

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

CRIMINAL REVISION APPLICATION NO.17 OF 2002

Vikas M.Patekar,
Age 40 years, Occ. Business,
Residing at Shivaji Nagar | Gaothan,
Pune at present detained
behind bars at Yerawada Central Prison,
Yerawada, Pune.

....Applicant.

Vs.

State of Maharashtra,
Through Deccan Police Station,
Pune.

....Respondent.

Mr. Uday Warunjikar, Advocate for the Applicant.
Mr. A.R.Patil, for the Respondent State.

**CORAM : C.V.BHADANG, J.
DATE : 29TH APRIL , 2015**

ORAL JUDGEMENT:

By this revision application the applicant original accused No.3 takes exception to the Judgment and order dated 31 December 2001 passed by the learned Additional Sessions Judge, Pune in Criminal Appeal No.71/1991 . By the impugned Judgment, the learned Sessions Judge while dismissing the appeal

has confirmed the judgment of the conviction and sentence dated 8 May 1991 passed by the Judicial Magistrate First Class, Pune in Regular Criminal Case No.481 of 1989 by which the applicant and the original accused No.1 Prashant Ramakant Kapase were convicted for the offence punishable under Section 380 read with 34 of the I.P.C. and were sentenced to suffer R.I. for two years and to pay a fine of Rs.2000/- each, in default to suffer S.I. for one year.

2) The prosecution case may be briefly stated thus:

That, on 8 August 1989, the complainant P.W.1 Hemant S. Kulkarni along with his sister P.W.2 Manjusha Kulkarni had gone to the place of their relative by name Shri. P.R.Joshi at Madhusanchay Society, Karve Nagar, Pune. This was at about 8.00a.m. It is said that P. W.No.2 Manjusha Kulkarni had kept two gold bangles in her purse on a table in the bedroom. At about 10.00a.m. P.W.2 Manjusha wanted to wear the gold bangles, when she found that the purse was not on the table and it was on the window seal. The purse was not found containing the gold bangles. However, the complainant (P.W.1) Hemant Kulkarni or P.W.2 Manjusha Kulkarni did not report the matter to the police.

It so happened that on 17 October 1989, the present applicant along with two others namely Prashant Kapase (original

accused No.1) and Dattatraya Deshpande (original accused No.2) were arrested in Crime No.97/1989. It is said that during the investigation of the same the accused No.1 Prashant Kapase while in custody gave a confessional statement offering to produce various articles in respect of which they had allegedly committed theft. The statement was recorded in the form of a memorandum at Exh.30. It is said that accused Kapase then led the police and the panchas to various places, including the house of the present applicant, where applicant produced one gold bangle. It is said that the accused Prashant also led police party to the shop of one Waikar Saraf at Kothrud, however his shop was found locked. On the next day Waikar Saraf produced one gold bangle at the police chowki which was allegedly sold by the applicant.

3) It appears that police had gone to the house of Shri. Joshi who in turn informed about the recovery of the articles to complainant (P.W.1) Hemant Kulkarni and his sister (P.W.2) Manjusha, who then went to the police station and identified the gold bangles. This was on 17 October 1989 when the complainant for the first time reported the theft of gold bangles. They were again called on 20 October 1989 at Deccan Police Station when they were shown another bangle recovered from Waikar Saraf which they identified. On completion of the investigation a charge sheet was filed against the applicant and two others before the Judicial Magistrate First Class, Pune. At the trial the prosecution

examined in all six witnesses. The learned Magistrate by the impugned judgment found that the present applicant and the accused No.1 Prashant Kapase, were guilty of the offence punishable under Section 380 read with Section 34 of the I.P.C. and they were convicted accordingly. The applicant unsuccessfully challenged the conviction before the learned Sessions Judge in Criminal Appeal N0.71/1991. That is how the applicant is before this court.

4) I have heard Shri. Warunjikar, learned counsel for the applicant and Shri. Patil learned APP for the State. With the assistance of the learned counsel for the parties, I have perused the entire evidence and the judgments of the courts below.

5) It is submitted by Mr.' Warunjikar learned counsel for the applicant that the courts below have relied upon the confessional statement of the co accused, which is not permissible. It is submitted that, so far as recovery of the other bangle is concerned, the prosecution has not examined Waikar Saraf. It is also submitted that Waikar Saraf is also not arrayed as an accused. The learned counsel has taken me through the prosecution evidence, in order to submit that it is not sufficient to bring home guilt against the present applicant. The learned counsel would submit that courts below have relied upon the alleged non furnishing of the explanation of the applicant about his possession

of the gold bangles in order to come to the conclusion that the applicant has complicity in the offence. It is stated that such a course is not permissible.

6) Shri. Patil, learned APP has supported the impugned judgment. It is submitted that the panch witness PW.4 and the Investigating Officer PW.6 have consistently stated about the recovery of the gold bangles from the house of the present applicant which he has failed to explain. He submitted that the courts below have rightly come to the conclusion holding the applicant guilty. It is submitted that no interference is called for in revisional jurisdiction of this court.

6) I have considered the rival circumstances and the submissions made. It would be significant to note that according to the prosecution incident had occurred on 8 August 1989 and the complaint was lodged only on 17 October 1989 i.e. after the alleged recovery of the golden bangles. There is no satisfactory explanation forthcoming for such belated lodging of the complaint. The prosecution has come with the case that as the complainant was not hopeful of the recovery of the ornaments, he did not find it fit to report the matter which has been accepted by the courts below. I do not find that such explanation could have been accepted. In so far as the evidence against the present applicant is concerned, it is in the form of disclosure statement purportedly

made under Section 27 of the Evidence Act by a co accused namely Prashant Kapase. It is trite that evidence of discovery can ordinarily be used as corroboration to any other substantive evidence available. When such evidence about the discovery is tried to be used against the co accused, it becomes a still weaker circumstance. None of the courts below have found that the memorandum Exh.30 or seizure panchanama Exh.31 bears the signature of the present applicant in order to establish that gold bangles were recovered from the house of the applicant. It is only when the recovery of the gold bangles is proved, the question of furnishing explanation of its possession can arise. Even PW. 4 Sripad Chilakwad who is a panch on the Memorandum Panchanamas Exh.30 and 31 has not stated that panchamama bears the signature of the applicant. In that view of the matter, I do not find that the evidence about the discovery of property at the instance of the co-accused can be used against the applicant.

So far as second gold bangle is concerned which is allegedly produced by Waikar Saraf, the prosecution had not examined the said witness on the ground that he was not available. In either case the fact remains that so far as second bangle is concerned there is no link established between the present applicant and the recovery of the said ornament, when it was recovered from a witness who is not examined. As far as identification of the two gold bangles is concerned P.W. No.1

Hemant Kulkarni and P.W.2 Manjusha have admitted that they were identified only on the basis of their design which is a common design available in the market.

7) The perusal of the judgment of the learned Sessions Judge shows that the court has heavily relied upon the absence of explanation about the possession of the gold bangles. Following observation in Para 11 are to be point.

“Therefore, though the statement made by accused No.1 Prashant is not binding accused/appellant Vikas, discovery of stolen articles from the possession of accused/appellant Vikas cannot be disputed. As stated earlier, it is not the contention of the accused/appellant Vikas that those recovered gold bangles are belonging to him. Therefore, it will have to be presumed that accused/appellant Vikas himself committed the theft”.

On careful consideration of the circumstances and the evidence produced on record such a reasoning cannot be accepted. When the finding recorded by the courts below is found to be based no evidence and/or where the courts have proceeded on a wrong footing, rendering the finding unsustainable, this court

will not only be justified, but duty bound to step in and correct the error. Thus, the conviction of the applicant cannot be sustained. In the result, I find that the prosecution has failed to establish beyond reasonable doubt that it is the applicant who had committed theft of gold bangles. In the result, the appeal is allowed. The impugned Judgment passed by the learned Magistrate as well as the Judgment in Criminal Appeal No.71/1991 passed by the learned Sessions Judge are hereby set aside. The applicant is acquitted of the offence punishable under Section 380 of the I.P.C. His bail bonds stand cancelled. Fine, if any paid, be refunded to the applicant.

(C.V. BHADANG, J.)