W.-1 is formal witness. Accused did not make any cross-examination of P.W.-2 and confessed his guilt in his statement under Section 313 Cr.P.C.

18. I do not agree with the submission made by the learned counsel for the appellant that despite the confession of appellant, learned trial court should have asked for two judgments in which appellant would

have been convicted under Section 411 I.P.C. because confession made by the accused, shall be taken as a whole. It cannot be in parts because it was made regarding same occurrence and he made confession with his own freewill and in his statement under Section 313 Cr.P.C., in question no.6 it was specifically put before the appellant as to whether he habitually used to deal in stolen goods. Appellant did not deny this question and in question no. 11, he also said that trial was held against him on account of commission of offences by him. It is important to mention that offences committed by the appellant which he confessed include offence under Section 413 I.P.C. also.

19. After confession made by the appellant, no other evidence was required to convict him. The confession regarding other offences under Sections 177, 171, 419, 417 and 411 I.P.C. is not challenged by appellant. Hence, when conviction is made as a whole regarding any occurrence or set of occurrences, it shall be taken as a whole. It cannot be fragmented into pieces and accused cannot at later stage claim that confessional statement made by him, should be considered regarding some of the offences only.

20. P.W.-2, Abhay Pandey, Head Constable was produced by the prosecution before the learned trial court as arresting witness, who said in his statement that on 12.03.2016 he along with other members of police party of P.S. G.R.P. Gorakhpur was present at platform no.2A. At the time of checking, accused-appellant was arrested by the police along with other co-accused persons and two stolen mobile phones, one stolen motorcycle were recovered from his possession apart from Alprazolam powder. It was also stated by this witness that at the time of arrest, appellant was having a fake identity card of U.P. Police and was wearing fake uniform of U.P. Police. Above statement was made by P.W.-2 in his examination-in-chief and it is very pertinent to note that P.W.-2 was not cross-examined by the accused-appellant, rather he made the confession of his guilt under Section

313 Cr.P.C. Hence, in my opinion, confessional statement of accused-appellant cannot be treated as partial and applicable to some of the offences only.

21. In view of the above, I am unable to agree with the argument of learned counsel for the appellant that for convicting the accused under Section 413 I.P.C. it is mandatory particularly after confession, that accused should have already been convicted under Section 411 I.P.C. twice or more than twice because accused appellant has himself made confession before the learned trial court that he was habitual in dealing with the stolen properties. It is not the case of the appellant nor he argued that accused did not make confession with freewill.

22. No other argument raised by the appellant.

23. I find no merit in this appeal and the same is liable to be dismissed.

24. The appeal is accordingly, **dismissed**.

(Ajai Tyagi, J.)

Order Date :-19.8.2021
P.S.Parihar