

vks

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.309 OF 2013

Latya Isam Kale	]	
age 53 years	]	
Occn. Wandering	]	 <u>Appellant</u>
r/at : Beghar Vasti, Kokrale,	]	Orig. accused No.1
Taluka Khatav,	]	
District Satara	]	
	]	
presently in Central Jail Kalamba,	]	
Kolhapur	]	
V/s.		
The State of Maharashtra	]	
	]	
at the instance Aundh Police Station, Anudh	]	 Respondent
Taluka- Khatav, District-Satara.	]	

Mr. R. V. Bansode, for the Appellant.

Smt. V.R. Bhosale, A.P.P., for the Respondent-State.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 8TH APRIL, 2015.

ORAL JUDGMENT :

1. The appellant, who stands convicted for the offence punishable under Section 395 read with Section 397 of the Indian Penal

Code, and sentenced to suffer rigorous imprisonment for 7 years and to pay fine of Rs.5,000/- in default to further undergo rigorous imprisonment for six months, by the learned Additional Sessions Judge, Vaduj, District Satara, by judgment dated 23rd August, 2012, in Sessions Case No.26 of 2011, by this appeal challenges his conviction and sentence.

2. Facts, as are necessary, for deciding this appeal may be stated as under:-

On the night of 23rd January, 2011 at about 9.30 p.m P. W.2 Bramhadeo was present in his house alongwith his family members including his mother Suman P.W.3. At that time, they heard a sound "*chor-chor*". Hence they opened the door of the house and found the appellant standing there, with knife, in his hand and pointing the same towards P.W.2 Bramhadeo's brother Rajendra. The appellant entered into house alongwith other co-accused. They committed the theft of various articles, ornaments, sarees etc. and after causing injuries to P.W.2 Bramhadeo and his family members by threatening them with knife, the appellant and the other co-accused left the house of P.W.2 Bramhadeo.

3. On the next day in the morning, P.W.2 Bramhadeo alongwith

some villagers took search of the appellant and the other co-accused, and found them in his sugar-cane crop field. All the other co-accused succeeded in running away. However, the appellant alone was caught hold of as while running away he fell down. He was taken to the Police Patil - Narayan Laxman Kale and thereafter handed over to police.

4. At Aundh Police station complaint Exh.37 of P.W.2 Bramhadeo was recorded and on his complaint Crime No.7 of 2011 was registered. The investigation of the offence was taken over by P.W.9 API Gawali. He arrested the appellant and from his possession, two gold ear-rings (tops) were recovered under panchanama Exh.51, in the presence of P.W.7 panch Ashok Kale. During the custodial interrogation of the appellant by P.W.9 API Amol Gavali on 26.01.2011, the appellant expressed his willingness to show the place where the stolen articles were concealed. The Memorandum panchanama of his statement was made in presence of P.W.8 panch Prakash Phadtare. Thereafter the appellant guided the police and panchas to the field from where the suitcase containing three sarees and other articles came to be recovered and seized under panchanama Exh.53. All the stolen articles were identified by P.W.2 Bramhadeo as belonging to his family members. Meanwhile on the next day of the incident the spot panchanama was

made. Efforts were made to trace the remaining absconding accused also. However, as they were not found, further to completion of investigation, chargesheet came to be filed initially against the appellant alone. Subsequent thereto co-accused Sherya Bhosale, was arrested on 4th February, 2012 and supplementary chargesheet was filed against him on 13.2.2012.

5. On the case being committed to the Sessions Court, the trial Court framed charge against the appellant and the co-accused Sherya vide Exh.9. Both of them pleaded not guilty and claimed trial. The appellant raised specific defence of false implication on account of the complaint lodged by him against P.W.9 API Amol Gavali for causing injury to his son.

6. In support of its case, the prosecution examined in all nine witnesses and on appreciation of their evidence, the trial Court was pleased to hold the guilt of the appellant to be proved beyond reasonable doubt and convicted and sentenced him as aforesaid. As regards co-accused Sherya Bhosale, the trial Court acquitted him *sans* any incriminating evidence on record against him.

7. In this appeal, I have heard learned counsel for the appellant and learned APP. In my considered opinion, in order to effectively deal with the rival submissions advanced by them, it would be useful to refer to the evidence on record.

8. The prosecution case is based on the evidence of P.W.2 Bramhadeo - the informant and also eye witness and the evidence of P.W.3 Suman his mother. In their house the incident of this dacoity has taken place. According to evidence of P.W.2 Bramhadeo on 23rd January, 2011, he and his family members were present in the house. He was taking the meal at about 9.30 p.m. At that time he heard his brother Rajendra shouting loudly as "*chor -chor*". Therefore, he opened the door of the house and saw the appellant pointing knife to the neck of his brother Rajendra. The appellant was accompanied with his sons Navnath, Umesh, Bajarang, Anisha and Homya Bhosale. According to P.W. 2 Bramhadeo, there were totally 8 dacoits. They threatened and caused injuries to him and his family members with knife while committing the theft.

9. Those dacoits then opened the cupboard and took out suitcase therein. They displaced all the articles in the suit case including

sarees of his wife. They snatched gold chain from his mother P.W.3 Suman, Mangalsutra and ear-rings (tops) of his wife Archana, silver strip of Rupali and with all this booty, they ran away from the house.

10. In the morning at about 5.00 a.m. he went to the village and then with the help of villagers, namely, Vitthal Phadtare, Amrut Gopala, Dnyaneshwar Shinde and Ashok Bajrang Phadtare, he took search of the dacoits. He found the appellant and the other accused in the sugar-cane field. However, the other accused succeeded in running away whereas the appellant was caught hold of and taken to the Police Patil. From there he was taken to Aund Police Station, where he lodged complaint Exh.37. P.W.2 Bramhadeo further deposed that during the course of investigation, ear-tops of his wife were shown to him. He identified the same. Similarly he also identified the suit case and the sarees therein as belonging to his family members.

11. P.W.2 Bramhadeo is cross examined at length and it is brought on record that Aundh Police Station is at a distance of 15 Kms away from his house. It is also further brought out in his cross examination as his mobile phone was not working, he could not communicate the incident to anybody. Hence he had to wait upto 5.00 a.m. in the morning to

go to the village and seek their help to chase the accused. He has lodged report at police station at about 7.30 a.m. It is also brought on record that he was knowing the appellant since prior to the incident as the appellant was very much resident of the same area. The suggestion is put up to him in his cross examination that no such incident has taken place and as his father is serving in police department, police persuaded him to lodge false report against the appellant. This suggestion is, however, outrightly denied by him.

12. Then there is evidence of P.W.3 Suman, his mother, who has deposed about how the incident has happened and about her presence, the presence of P.W. 2 Bramhadeo and other family members in the house at the time of incident. According to her, at about 9.30 p.m. Rajendra, who was sleeping in the veranda of the house, shouted loudly. P.W.2 Bramhadeo therefore opened the door and the appellant and the co-accused entered into the house. The appellant snatched her gold chain by pointing knife to her neck. The mangalsutra of her daughter-in-law was also snatched. The ear-rings (tops) were snatched from her daughter-in-law Archana and her grand-son Aditya was lifted and thrown on the ground. Those accused persons also assaulted her elder son Rajendra by knife. In the said incident, her son P.W.2 Bramhadeo also suffered injury.

In the evidence before the Court, she has identified ear-tops (Article No.1) as belonging to her daughter-in-law Archana. She has also identified the other articles like suit case and the sarees which were recovered in the course of investigation, as belonging to her daughter-in-law Archana.

13. Both P.W.2 Bramhadeo and P.W.3 Suman have deposed that they were referred to Government Hospital, where they were examined by the Doctor. In the cross examination of P.W.3 Suman, it is brought on record that she was also knowing the appellant since prior to the incident. She has further stated that her son Rajendra has suffered injury to his right hand. She has deposed that she is not aware whether the appellant and his sons had filed criminal case against Aundh police. She is also not aware whether the appellant was allotted house at Beghar Vasti and he was authorized by the Government to protect the crops of farmers in the village. The only admission elicited in her cross examination is that the incident was apprised to the police on phone. The police came to the spot at about 8.00 a.m. whereas as per evidence of P.W.2 Bramhadeo, police came at about 2.30 p.m. Except for that there is nothing in the cross examination to challenge her credibility.

14. The evidence of these two witnesses who are injured eye witnesses stands corroborated from the evidence of P.W.6 Dr. Vikas Salunkhe, who has examined P.W.2 Bramhadeo on 24th January, 2011 and found one oblique abrasion over right forearm extensor aspect beneath the elbow joint of size 3 cm x ½ cm. P.W.6 Dr. Salunke has also examined P.W.3 Suman on the same day and found abrasion over her upper lip in mid line of size 2cm x ½ cm. According to him, the injuries sustained by both these witnesses were caused within 24 hours by hard and blunt object. Both of them had given to him history of assault by thieves on the night of 23rd January, 2011. He has issued injury certificates at Exh.43 and 44, of both these witnesses.

15. On the same day, P. W.6 Dr. Salunke has also examined the other injured Rajendra and found contusion on lateral aspect of left eye ball of size 3 cm x 2 cm. He has also examined Archana and found tenderness on her occipital portion of head and on examination of Aditya, he found abrasion at the base of right nasal alley of size ¼ cm x ¼ cm. As these injured are not examined as witnesses and hence even if their injury certificates are left out of consideration, the evidence of P.W.6 Dr. Salunke clearly goes to prove the injuries sustained in the same incident by P.W.2 Bramhadeo and P.W.3 Suman.

16. Then there is evidence of recovery of stolen articles. First there is evidence of P.W.7 panch Ashok Kale. According to him on 24th January, 2011, the appellant was present in the Chawadi of village Loni and his personal search was taken by the police in his presence and in that personal search a pair of ear-rings (tops) was recovered from the inner pocket of his pant. They were identified by P.W.2 Bramhadeo as belonging to his wife.

17. There is also evidence of P.W.8 panch Prakash Phadtare and P.W.9 API Gawali about recovery of other stolen articles like three sarees, suit case and knife, the weapon of assault, at the instance of appellant in pursuance of the disclosure statement given by him. As per their evidence during police custody, the appellant expressed his willingness to show the place where he has hidden the stolen articles. The memorandum of panchanama of his statement was made. Thereafter the appellant guided them to the sugar-cane crop field of P.W.2 Bramhadeo, from where the suit case, three sarees and knife were produced by the appellant which came to be seized under panchanama Exh.53.

18. Thus, in the present case, there is evidence of two eye

witnesses, who were injured in the incident, supported and corroborated with the recovery evidence of stolen gold tops, immediately after the incident from the possession of appellant and thereafter within two days therefrom recovery of remaining stolen articles at the instance of the appellant. The trial Court, has therefore, rightly relied upon the presumption under Section 114(a) of the Evidence Act, in view of the failure of the appellant in his statement under Section 313 of the Code of Criminal Procedure to offer any explanation about his recent possession of the stolen articles.

19. This prosecution case and evidence, is however, challenged by the learned counsel for the appellant on several counts. In the first place, it is submitted that, though as per evidence of P.W.2 Bramhadeo, he alongwith four other persons had caught hold of the appellant, those four persons are not examined by the prosecution and hence necessary adverse inference is to be drawn. The learned counsel for appellant also urged that, out of alleged five injured witnesses, only two injured are examined and the other three are not examined and hence adverse inference is to be drawn. However, as rightly submitted by the learned APP, when evidence of witnesses examined by the prosecution is found to be reliable and trustworthy, non-examination of other witnesses does not

become fatal to the prosecution case. As per well settled principle of law also, evidence has to be weighed and not counted. It is not the number of witnesses, but quality of the evidence adduced by them which is of importance. Therefore, the Court may even rely upon the evidence of solitary witness also to convict the accused, if his evidence is found to be reliable and consistent. Here in the present case there is absolutely no reason for any of two witnesses viz P.W.2 Bramhadeo and P.W.3 Suman to depose falsely against the appellant. Their evidence is cogent, consistent and inspires confidence in the judicial mind and hence non examination of the other injured or other witnesses does not make any dent in the prosecution case.

20. The next submission of learned counsel for the appellant is that as per evidence of P.W.3 Suman, her gold chain was snatched by the appellant, whereas what is recovered is gold ear-tops and not chain. It is also submitted by him that the other gold articles like Mangalsutra and silver strips are also not recovered. As regards this submission, it has to be stated that the evidence of both P.W.2 Bramhadeo and P.W.3 Suman, goes to prove that not only her gold chain but ear-tops of her daughter-in-law Archana were also snatched by the accused. It is pertinent to note that the accused were not caught while committing the theft. Appellant

alone was caught hold of, that too after some hours from the occurrence. Moreover, all the accused were not caught or arrested. Hence non recovery of other gold ornaments can be definitely explained in the instant case. Conversely, recovery of ear-tops from the possession of appellant within hours of the incident, goes to prove his complicity and non recovery of other articles does not make any dent in the veracity of the prosecution case. It is pertinent to note that three sarees belonging to daughter-in-law of P.W.3 Suman, were also recovered at the instance of the appellant and they are identified by P.W.3 Suman as belonging to her daughter-in-law.

21. Further submission of learned counsel for the appellant is that, as per evidence of P.W.2 Bramhadeo, the incident lasted for about 2 to 2 ½ hours. According to him, it is ridiculous to accept that the accused were in the house for 2 ½ hours and even then P.W.2 has not informed about the same to other villagers. In this respect it has to be remembered that when a witness deposes about timing or duration of the incident, it is mostly by way of estimate and therefore approximate time is given. It is not the exact time of the incident, therefore much significance cannot be given to that part of their evidence.

22. The recovery evidence is challenged on the ground that

P.W.8 Prakash has deposed that disclosure statement was given by the appellant on 24th January, 2011 whereas P.W.9 API Gawali has stated that it was given on 26.1.2011. According to learned counsel for the appellant, it creates doubt about the credibility of their evidence. However, in this respect also, it has to be borne in mind that P.W.8 panch Prakash is a rustic, rural witness and therefore, there is possibility of his giving some wrong date, when he is deposing about it, two years after the same. The memorandum and seizure panchanama (Exh.53) bear the date 26th January. Therefore, mere giving of wrong date by P.W.8 Prakash will not vitiate the evidence relating to recovery of these articles.

23. The last submission advanced by the learned counsel for the appellant is false implication of the appellant on account of the complaint lodged by appellant against P.W.9 API Gawali. In the cross examination of P.W. 9 API Gawali, it is suggested to him that the police custody of Nikal Kale was obtained in respect of one offence. Nikal Kale made complaint against him and police officers before the Court that he was assaulted by police during police custody. The said Nikal Kale is the son of present appellant. Hence being annoyed by the said complaint of Nikal Kale, the appellant is falsely implicated in this offence. These suggestions are denied by P.W.9 API Gawali in his cross examination. The

suggestions, which are denied, have no evidential value. No other evidence is produced on record by the appellant to substantiate his defence of false implication, like complaint lodged by his son Nikal Kale against P.W.9 API Gawali. Moreover, no such defence is put up to P.W.2 Bramhadeo or P.W.3 Suman or any other prosecution witnesses. It also does not appeal to reason that these two witnesses will lodge false case of dacoity against the appellant and the other accused at the instance of police. The recovery evidence in the instant case of stolen articles from the possession and at the instance of appellant also goes to prove the case and falsifies the defence of the appellant.

24. In short, therefore, it has to be held that the trial Court has rightly held the guilt of the appellant to be proved beyond reasonable doubt for the offence punishable under Section 395 read with Section 397 of the Indian Penal Code. Consequently the appeal stands dismissed, confirming the conviction and sentence of the appellant.

[DR. SHALINI PHANSALKAR-JOSHI, J.]