

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.762 OF 2013**

**SANTOSH GOPAL NAYAR )...APPELLANT**

**V/s.**

**THE STATE OF MAHARASHTRA )...RESPONDENT**

Ms.Sarojini Upadhyay, Advocate for the Appellant.

Mr.Deepak Thakre, APP for the Respondent – State.

**WITH**

**CRIMINAL APPEAL NO.463 OF 2013**

**SHAHYAJU SUNNY OPI )...APPELLANT**

**V/s.**

**THE STATE OF MAHARASHTRA )...RESPONDENT**

Mr.Sachin Deokar i/b. Mr.V.V.Purwant, Advocate for the Appellant.

Mr.Deepak Thakre, APP for the Respondent – State.

**CORAM : ABHAY M. THIPSAY, J.**

**DATE : 2<sup>nd</sup> SEPTEMBER 2015.**

**ORAL JUDGMENT :**

1           These two appeals can be conveniently disposed of by this common judgment as the appellants in both these appeals were convicted in one and the same case i.e. Sessions Case No.14 of 2012 tried by the Additional Sessions Judge, Solapur. Initially, apart from the appellants, three others were also being prosecuted, but one of them absconded, and only four including the appellants were tried. The trial resulted in the conviction of the appellants and the acquittal of the other two. The appellant Santosh Nayar (Criminal Appeal No.762 of 2013) was the accused no.1 and the appellant Shahyaju Sunny Opi (Criminal Appeal No.463 of 2013) was the accused no.2, before the court of Sessions. The learned Additional Sessions Judge sentenced the appellant Santosh Nayar to suffer Rigorous Imprisonment for 5 years and to pay a fine of Rs.1000/-, with respect to offence punishable under Section 392 of the Indian Penal Code (IPC), to suffer Rigorous Imprisonment for 3 years and to pay a fine of Rs.500, with respect to offence punishable under Section 25(1)(a) of Indian Arms Act, and to suffer Rigorous Imprisonment for 3

years and to pay a fine of Rs.500/- with respect to offence punishable under Section 27(1) of Indian Arms Act. The learned Additional Sessions Judge sentenced the appellant Shahyaju Sunny Opi to suffer Rigorous Imprisonment for 5 years and to pay a fine of Rs.1000/-, with respect to offence punishable under Section 392 of the IPC. The learned Additional Sessions Judge directed that the sentences would run concurrently.

2           I have heard Smt.Sarojini Upadhyay, the learned counsel, appointed to prosecute Criminal Appeal No.762 of 2013 on behalf of the appellant Santosh Nayar. I have heard Mr.Sachin Deokar, the learned counsel for the appellant Shahyaju Sunny Opi in Criminal Appeal No.463 of 2013. I have heard Mr.Deepak Thakre, the learned APP for the State.

3           With the assistance of the learned counsel, I have gone through the record of the case. I have carefully gone through the entire evidence adduced during the trial. I have also carefully gone through the impugned judgment.

4           The prosecution case, as put forth before the trial court, may, in brief, be stated thus :

On 30<sup>th</sup> September 2011, Kartik Natesan, who was driving lorry No.TN-54/Z-4225, halted the same ahead of Zalki Octroi, Taluka Indi, District Bijapur, Karnataka State. After he had meals with his cleaner, two persons got into the truck with revolver. One of them, pointed out the revolver to Kartik and asked him to pay money. The said person also made enquiries about the consignment in the truck which information Kartik gave to him. The said robbers took out the key of the cabin box of the truck and removed cash of Rs.10,000/- therefrom. They snatched the mobile telephone instrument of the cleaner – one Raja. One of them took charge of the steering wheel of the truck and started plying the truck. Some other associates of the said robber, who had covered their faces by cloth, were following the truck. At one place, they got diesel filled in the truck. Thereafter, they asked Kartik to drive the vehicle. Thereafter, one of the robbers put a revolver on the neck of Kartik and asked him to park the truck on the side of the road. Two robbers, thereafter, got down from the

truck and ran away with the bag of Kartik. Kartik, then, jumped down and started running shouting *chor chor*. A number of persons assembled near the truck and chased the robbers, who were running away. One of the robbers fired two rounds in the air. The mob that had gathered accosted two robbers. The two robbers were handed over to the police, who arrived there. These two robbers are said to be the present two appellants. The one, who had fired revolver, is said to be appellant Santosh (Criminal Appeal No.762 of 2013). On a report lodged by Kartik, which was treated as First Information Report (FIR), a case in respect of offence punishable under Section 395 of the IPC and the offences punishable under the Arms Act came to be registered against these two appellants and three others.

5           Thus, the case of the prosecution against the appellants is that, they committed dacoity in respect of the truck and other property belonging to, and/or in possession of the First Informant Kartik, and that, at that time, the appellant Santosh possessed a fire arm and did use it. The case is that the

appellants, while they were attempting to run away after the dacoity, were chased by the mob that had gathered there, apprehended and were handed over to the police.

6           The First Informant Kartik was not examined as a witness during the trial. Even the cleaner of the vehicle Raja was not examined.

7           The prosecution examined eight witnesses during the trial. The first is, one Nitin Gadadare, who was a part of the mob that chased the culprits after the incident. The second witness Ganesh Shinde is a panch in respect of the arrest panchnama of the appellants, and the third witness Sidheshwar Kavade, is a panch in respect of the spot panchnama, which is also the panchnama in respect of the seizure of the truck. The fourth witness Popat Kale is also a panch in respect of the discovery of a Indica car, pursuant to the information disclosed by one of the accused in the case. His evidence is not relevant in the context of the case against the appellants. The fifth witness Rajkumar Pawar

is also a panch in respect of the seizure of the revolver and mobile, supposedly from the appellant Santosh. His evidence shows that when he was called by the police on 30<sup>th</sup> September 2011 at the police station, Nayar was there and that a revolver and mobile had been recovered from him. The evidence of this witness does not show that anything was actually recovered in his presence and indicates that these articles had already been recovered by the police, when he went to the police station. Even otherwise, that is the prosecution case. The sixth witness Premraj Nayar is the person whose services were used by the police as a translator for getting the statements of the appellants recorded. The evidence of this witness is not relevant. Most of the facts stated by him are not admissible in evidence. The seventh witness Prabhakar Shinde, Inspector of Police, attached to Tembhurni Police Station, at the material time, is the one who recorded the First Information Report and registered the case. He carried out further investigation into the matter, and apparently, the entire investigation was done by him only. The eighth and the last witness is P.S.I. Sachin Saste, who had filed the charge-sheet

against the appellants and the other accused. He had actually not carried out any investigation at all and had merely filed the charge-sheet, as PW7 Prabhakar Shinde was on leave.

8           It is clear that though the prosecution case was that the appellants were apprehended immediately after the incident while they were running away, no person, who had apprehended the appellants or any of them, has been examined during the trial. Even the members of the police party who apprehended the appellants, who were supposedly already detained by the mob, were not examined.

9           It has already been observed that the First Informant Kartik and the cleaner Raja, who had witnessed the actual incident of dacoity and who were the victims of the offence, were not examined.

10          The only witness who can claim to have some knowledge about the actual incident, is PW1 Nitin Gadadare. I

have carefully gone through his evidence. The recording of evidence is rather remarkable and it would be, therefore, appropriate to reproduce a certain part of his evidence here :

“My house and field is near the railway gate at Modnimb. There is garage in front of my house. I was standing there at about 4.45 p.m. Mean time I heard commotion from the railway gate. It happened on 30.9.2011. I rushed to the spot and found that 2-3 persons are running away. The driver told that those persons were thieves and to catch them. Driver was under the state of fear.”

It is remarkable that neither the Public Prosecutor in-charge of the trial, nor the court bothered to have it clarified as to where from the 'driver' cropped up.

11           According to Nitin, he found the said 2-3 persons running away, and that, while running they went towards Uma Vidyalaya. Nitin has named three persons, as the persons who

were among the persons chasing the culprits. The names of these persons are given by him as Dasharath Vhnamane, Sidheshwar Tole and Samir Shaikh. None of these persons has been examined as witness.

12 Nitin does say about his being a part of the mob that chased the culprits and further states that two of the culprits went in the field of maize crop and concealed themselves. Nitin further states that in the meantime, the police party came there and rounded the crop field. According to him, the police traced those persons from the crop field and made enquiries with them. After having said so, he proceeded to state what those persons told to the police. Obviously, the statements made by those persons, who are supposed to be the appellants before the police, which are of an incriminating nature, would not be admissible. Interestingly, even the identity of the appellants as the same persons, who were apprehended by the police from the crop field, has not been satisfactorily established. Nitin does not specifically say that the appellants were those two persons. The only evidence in that

regard is the last sentence in the notes of evidence of Nitin which reads "*I know those persons, at present they are before the court.*" There were four accused who were being tried and neither the Public Prosecutor, nor the learned Judge felt it necessary to have it clarified as to who were the two persons, who were before the court.

13           In my opinion, when the persons who had supposedly apprehended the appellants were not examined, and when even the members of the police party who had supposedly taken them in custody were not examined, the appellants could not have been held guilty of the alleged offences. Even the evidence of recovery of weapon from the appellant Santosh was not satisfactory as the person or persons, who had actually found it with the said appellant, have not been examined. The learned Sessions Judge has placed heavy reliance on the evidence of PW7 Prabhakar Shinde, overlooking that Prabhakar Shinde had no personal knowledge of the incident or even about the apprehension of the appellants.

14            This was a case, where the appellants should have been acquitted.

15            The appeals are allowed.

The impugned judgment and order of conviction of appellants is set aside.

The appellants are acquitted.

The appellant Santosh Nayar be set at liberty forthwith unless required to be detained in connection with some other case.

The bail bonds of appellant Shahyaju Sunny Opi are discharged.

Fine if paid, be refunded to the appellants respectively.

The appeals are disposed of in the aforesaid terms.

Professional fees payable to Ms.Sarojini Upadhyay, the learned Appointed Advocate, are quantified at Rs.3,000/-

**(ABHAY M. THIPSAY, J.)**

