CRIMINAL APPEAL

Present: **The Hon'ble Justice Ashim Kumar Banerjee**
AND
The Hon'ble Justice Kishore Kumar Prasad

CRIMINAL APPEAL NO. 67 OF 2006

Judgment on: April 1, 2010.

SK. EKLASH
VS
STATE OF WEST BENGAL

WITH

CRIMINAL APPEAL NO. 33 OF 2006

HAMIDULLAH KAZI @ HAMID
VS
STATE OF WEST BENGAL

POINTS:

SENTENCE: Appellants sentenced to suffer rigorous imprisonment for two cases--Sentences awarded to run concurrently-In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix- The learned Trial Judge, whether justified in passing orders of conviction and sentence-Indian Penal Code, 1860 Ss.392/411

FACTS:

These two appeals arise out of a common judgment and order of conviction passed by the learned Additional Sessions Judge, First Court, Howrah. The appellants were heard on question of sentence and thereafter by an order passed on the same day they were sentenced to suffer Rigorous Imprisonment for ten years for the offence punishable under Section 392 of Indian Penal Code. They were also sentenced to suffer Rigorous Imprisonment for three years for the offence punishable under Section 411 of Indian Penal Code. The sentences awarded to the appellants were

ordered to run concurrently. Being aggrieved by the orders of conviction and sentence passed by the learned Trial Judge, the appellants have preferred the present appeals separately.

HELD:

The learned Trial Court after detailed consideration of the evidence on record came to the conclusion that the prosecution had proved its case beyond reasonable doubt. The judgment of the learned Trial Court is exhaustive and deals with every aspect of the case. The defence did not dispute before the learned Trial Court that the robbery did not take place in the manner alleged by the prosecution. The learned Trial Court had undertaken a very meticulous and exhaustive analysis of the entire evidence on record. Nothing had been left out and each piece of evidence had been noticed and discussed threadbare. All the contentions urged by the appellants had been considered and proper findings had been recorded. Para-16

In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The criminal law allows some significant discretion to the Judge in arriving at a sentence in each case. Judges in essence affirm that punishment ought always to fit the crime, yet in practice sentences are determined largely by other consideration. In our country, statutory provision for psychotropic treatment during the period of incarceration in the jail is not available, but reformist activities are systematically held at many places with the intention of treating the offenders psychologically so that he may not repeat the offence in future and may feel repentant of having committed a crime. Para-25

Mr. Jayanta Narayan Chatterjee
Mr. Uttam Basak : For the appellant in CRA 67/2006.

Mr. Subir Ganguly : For the appellant in CRA 33/2006.
(State Defence Counsel)

Mr. Sandipan Ganguly : For the State in CRA 67/2006.

Mr. Samir Chatterjee : For the State in C.R.A. 33 of 2006.

THE COURT:

1) These two appeals arise out of a common judgment and order of conviction dated. 11.11.2005 passed by the learned Additional Sessions Judge, First Court, Howrah in Sessions Trial Case No. 268 of 2003 convicting the two appellants herein for the offences punishable under Sections 392/411 of Indian Penal Code.

2) The appellants were heard on question of sentence on 21.11.2005 and thereafter by an order passed on the same day i.e., on 21.11.2005, they were sentenced to suffer Rigorous Imprisonment for ten years for the offence punishable under Section 392 of Indian Penal Code. They were also sentenced to suffer Rigorous Imprisonment for three years for the offence punishable under Section 411 of Indian Penal Code. The sentences awarded to the appellants were ordered to run concurrently.

3) Having regard to the economic condition of the appellants, the learned Trial Court did not impose any fine against the appellants for the offences punishable under Section 392/411 of Indian Penal Code.

4) Being aggrieved by the orders of conviction and sentence passed by the learned Trial Judge, the appellants have preferred the present appeals separately.

5) The prosecution version as unfolded during trial in a nutshell is as follows :-

6) In the afternoon at about 13.50 hours on 31.12.2002 a daring robbery was committed at Boalior Branch of Howrah Gramin Bank within the limits of Uluberia P.S. The robbers are said to be four in number. Out of them, two armed with fire arms and one armed with Bhojali entered into the bank and forced the employees and others to go inside the bathroom of the bank by pointing fire arms and Bhojali towards them. It is alleged that the robbers looted away Rs. 2,00,000/- (2 lakhs) from the vault and Rs. 1,67,675/- from the cash cage of the bank. The currency notes of the denomination of Rs. 100 which were looted from the vault had chits affixed to the bundles which carried the signature of the Branch Manager and Cashier of the Bank respectively with the seal of the Bank.

7) Information reached the police and they arrived at the spot. The First Information Report was lodged by P.W.1, the Manager of the Bank at about 15.45 hours and on the basis of the same a case was registered at Uluberia P.S. under Section 392 of Indian Penal Code and 25/27 of the Arms Act.

8) After taking up the investigation, the Investigating Officer visited the place of occurrence, seized the material objects from the Bank, examined the witnesses, inspected the records of the Bank to verify the claim, arrested the appellants and recovered currency notes amounting to Rs. 80,000/- along with fire arms loaded with ammunition, one motor cycle, wearing apparels etc by preparing several seizure lists pursuant to the statement of the appellants. The appellants and the currency notes recovered from their possession were also placed in Test Identification Parade in course of

investigation. After completion of the investigation, the appellants were charge sheeted and put on trial after committal of the case to the Court of Sessions.

9) In the Trial Court, the prosecution examined as many as 30 witnesses. Apart from leading oral evidence, the prosecution also tendered and proved a large numbers of exhibits which were marked as exhibit 1 to 26 and Mat exhibit I to XIII.

10) Though the appellants were examined under Section 313 Code of Criminal Procedure, yet there was no adduction of evidence by them.

11) The defence version was denial of the prosecution case as brought out in evidence.

12) The learned Trial Court after considering the oral and documentary evidence on record and hearing the learned counsel for the parties passed order of conviction and sentences as stated hereinabove.

13) Mr. Jayanta Narayan Chatterjee, learned counsel appearing for the appellant Sk. Eklash and Mr. Subir Ganguly, learned counsel for the appellant Hamidullah Kazi @ Hamid (appointed vide order dated 26.3.2010 of this Court) fairly submitted that in view of the evidence adduced by the prosecution there is nothing much to argue in defence and, therefore, they confined their prayer for reduction in sentence. They submitted that from the date of their arrest i.e., from 27.1.2003 the appellants are in custody and by this time they have suffered more than seven years and, therefore,

in the circumstances, it is a fit case in which their sentence be reduced to the period already undergone by them.

14) Mr. Sandipan Ganguly, learned counsel appearing for the State Respondent in CRA 67 of 2006 and Mr. Samir Chatterjee, learned counsel for the State Respondent in CRA 33 of 2006 in their usual fairness left the question of sentence to be imposed upon the appellants to the discretion of this Court.

15) We have given our anxious and thoughtful consideration to the respective contentions of the learned counsel for the parties. We have perused the evidence both oral and documentary produced by the prosecution to substantiate its case and the impugned judgment.

16) The learned Trial Court after detailed consideration of the evidence on record came to the conclusion that the prosecution had proved its case beyond reasonable doubt. The judgment of the learned Trial Court is exhaustive and deals with every aspect of the case. The defence did not dispute before the learned Trial Court that the robbery did not take place in the manner alleged by the prosecution. We find that the learned Trial Court had undertaken a very meticulous and exhaustive analysis of the entire evidence on record. Nothing had been left out and each piece of evidence had been noticed and discussed threadbare. All the contentions urged by the appellants had been considered and proper findings had been recorded.

17) In the instant case, we find that the prosecution successfully established the recovery of the currency notes amounting to Rs. 80,000/- out of the looted currency notes amounting to Rs. 3,67,675/- from the possession of the appellants which were the subject matter of the robbery.

18) The recovered currency notes have been duly identified in T.I. parade as also before Court during trial having regard to the special features namely, existence of chits on the bundles bearing the seal of the bank and the signatures of P.Ws. 1 and 9, the Branch Manager and the Cashier of the Bank respectively. The employees of the bank namely, P.Ws. 1 to 5 who had ample opportunity of noticing the facial features of the culprits correctly identified the appellant Sk. Eklash. The substantive evidence of identification in Court finds support on the basis of corroborative evidence in the form of recoveries of looted currency notes from the possession of the appellants. The recoveries made on the information of the appellants are clinching evidence against the appellants which throw a flood of light about the involvement of the appellants in the commission of crime.

19) That apart there is no lapse of time between the date of arrest of the appellants and the recovery of the stolen currency notes.

20) In view of the above discussion, we are of the view that the appellants have been rightly convicted by the learned Trial Court for the offence punishable under Section 392 of Indian Penal Code. Accordingly, the conviction of the appellants for the offence under Section 392 of Indian Penal Code deserves to be affirmed. We do so.

21) In Section 114 Illustration (a) of the Evidence Act the words “either the thief or has received goods” and more particularly, the word “or” postulates that both the presumptions cannot be drawn simultaneously. This appears to be a pointer to the proposition that one cannot be convicted with both theft and for receiving or retaining stolen property. Section 411 nor Section 414 of the IPC can be applied to the original theft of the property concerned. No person can receive for himself, nor does a person assist himself in concealing. Thus, it appears that simultaneous conviction for robbery and receiving or retaining stolen property by commission of robbery is not permissible.

22) The act of dishonest removal constitutes dishonest reception and so the thief does not commit the offence of retaining stolen property merely by continuing to keep possession of the property he stole. The theft and taking and retention of stolen goods form one and the same offence and cannot be punished separately.

23) For the reasons aforesaid, the order of conviction and sentence awarded by the learned Trial Judge against the appellants of the charge framed against them punishable under Section 411 of Indian Penal Code cannot be maintained and are set aside.

24) The only question which survived is what should be the quantum of sentence to be awarded to the appellants under Section 392 of Indian Penal Code.

25) In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The criminal law allows some significant discretion to the Judge in arriving at a sentence in each case. Judges in essence affirm that punishment ought always to fit

the crime, yet in practice sentences are determined largely by other consideration. In our country, statutory provision for psychotropic treatment during the period of incarceration in the jail is not available, but reformist activities are systematically held at many places with the intention of treating the offenders psychologically so that he may not repeat the offence in future and may feel repentant of having committed a crime.

26) Now, coming to the question of sentence, the learned Trial Judge has himself noted that the appellants were poverty stricken. The evidence on record shows that two other persons along with the appellants participated in the crime. No doubt it was a daring act on their part but they did not assault any one of the witnesses.

27) There is nothing on record to show that the appellants had any adverse criminal antecedent. That apart, the incident occurred way back in the last part of December, 2002 and during the course of proceeding upto this Court, the appellants had suffered mental agony in jail custody for a period of more than seven years.

28) The appellants namely, Hamidullah Kazi and Sk. Eklash are now about 38 years and 46 years of age respectively and there appear to be fairly good chances of the appellants getting reformed and becoming a good citizen.

29) Thus, looking to the matter from all angles and after giving our serious consideration to the whole matter, we are of the view that the period already undergone by the appellants will be proper and reasonable for the ends of justice in the instant case. Thus, the sentence awarded to the

appellants for the offence punishable under Section 392 of Indian Penal Code is hereby reduced to the period already undergone by the appellants.

30) Accordingly, we award the appellants such sentence punishable under Section 392 of Indian Penal Code and direct that the appellants be released forthwith, if their detention is not required in connection with any other case.

31) With this modification, the appeals are disposed of.

32) Learned Lower Court is directed to issue necessary revised jail warrant as required by the Rules in respect of these two appellants.

33) Send a copy of this judgment to the concerned Superintendent, Correctional Home where these two appellants are now under detention for information and taking necessary action.

34) Lower Court records along with a copy of this judgment to go down forthwith to the Court of Learned Trial Judge for information and necessary action.

35) Urgent xerox certified copy of this judgment, if applied for, be supplied to the Learned Counsel for the parties upon compliance of all formalities.

(Kishore Kumar Prasad, J.)

36) I agree.

(Ashim Kumar Banerjee, J.)