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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.197 OF 2000

Kumar Ranuji Gaikwad
Age-34 years, Occ- Service
R/o Yerwada, Pune

APPELLANT

VERSUS

The State of Maharashtra

RESPONDENT

.....

Mr. Satej S. Jadhav, Advocate for the appellant
Mr. A. V. Deshmukh, APP for respondent State

.....
WITH
CRIMINAL APPEAL NO.190 OF 2000

Suresh @ Dastya s/o Maroti Chavan
Age-32 years, Occ- Labour
R/o Padhegaon, Taluka – Kopargaon,
District - Ahmednagar

APPELLANT

VERSUS

The State of Maharashtra

RESPONDENT

.....

Mr. V. R. Dhorde h/f Mr. R. N. Dhorde, Advocate for appellant
Mr. A. V. Deshmukh, APP for respondent State

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[CORAM : T.V.NALAWADE, J.]

RESERVED ON : 26th FEBRUARY, 2015
PRONOUNCED ON : 3rd MARCH, 2015.

JUDGMENT:

1. Both the appeals are filed against judgment and order of

Sessions Case No. 19 of 1999, which was pending in the Court of Additional Sessions Judge, Kopargaon, District – Ahmednagar. Appeal No. 190 of 2000 is filed by original accused No.5, who is convicted for the offence punishable u/s 397 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for seven years and to pay fine. The other appeal is filed by original accused No.1, who is convicted for the offence punishable under section 414 of the Indian Penal code and sentenced to suffer Rigorous Imprisonment for two years and to pay fine.

2. Both the sides are heard. This Court has perused the original record.

3. It is the case of the prosecution that Dileep Solanki – original complainant is a goldsmith and was running his business in Khadki area of Pune. Accused No.1 – Kumar was known to the complainant from the childhood of Kumar as house of accused No.1 Kumar is situated in the locality where house of the complainant is situated. Brother of the complainant is a friend of accused No.1 and due to that reason also accused Kumar was known to the complainant.

4. It is the case of the prosecution that on 16th February, 1999, accused No.1 went to the complainant with absconding

accused Raju his brother-in-law, and told that they had found hidden treasure while making digging for construction of a house. Accused No.1 told to the complainant that the hidden treasure consists of silver coins and gold ornaments and the owner of the treasure wanted to sell the same. As representation was made that at much lower price than the market price, the gold ornaments and silver coins can be purchased by the complainant, the complainant showed interest in purchasing the so called treasure. Accused No.1 said that the treasure can be shown to the complainant if he comes to Kopargaon on 18th February, 1999. The complainant agreed to go to Kopargaon.

5. On 18th February, 1999, the complainant, absconding accused Raju and one employee of the complainant by name Balu were taken first to Padhegaon by accused No.1. At Padhegaon, accused No.5 – Suresh and accused No.2 – Shelar were collected by accused No.1 and in the same vehicle they were taken to a field. Accused No.5 and said Shelar (accused No.2) showed the way up to the field. In the field, one man informed that he was having 1 kg of silver coins and 250 to 300 grams of gold ornaments. He said that he was having more gold and silver, which was part of the treasure. Negotiations took place and the complainant agreed to purchase all the articles of

the treasure for the consideration of Rs.6 lac. On that day, by paying an amount of Rs.1500/- towards advance to said person, the complainant collected 25 silver coins from him. The complainant promised to return with remaining amount for purchasing the remaining articles, within two days.

6. On 18th February, 1999, it was Thursday and they returned from the field on Friday. On Friday itself accused No.1 again met the complainant and inquired as to whether the complainant had collected the money. The complainant informed that he could collect an amount of only Rs.1 lac and he was finding it difficult to collect the remaining amount. Upon that, accused No.1 promised to the complainant to see that only silver coins are given for the consideration of Rs.1 lac. He also promised to convince the persons having treasure for such deal.

7. On 20th February, 1999, accused No.1 again approached the complainant and told that he had contacted accused No.2 Shelar on phone and said persons were ready to settle the transaction for Rs.1 lac. Accused No.1 thereafter asked the complainant as to when he would be ready to go to the place. The complainant told that they can leave for the said place on 21st February, 1999 at 8.00 am.

8. On 21st February, 1999, at about 8.30 am, the complainant, his driver, accused No.1, one Vitthal Deokar and Balu (employee of the complainant) left in a jeep. They reached at Kopargaon at about 2.30 pm. Accused No.1 knew the place where accused No.2 was to wait for them. At that place, accused No.2 boarded the jeep and thereafter they also collected accused No.5 from Kopargaon and proceeded to the spot. This time, accused No.2 and 5 lead them to another field. In the field, a farce was made about further talks regarding the transaction. Accused persons then asked all the persons brought by the complainant to come to the field with cash. When they gathered, a signal was given by the person who was representing that he was having the treasure and then his associates, who were 25 to 30 in number, came forward from the crop. Those persons had covered their faces with clothes. They were holding weapons like, axes, choppers and knives and they surrounded the complainant and his men. Search of the complainant and his men was taken. Not only the cash amount of Rs. 1 lac was taken away, but the cash, which was present on the person of the complainant, his friends and also of Balu was taken away and the ornaments, which they were having on their persons, were also taken away and all of them were robbed. The complainant

had taken with him Machhindra, Balu and Vitthal Deokar. In addition to accused No.5 – Suresh, there was one more accused by name Suresh, but his name was Suresh Bharti (accused No.3). The allegation is that the complainant and his persons were robbed of cash and valuables worth Rs.1.43 lac.

9. The complainant had seen accused No.2 Shelar and accused No. 5 Suresh closely and accused No.1 Kumar was known to the complainant from the beginning. After the incident of robbery, others like accused No.2 and 5 ran away from the field itself with the aforesaid robbers, but Kumar remained in the company of the complainant. When the complainant expressed that it was necessary to give report to the police from Kopargaon, accused No.1 advised not to do so by saying that it would not be a proper step. In view of said advice, the complainant and other persons returned to Pune. After consulting with others, the complainant approached Yerwada Police Station of Pune on 22nd February, 1999. The report of the complainant was sent to Kopargaon police station on 23rd February, 1999 and the crime came to be registered for the offences punishable u/s 420, 395, 12-B etc. of the Indian Penal Code and u/s 4 read with 25 of the Arms Act.

10. In view of the aforesaid nature of allegations and as the residential place of accused No.1 was known, he was taken into custody by the police and on the basis of information collected from him, other four accused were traced and arrested. During the trial, accused No.1 Kumar took a defense that he had given company to the complainant and he had been to the spot of offence. Though he has admitted that such incident took place, he denied that he was working as associate of aforesaid dacoits. In addition to a statement under section 313 of the Criminal Procedure Code he gave explanation in writing. He contended that he saved himself on that day from the assault and also saved his wrist watch. Accused No. 2 and 5 took a defense of total denial. Accused No.2 Shelar is also convicted for the offence punishable under section 397 of the Indian Penal Code, but he has not filed any appeal.

11. Complainant – Dileep has given evidence that he knew accused No.1 right from the beginning and it is accused No.1 who had brought to him the absconding accused Raju by saying that Raju was his brother-in-law. He has deposed that on 16th February, 1999 itself some silver coins (two in number) were given to him, as samples by accused No.1 and said Raju. Though there is no specific mention about handing over of two silver

coins as samples on the first day, evidence of complainant (PW-5) shows that on 18th February, 1999, twenty-five silver coins were given to him and he had handed over twenty – seven silver coins to the police, after registration of the crime. As per record, under Panchanama Exhibit-26, the police took over twenty – seven silver coins from the complainant.

12. Evidence of complainant (PW-5) further shows that it is accused No.1 who had convinced him to go to the place of dacoits on both the occasions. This initiative was taken by accused No.1 and he helped the dacoits. He knew other accused like accused No.2 and 5 and in Pedhagaon so also in Koparagaon, he had taken the complainant directly to them. His specific evidence against these accused is that on the day when the incident took place, accused No.2 and 5 worked as members of gang of the dacoits. Accused Raju, the so called brother-in-law of accused No.1, is still absconding and it shows that accused Raju was also a member of the gang of dacoits. In view of these circumstances, no probability is created by accused No.1 that he did not know anything about the robbers and he had gone to the spot with the complainant and at the instance of the complainant.

13. The complainant (PW-5) has given evidence that on 18th February, 1999, accused No.1 came to him to convince that he should agree to purchase the treasure for Rs.6 lac. It is accused No.1 who had promised to see that the complainant can give Rs.2 lac as advance amount and he can give the remaining amount, after taking delivery of other articles. After the incident also, it is accused No.1, who had taken the complainant and his men out of the field, towards the road.

14. The complainant (PW-5) has deposed that when he returned to Khadki, after the incident dated 18th February, 1999, accused No.1 again contacted him to ascertain as to whether the complainant had collected the money. Even when the complainant had collected only Rs.1 lac, accused No.1 promised him to see that at least some articles like silver coins are given for such consideration. Evidence of the complainant (PW-5) shows that it is the accused No.1, who had contacted accused No.2 Shelar for settling of such deal.

15. Complainant (PW-5) has further deposed that on 21st February, 1999, he, Balu, Deokar, accused No.1 and driver Macchindra left for the spot. The complainant has given evidence that at Kopargaon, accused No.2 and 5 joined them and they

took them to the spot, where a man was to wait with the treasure. Evidence of complainant (PW-5) shows that a farce of negotiations was created by the dacoits in the field and their attempt was to bring all the persons of the complainant together and then to surround them and to rob them of all the articles. Evidence of the complainant shows that the dacoits had taken care to see that nobody is able either to escape or to contact police. Evidence shows that care was also taken to take personal search of the complainant and the men brought by him.

16. There is specific evidence of the complainant (PW-5) that his entire cash, including the amount of Rs.1 lac kept in a bag and ornaments, which were on his person, were taken away by the robbers. He has given evidence that his friends were also robbed and in his presence accused No.2 and 5 ran away with other dacoits. Evidence of the complainant (PW-5) shows that he intended to give report to the police immediately and report could have been given to Kopargaon police, but it is accused No.1, who prevented him from doing so under some pretext. The complainant has deposed that report at Exhibit-30 was given by him on the next day with Yerwada police station at Pune. In the cross examination, it is brought on record that one police officer from Yerwada police station is a friend of the complainant. On

the basis of this admission, it was submitted that the complainant has tried to concoct things. However, this submissions is not acceptable, in view of the defense taken by accused No.1, which is already quoted above. He has admitted that the incident did take place.

17. Evidence is given by other witnesses like Macchindra-driver of the complainant and Deokar, which is similar in nature. Their evidence is consistent with the evidence of the complainant and it is as against accused No.1. Accused No. 1 was known to other witnesses also from the beginning. PW-5 and PW-6 have given evidence that they had seen one more person in the company of accused No.2 though they have not specifically named accused No.5 – Suresh in that regard.

18. Evidence of Balu (PW-7) – employee of the complainant is against both the appellants and it is in respect of both the incidents. His evidence is against accused No.1 and also accused No.2 and is consistent on material points with the evidence of the complainant. He had occasion to travel in the vehicle with accused No. 5 on two occasions and there is no reason to disbelieve his evidence on the point of identification of accused No.5. There is some inconsistency in the evidence of this witness

and evidence of complainant. This witness has tried to say that it is accused No.5, who had snatched and taken away ornaments from the person of the complainant when the complainant has probably said that it was other accused having similar name, Suresh. This inconsistency cannot make much difference for proving the offence, as against accused No.5 in view of other material.

19. The evidence shows that no test identification parade was arranged by the investigating agency. As accused No.1 was known to all the aforesaid witnesses from the beginning and as accused No.5 had travelled with them, on two occasions in the same vehicle for much time and as evidence was recorded on 10th February, 2000, this Court sees no reason to disbelieve all these witnesses. They identified accused No.1 and 5 in the Court. The evidence given as against accused No.1 is sufficient to draw an inference that he was member of aforesaid gang of dacoits and explanation given by him is not at all believable. Evidence given by aforesaid witnesses shows that accused No.1 was neither assaulted nor he was robbed though he was having wrist watch on his person. Other evidence against accused No.1 is already discussed by this Court. The contents of FIR (Exhibit-30) are consistent on material points with the evidence of the

complainant.

20. As the appeal is filed only by accused No.1 and 5, there is no need to discuss evidence given as against other accused, including accused No.2. The aforesaid material is sufficient to prove that both the accused i.e. accused No.1 and accused No.5 – present appellants were members of gang of dacoits and offence of dacoity did take place.

21. Learned advocate for appellant – Kumar submitted that he cannot be convicted for the offence punishable u/s 414 of the Indian Penal Code, in view of ingredients of the section. This submission is not at all acceptable due to aforesaid evidence. It can be said that the trial court could have safely convicted accused No.1 Kumar for the offence punishable under section 395 of the Indian Penal Code. It can be said that accused No.1 is fortunate that he is convicted for the offence punishable u/s 414 of the Indian Penal Code instead of offence punishable under section 395 of the Indian Penal Code. Evidence shows that in his presence, his associates robbed the complainant and others and they ran away and due to his advice given to the complainant, he did not contact police at Kopargaon and the thieves could conceal the stolen property and not much from the stolen

property was recovered during the investigation.

22. Learned counsel for the other appellant – accused No.5 submitted that evidence given as against the appellant does not show that he had caused grievous injury to anybody or he was holding any weapon, as required u/s 397 of the Indian Penal Code. He submitted that due to absence of such material against accused No.5, he cannot be convicted for the offence punishable u/s 397 of the Indian Penal Code. He submitted that minimum imprisonment of seven years is provided for the offence punishable under section 397 of the Indian Penal code, but there is no such minimum penalty for the offence punishable u/s 395 of the Indian Penal Code and so at least to that extent, the appeal needs to be allowed.

23. In view of the sentence given as against accused No.1, which is of two years, this Court holds that the sentence of imprisonment of two years can be given to accused No.5 also and he can be convicted for the offence punishable under section 395 of the Indian Penal Code. It is a lessor offence of the offence punishable under section 397 of the Indian Penal Code. Thus, to that extent, appeal of accused No. 5 can be allowed. In the result, following order.

ORDER

- i) Criminal Appeal No. 197 of 2000 is dismissed. The appellant-accused No.1 to surrender to the bail bonds for undergoing the sentence.
- ii) Criminal Appeal No. 190 of 2000 is hereby partly allowed. Judgment and order convicting the appellant for the offence punishable under section 397 of the Indian Penal Code is set aside and instead he is convicted for the offence punishable under section 395 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for two years and to pay the fine, which is already imposed by the trial court. This appellant is also to surrender to the bail bonds for undergoing sentence.
- iii) Both the appellants are entitled to the set off in the substantive sentence, as already ordered by the trial court.

[T.V.NALAWADE, J.]