

**Criminal appeal**  
**PRESENT:**  
**THE HON'BLE MR. JUSTICE ASHIM KUMAR BANERJEE**  
**AND**  
**THE HON'BLE MR. JUSTICE KALIDAS MUKHERJEE**  
**JUDGMENT ON: May 19, 2010.**

**CRA NO. 432 OF 2001**

**Dikla @ Surender Das & Ors.**  
**Vs.**  
**The State of West Bengal**

**Point:**

DEFECT IN FIR, NON PRODUCTION OF SEIZED ARTICLE: The F.I.R. was registered subsequently and that at the time of lodging the F.I.R. he did not receive the names of the miscreants-Non-production of the seized pipe guns at the time of trial- Inconsistencies in the sanction order and the charge under Section 27 of the Arms Act having failed whether the charge under Section 25 of the Arms Act can stand-The Arms Act,1950 S 25,27

**Facts:**

One Ajay Kumar Chowdhury lodged a complaint alleging that on 17.11.1999 he and his elder brother Kishanlal Chowdhury, younger brother Ganesh Chowdhury were in the grocery shop and doing the business in 'Sree Apartment'. At about 7.25 P.M. when the customers were present in the shop, Dikla, Jagadish, Amarjit, Guddu, Ram Avatar, Ranajit Verma, Omprakash, Chhotu and 5/6 others suddenly entered into their shop being armed with revolvers, bombs and looted all the cash from the shop. After committing robbery the miscreants escaped shooting at random from the firearms and hurling bombs. Kishan Lal Chowdhury, the elder brother of the informant aged about 38 years and an employee of the shop named 'Dadu' suffered severe gunshot injuries and fell down

on the ground. Ganesh Chowdhury, the younger brother of the informant also sustained bullet injury in his left hand. After receipt of the complaint, the Shibpur P.S. case No. 264 dated 17.11.1999 under Section 396 I.P.C. and 25, 27 Arms Act and 9(b) of the Explosives Act was started. After completion of investigation, charge sheet was submitted. Charges were framed under Section 396 I.P.C. against all the seven accused persons under Section 25/27 Arms Act and as against Jagadish Dewar under Section 412 I.P.C. The charges were read over and explained to the accused persons who claimed to be tried. Ultimately, the learned Trial Judge upon consideration of materials on record passed the impugned judgment and conviction of sentence against the appellants. The learned Trial Judge, however, acquitted accused Tifiya @ Hyder Ali, Behari @ Santosh Mahato, Surya @ Suraj Prosad and Gopiya @ S. Gopi as there was no evidence against them.

**Held:**

The F.I.R. was registered subsequently and that at the time of lodging the F.I.R. he did not receive the names of the miscreants. Evidently, therefore, there are grave inconsistencies, embellishment and concoction in the F.I.R. The prosecution case as set forth in the F.I.R. as regards the involvement of the present appellants is very much doubtful.

**Para-18**

Because of the non-production of the seized pipe guns at the time of trial, the inconsistencies in the sanction order itself and the charge under Section 27 of the Arms Act having failed, the charge under Section 25 of the Arms Act cannot also stand. There are serious inconsistencies, inherent improbabilities and irreconcilable anomaly in the prosecution case as set forth in the F.I.R. and, as such, the charges under Section 396 I.P.C. fails.

**Para-21**

The learned Trial Judge failed to consider the evidence on record from its proper perspective and was not justified in passing the judgment of conviction and sentence. The appellants are found not guilty of the charges brought against them. . The appellants are acquitted of the charges and be set at liberty at once, if not wanted in any other case. Seized pipe gun and gold chain be confiscated to the State and the other seized articles be destroyed.

**Paras –22& 23**

**For the Appellants: Mr. Milan Mukherjee,  
Mr. Aniket Mitra.**

**For the State Mr. R. K. Ghosal**

**The Court:**

1.This appeal is directed against the judgment of conviction and sentence passed by learned Additional Sessions Judge, 1<sup>st</sup> Court, Howrah in Sessions Trial No. XVIII (January) of 2000 sentencing the appellants to suffer R.I. for life and also to pay a fine of Rs.5,000/- each in default to suffer further R.I. for one year under Section 396 I.P.C. The appellants Jagadish Dewar and Amarjit Upadhyay have been sentenced to suffer R.I. for three months under Section 25(1) of the Arms Act. The learned Judge, however, directed that both the sentences will run concurrently.

2.The case of the prosecution, in short, is that one Ajay Kumar Chowdhury lodged information alleging that on 17.11.1999 he and his elder brother Kishanlal Chowdhury, younger brother Ganesh Chowdhury were in the grocery shop and doing the business in 'Sree Apartment'. At about 7.25 P.M. when the customers were present in the shop, Dikla, Jagadish, Amarjit, Guddu, Ram Avatar, Ranajit Verma, Omprakash, Chhotu and 5/6 others suddenly entered into their shop being armed with revolvers, bombs and looted all the cash from the shop. It has also been alleged that those

miscreants snatched away gold chain from the neck of the younger brother of the informant and some female customers. The informant and others could not resist them out of fear. After committing robbery the miscreants escaped shooting at random from the firearms and hurling bombs. Kishan Lal Chowdhury, the elder brother of the informant aged about 38 years and an employee of the shop named 'Dadu' suffered severe gunshot injuries and fell down on the ground. Ganesh Chowdhury, the younger brother of the informant also sustained bullet injury in his left hand. The injured persons were taken to Medicare Nursing Home for treatment. The doctor declared the elder brother of the informant and the employee 'dadu' @ Tushtudhar Mahanto dead. The informant also suffered bomb injuries. The miscreants looted away about eight to ten thousand rupees. The informant recognized all of them in the electric light of the shop. After receipt of the complaint, the Shibpur P.S. case No. 264 dated 17.11.1999 under Section 396 I.P.C. and 25, 27 Arms Act and 9(b) of the Explosives Act was started. After completion of investigation, charge sheet was submitted.

3.Charges were framed under Section 396 I.P.C. against all the seven accused persons namely, Dikla @ Surendar Das, Jagadish Dewar, Amarjit Upadhyay, Tifiya @ Haider Ali, Bihari @ Santosh Mahanto, Surya @ Suraj Prosad, Gopia @ S. Goopi; as against Amarjit Upadhyay and Jagadish Dewar under Section 25/27 Arms Act and as against Jagadish Dewar under Section 412 I.P.C. The charges were read over and explained to the accused persons who claimed to be tried.

4.The learned Trial Judge while passing the impugned judgment of conviction and sentence held that prosecution has been able to prove beyond shadow of doubt that accused Dikla, Amarjit and Jagadish and some other miscreants being armed with pipe gun entered into the shop of defacto-complainant under the name and style 'Shyam Vander' and looted away the articles from the shop

as well as gold chains from the lady customers and by firing indiscriminately killed two persons. It has been held that the factum of commission of murder by firing has also been proved by examining the doctor (P.W. 12). It has been held that Kishan Lal Dewar, Dadu @ Tushtudhar received gunshot injury. Ultimately, the learned Trial Judge upon consideration of materials on record passed the impugned judgment and conviction of sentence against the appellants. The learned Trial Judge, however, acquitted accused Tifiya @ Hyder Ali, Behari @ Santosh Mahato, Surya @ Suraj Prosad and Gopiya @ S. Gopi as there was no evidence against them.

5.Mr. Mukherjee appearing for the appellants submits that despite three persons having been acquitted out of seven, the learned Trial Judge recorded the conviction and sentence under Section 396 I.P.C. and under Section 25 Arms Act. It is submitted that Jagadish Dewar has been acquitted of charge under Section 412 I.P.C. and the learned Trial Judge held that the charge under Section 27 Arms Act failed. It is submitted that in the order of sanction issued by the District Magistrate, the date of commission of the offence has not been mentioned; there is also discrepancy in the address of the accused persons between the order of sanction and the seizure list. Mr. Mukherjee contends that the F.I.R. is ante-dated. It is submitted that in the relevant column of the formal F.I.R. it has been noted that the information was received on 17.11.1999 at 19.35 hours vide G.D. entry No. 1134. It is submitted that the police officer (P.W. 21) received the complaint at the Nursing Home and sent it to the duty officer of the Shibpur P.S. for starting a case which was received at the P.S. at 21.45 hours. Mr. Mukherjee contends that the police officer (P.W. 21) stated that he opened the C.D. at 19.35 hours, although, evidently the case was registered at 21.45 hours. Mr. Mukherjee contends that unless a case is registered at the P.S. and F.I.R. is drawn there is no question of opening the C.D.

6.Mr. Mukherjee contends that P.W. 6 stated that he did not recognize the miscreants and he told it to the police officer. It is contended that at the time of trial P.W. 6 was not asked by the prosecution to identify the accused persons in Court. It is submitted that the P.W. 6 is the injured and T.I. Parade was not held at all.

7.Mr. Mukherjee contends that the gold chain was seized on 30.11.1999, but, the T.I. Parade of article was not held. Mr. Mukherjee contends that in the F.I.R. there was embellishment and fabrication for which the entire prosecution case should be disbelieved. Mr. Mukherjee contends that the complaint was written in Bengali, although, the informant is a Hindi speaking person and there is no endorsement in the complaint that it was read over and explained in Hindi to the informant. Mr. Mukherjee contends that P.W. 1 named three persons only and the inquest was prepared at 8.30 P.M. which was signed by the P.W. 1; but P.W. 1 lodged the F.I.R. at 21.45 hours. Mr. Mukherjee contends that the learned Trial Judge did not consider all these aspects of the case and the impugned judgment is not sustainable in law.

8.Mr. Ghosal appearing for the State submits that the victim sustained bullet injury and it was corroborated by the medical evidence. Mr. Ghosal submits that there was no question of identification as the miscreants were local and known persons. It is submitted that the injury upon the victim has been proved and the prosecution has also proved the recovery.

9.P.w. 21 P. P. Ghosh after receipt of the complaint at the P.O. forwarded it to the O.C. through a constable for starting a case. It is in his evidence that the case was registered at 21.45 hours. It is in his cross-examination that he opened the case diary at 19.35 hours at the P.S. If the C.D. was

opened by the P.W. 21 at the P.S. at 19.35 hours, then why the case was registered at the P.S. at 21.45 hours, it is difficult to reconcile.

10.P.W. 21 has stated that he is the I.O. and investigated the case. It is in his evidence that he held inquest over the dead body of Kishan Lal Chowdhury at 8.30 P.M. and over the dead body of Tustudhar Mahanta at 9.15 P.M. on 17.11.1999; the time of completion of inquest was not noted in the inquest report.

11.In the inquest report it was noted that it was held with reference to Shibpur P.S. Case No. 264/99 dated 17.11.1999 under Section 396 I.P.C., 25/27 Arms Act and 19(b) of Explosives Act. Although the complaint was received at the P.O. at 19.35 hours, the F.I.R. was not registered at that point of time. Since the F.I.R. was drawn and the P.S. case was registered at 21.45 hours, the inquest ought to have been held by starting U.D. case. But that was not done. Under such circumstances it was not possible to mention the P.S. case in the inquest report as the F.I.R. was drawn much later. In other words, it shows that the P.S. case was subsequently inserted in the inquest report which renders the prosecution case doubtful.

12.It is in the cross-examination of I.O. that the persons facing trial are not named in the F.I.R. and he did not pray for holding the T.I. parade of the miscreants. It is worth mentioning here that the informant has named eight persons in the complaint. So in view of the evidence of I.O., the supply of the eight names of the miscreants in the F.I.R. creates suspicion.

13.P.W. 1 has stated in his cross-examination that he opened the case diary at 19.35 hours at the P.S. and he received the F.I.R. subsequently. It remains unexplained as to why he opened the C.D. without receiving the F.I.R. This is bound to be viewed with suspicion. He has further stated that

at the time of lodging the F.I.R. he did not receive full name, father's name and address of the miscreants and it would have been noted if he got the same. At another place of cross-examination P.W. 21 has stated that in the F.I.R. he received the names of Guddu, Ramavtar, Ranajit Verma and Chhotu. Mentioning of the names of eight persons in the F.I.R., therefore, speaks of concoction and embellishment.

14.P.W. 1 has stated that the miscreants took away the total cash of Rupees 6-7 thousand; lady customers were standing outside the shop room, the miscreants snatched away their chains from neck and fired from their fire arms, as a result of which his elder brother sustained bullet injury and younger brother sustained bullet injury on the left hand, Dadu also sustained bullet injury; all the injured were taken to Medicare Nursing Home situated in the first floor of the building; the elder brother and 'Dadu' were declared dead and his younger brother Ganesh Chowdhury was treated there and the cartridges were extracted from his hand after operation. P.W. 1 has stated that he recognised some of the miscreants who were Dikla, Amarjit and Jagadish and he could not recognise the rest of the accused persons. In spite of such evidence of the P.W. 1 in his examination-in-chief, eight persons were named in the F.I.R. along with 5/6 others. It is very much doubtful as to how the eight persons were named in the F.I.R., although, the informant (P.W. 1) in his examination-in-chief stated that he could recognise three persons namely Dikla, Amarjit and Jagadish. The evidence of P.W. 1 vis a vis the evidence of I.O. (P.W. 21) clearly goes to show that when the information was lodged, the names were not ascertained at that point of time. These are the circumstances which create serious doubt and point at the inherent improbability as to the veracity of the prosecution case. The F.I.R. was registered at 21.45 hours on 17.11.99. Although the distance between the P.S. and the Court was  $\frac{1}{2}$  K.M. it was sent to the



learned Magistrate on 19.11.1999. The inconsistencies as appearing from the evidence of P.W. 1 and P.W. 21 as to the time of lodging the F.I.R. and mentioning of the names of the accused persons, are the circumstances which indicate fabrication.

15.As regards the sanction order for launching prosecution under Section 25/27 Arms Act, one improvised pipe gun, one live cartridge and one polythine bag were recovered from the possession of Amarjit Upadhyay and the place of seizure was 70/8 Atindra Mukherjee Lane (Ext. – 11). By another seizure list (Ext. 13) one improvised pipe gun, two live cartridges were recovered from Jagadish and the place of seizure was 103/2/1 and 103/3 Atindra Mukherjee Lane. But the sanction order shows that two pipe guns and five live cartridges were recovered from a place in between 103/2/1 and 103/3 Atindra Mukherjee Lane. There is no mention of 70/8 Atindra Mukherjee Lane in the sanction order. The date of recovery was also not mentioned therein. It shows that while granting sanction, the Sanctioning Authority did not apply his mind and there was non-consideration of the materials on record.

16.P.W. 2 Shankar Lal Chowdhury was a post occurrence witness. P.W. 3 has stated that while he was returning home from the house of Binod Panday, he heard sounds of firing and found 5/6 Persons fleeing away and he could recognise Dikla, Amarjit and Jagadish. In the cross-examination he stated that he did not state the names of these accused persons to the police officer. P.W. 4 was the employee of Medicare Nursing Home who produced some medical papers of the said Nursing Home. P.W. 5 stated that on hearing sound of firing he went there and found that Kishanlal and 'Dadu' were being taken to the Medicare Nursing Home. P.W. 6 has stated that 7/8 miscreants entered into the shop being armed with pistol; the decoits took away the money and

snatched away gold chain from the lady customers; thereafter they started firing and, as a result, he sustained injury in his left arm; his elder brother and employee 'Dadu' sustained bullet injury. It is in his evidence that he could not recognise the decoits.

17.P.W. 7 Sushil Sharma stated that Dikla snatched away gold chain from the lady customers; Kishanlal protested and Dikla fired at Kishanlal. In the cross-examination he stated that he could see that 6/7 persons entered into the shop; he did not attend the T.I. parade. P.W. 8 is the post occurrence witness. P.W. 9 to P.W. 11 are the police personnel. P.W. 12 is the owner of Medicare Nursing Home who produced the injury report. He stated that history of assault has not been noted in the injury report and similarly the names of the assailants were not noted; he did not give the identification mark of the bullet head which was removed from the left arm of the injured. P.W. 3 is the doctor who held the Post Mortem examination and stated that death was due to gunshot injury ante-mortem and homicidal in nature. P.W. 14 is an employee of the office of the District Magistrate and he proved the sanction order. P.W. 15 to P.W. 17 are the seizure witnesses. P.W. 18 is the police officer who received the complaint through a constable and filled up the formal F.I.R. P.W. 19 and P.W. 20 are the seizure witnesses. P.W. 21 is the I.O.

18.In view of the evidence of P.W. 1 and P.W. 21 it is clear that at the time of occurrence the informant could not recognise the miscreants and the names were supplied afterwards. P.W. 1 stated that he could recognise three persons namely Dikla, Amarjit and Jagadish. The question necessarily arises as to how he could name eight persons in the F.I.R. From the evidence of the I.O. (P.W. 21) it is clear that he opened the case diary at 19.35 hours and the F.I.R. was registered subsequently and that at the time of lodging the F.I.R. he did not receive the names of the

miscreants. Evidently, therefore, there are grave inconsistencies, embellishment and concoction in the F.I.R. The prosecution case as set forth in the F.I.R. as regards the involvement of the present appellants is very much doubtful.

19.The striking feature of the case is that I.O., admittedly, did not pray for holding T.I. Parade of the suspects as well as of the articles after recovery. The learned Trial Judge held that the charge under Section 412 I.P.C. was not proved against the accused Jagadish holding that no lady customer has been cited as witness in this case and police seized one piece of torn gold chain from the house of the accused Jagadish on 30.11.99. The learned Judge held that in the seizure list two witnesses were cited one being the defacto-complainant Ajoy Chowdhury and the other being Shyam Sundar Modi. The learned Judge held that witness Shyam Sunder was not examined in this case and held that the recovery of alleged gold chain has not been proved satisfactorily. The learned Judge further held that in order to substantiate the case, the prosecution should have examined the owner of the article (gold chain) for proper identification of the same, but, no attempt was made by the prosecution to examine the owner of the gold chain. The learned Judge held that it was not the case of the defacto complainant that the gold chain belonged to him. The learned Judge further held that the prosecution could not prove that the seized gold chain was obtained by commission of dacoity. Thus the learned Judge held that the charge under Section 412 I.P.C. could not be proved.

20.The learned Trial Judge held that the prosecution could not prove that the seized revolvers which were recovered from the possession of the accused persons were used at the time of commission of decoity; the pipe gun has not been produced before the witness for identification. The learned Judge held that the prosecution could not prove the charge under Section 27 of the

Arms Act for using the pipe guns at the time of commission of the decoity. The learned Judge, however, held that the appellants were guilty of having committed the offence under Section 25 of the Arms Act.

21. We are of the considered view that because of the non-production of the seized pipe guns at the time of trial, the inconsistencies in the sanction order itself and the charge under Section 27 of the Arms Act having failed, the charge under Section 25 of the Arms Act cannot also stand. There are serious inconsistencies, inherent improbabilities and irreconcilable anomaly in the prosecution case as set forth in the F.I.R. and, as such, the charges under Section 396 I.P.C. fails.

22. Having regard to the materials on record and after giving anxious consideration to the submissions of Mr. Mukherjee and Mr. Ghosal we are of the view that the learned Trial Judge failed to consider the evidence on record from its proper perspective and was not justified in passing the judgment of conviction and sentence. The appellants are found not guilty of the charges brought against them. We, therefore, set aside the conviction and sentence as recorded by the learned Trial Judge.

23. The appeal is allowed. The appellants are acquitted of the charges and be set at liberty at once, if not wanted in any other case. Seized pipe gun and gold chain be confiscated to the State and the other seized articles be destroyed.

24. Let a copy of this judgment be sent to the concerned Correctional Home where the appellants are now detained.

25.Let a copy of this judgment along with the L.C.R. also be sent down to the learned Court below immediately.

26.Urgent Photostat certified copy, if applied for, be handed over to the parties as early as possible.

(Kalidas Mukherjee, J. )

Ashim Kumar Banerjee, J.

I agree,

(Ashim Kumar Banerjee, J. )