

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 72 OF 1995**

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| 1. | Suryakant @ Balu Appaji Mirashi
residing at New Chikalwadi, G-Block,
Room No.24, 1 st floor, Centre Road,
Grant Road, Bombay 400 007. |)
)
)
) | [Abated as per Court's
order dated 19/8/13] |
| 2. | Manohar @ Mandu Gopal Rathod
residing at New Chikalwadi, G-Bolock,
Room No.18, Central Road, Grant Road,
Bombay-7. |)
)
)
) | |
| 3. | Santosh Daulat Bhalekar,
residing at Badri-Narayan Dham,
Room No. 103, Kharegaon, Bhaindar,
Dist. Thane. |)
)
)
) | |
| 4. | Santosh Shyam Sawant,
residing at P.P.T. Colony, Bldg. No.5,
Cotton Green, Shivri, Bombay-33. |)
)
) | |
| 5. | Harishchandra Genu Khosa,
residing at Behri Bldg.,No.3,Room No.37/38)
T.J. Road, Shivri, Bombay-15. |)
)
) | [Abated as per
Court's order
dated 16/3/2006.
[|
| 6. | Chandrakant @ Pintya Harichandra
Nandgaonkar, residing at Shiv Shakti Nagar,
Room No.6, Santosh Photo Studio,
Dhanmill Naka, Bombay-25. |)
)
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) | [
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)Appellants
(Orig. accused Nos. 2, 3,
5 to 8) |
| vs. | | | |
| 1. | The State of Maharashtra | ... |) |
| 2. | The Bhoiwada Police Station. | |)Respondents |

Ms.Shweta Sangtani, Advocate appointed for the appellants.
Ms. A.A.Mane, APP, for the State.

CORAM: SMT.SADHANA S.JADHAV,J.
DATE : 24th November, 2015.

ORAL JUDGMENT:

1. The present appellants are the original accused Nos. 3 and 5 in Sessions Case No. 749 of 1993 @ 422/1994. At the trial in Sessions Case No.749 of 1992, 11 accused were prosecuted for the offences punishable under Sections 394, 395, 397 read with Section 34 of Indian Penal Code and original accused Nos. 9 to 11 were prosecuted for the offences punishable under Section 412 of Indian Penal Code. The present appellants are original accused Nos. 3 and 5.

2. The appeal stands abated against original accused Nos.2, 4, 6, 7 and 8. Accused Nos. 1, 9, 10 and 11 are acquitted. The appellants herein are convicted of the offence punishable under Section 395 read with Section 34 of Indian Penal Code and are sentenced to suffer R.I. for seven years and fine of Rs.2,000/- each, in default to suffer R.I. for one year. They are acquitted of the offences punishable under Section 397 read with Section 395 of IPC. Hence, this Appeal.

3. Such of the facts as are necessary for the decision of this appeal are as follows :-

(a) That on 11.10.1992 at about 3.30 p.m., 7 persons had entered into the business premises of one Gopal Shivkumar Mandal, who was a businessman. He was a jeweller. That several jewellers used to send raw gold and do business of ornaments which were manufactured in this business premises. On the day of the incident, approximately 25 persons were doing their jobs in the business premises. At about 3.30 p.m., there was a knock on the door. One of the employees opened the door. As soon as the door was opened, 5 – 6 persons had forcefully entered into the said room. They were armed with revolvers and choppers. Their companions were standing guard outside the room. The said 5 – 6 persons had threatened the complainant and his employees that they should not leave their respective places nor they were allowed to raise alarm. They were threatened of dire consequences. One of the thieves which caught hold of the complainant and ordered him to open the locker. The complainant was under threat and hence he opened the locker. The companions had collected all the new and old ornaments along with the raw gold which was

kept in the locker. The same persons had opened the drawers of the table and collected ornaments, gold and cash. Thereafter, each of the employees was individually threatened by the thieves. Thus, they all collected the gold as well as ornaments from the employees. They had also collected gold from the employees who were working on the mezzanine floor of the said shop. They all threatened the complainant that he should not raise cry or alarm as soon as they leave. The thieves had left the said premises. The room was latched from outside. Thereafter, someone had opened the door from outside. The complainant was in a state of shock. At about 5 – 5.30 p.m., the complainant was taken to a nearby business premises from where he contacted Bhoiwada Police Station and had given information of theft which was committed in his business premises. Soon thereafter, the police from Bhoiwada Police Station had come to the premises and the statement of the complainant was recorded. The complainant had given the report alleging therein about the incident that had occurred. He had stated in the FIR that one of his employees had gone to answer nature's call. He opened the door from outside and only thereafter he could lodge his report. On the basis of the said report, Crime No.440 of 1992 was registered at Bhoiwada Police Station against unknown persons for the offences punishable under Sections 394, 395, 397 read with Section 34 of IPC.

4. Original accused No.3 was arrested on 23.2.1993. The original accused No.5 was arrested on 27.2.1993. After completion of investigation, charge-sheet was filed. The case was committed to the Court of Sessions and registered as Sessions case No.749 of 1993 @ 422 of 1994. The prosecution examined as many as 28 witnesses to bring home the guilt of the accused.

5. The learned counsel appointed for the appellants rightly submits that the case rests upon the evidence in the nature of test identification parade and the alleged recovery of a chopper at the hands of the original accused No.2.

6. PW-1 Gopal Mandal happens to be the complainant. He has partly deposed in consonance with the first information report. According to him, there was one person holding a revolver having a cloth jute bag. The said person is purportedly original accused No.5. The learned counsel appointed for the appellants has drawn attention of this Court to the inherent inconsistencies in the substantive evidence of PW-1. According to PW-1, the time of incident is at about 3.30 p.m. On 11.10.1992, 5 – 6 persons had come inside the business premises. They were armed with weapons like revolver and choppers. They had threatened the complainant

and his employees. He was coerced to open the Safe. They had taken the ornaments as well as the raw gold which was in the Safe. The thieves had closed the main door. They had also closed the window which was open prior to their ingress to the said room. That the thieves had latched the room from outside while they were leaving. That after 5 – 7 minutes, a customer had come to the room. The said boy had opened the latch and asked as to why the door was latched from outside. The complainant in his examination-in-chief has stated that he does not know the name of the person who had opened the door. The complainant has subsequently deposed that the boy who could opened the door was from Ramesh Jewellers. That after the boy had left the premises the owner of Anil Jewellers had come to the shop. The owner of Anil Jewellers informed the complainant that the boy from Ramesh Jewellers had informed him that some theft had occurred in the shop. The owner of Anil Jewellers had enquired with the complainant as to whether the police report was filed. The complainant had informed him that he does not know the telephone number of the police station. At that time, the complainant had tried to use the telephone and had noticed that the wire is cut. He believed that the thieves had cut the telephone wire. The complainant along with the owner of Anil Jewellers went to the shop of Navratan Jewellers on the other side

of the road and the complainant had informed Bhoiwada Police Station and had given the address. The police had reached in a few minutes. The statement of the complainant was recorded by the police. The said report is marked as Exhibit 24. The complainant has further deposed that Noor Hasan, who was working with him, had gone to answer nature's call at the time of incident. When Noor Hasan entered the room, the robbers were collecting gold, cash and ornaments and the persons who were standing guard outside the room had assaulted Noor Hasan. It is also stated that Noor Hasan had no injury on his person.

7. PW-1 has further deposed that due to communal riot of December 1992, he had left for his native place. He returned to Mumbai on 4.3.1993. Those employees had returned about the same time. On 5.3.1993, he had been to Bhoiwada Police Station and had met Police Inspector Yadav who informed him that thieves were arrested and he should come on the next day at about 1.45 p.m. The complainant had gone to the police station on the next day. At that time, PI Yadav had introduced one Mr. Jain to the complainant and he was informed that Mr. Jain is the Special Executive Magistrate who has conducted the test identification parade. Two persons were also shown to the complainant who were to act

as panchas. Test identification parade was held. PW-1 had identified original accused No.4. There is no substantive evidence to the extent that PW-1 had identified original accused No.s 3 and 5 in the test identification parade. He had also identified original accused No.8.

8. It is elicited in the cross-examination that at the time of incident, 7 thieves had entered the room. Except for opening the Safe, all the while the complainant was sitting on a chair. He was watching the activities of the thieves. That he has not given description of the revolver. It is admitted that there are 15 rooms on the second floor of the said building and in one of the rooms, there is workshop of the complainant i.e. the place of incident. It is specifically admitted that families are residing in the rest of the rooms and family members are often coming to their respective rooms. The room where the incident had occurred is at the end of the floor. There is only one staircase for the 2nd floor. He has also admitted that when the police arrived they had not recorded the statement of any of the neighbours. That he had not accompanied the police officer to the police station immediately after the complaint was reduced into writing.

9. The learned counsel appointed for the appellants has further

drawn attention of this Court to the fact that PW-1 had specifically stated in his substantive evidence that on the same day the police officer had come to his room at about 9 or 9.30 p.m. The police officer asked him to accompany them. When he went to the police station, the police had shown him photographs of habitual offenders. They had not told him anything else. They had also shown the photographs to the employees of the complainant. There were enquiries with the employees.

10. PW-1 has specifically admitted in the cross-examination that he was acquainted with the Special Executive Magistrate Mr. Jain even prior to the incident. That Mr. Jain happens to be the owner of Swastik Jewellers and he was the customer of PW-1. The gold and ornaments of Swastik Jewellers were also stolen away at the time of incident from the scene of offence. Mr. Jain had told him that the thieves would come in the room and that he should identify them. Initially he had given description of accused No.3 as a fair person. However, at the time of identifying PW-3 before the Court he has specifically admitted that the original accused No.3 Manohar is having a black complexion. There is no reference to original accused No.5 in the substantive evidence from PW-1. It is further admitted in the cross-examination that his employee Noor Hasan who had gone to

answer nature's call, which is adjacent to the place. The photographs of the habitual offenders were also shown to Noor Hasan. PW-1 has admitted in the cross-examination that he had not given any specific mark of identification of any of the accused except description in the complaint. Upon perusal of the first information report, it appears that the description was given only of the clothes and age. The first information report shows that all the accused were in the age group of 25 and 27.

11. It is specifically stated in the first information report that one of the employees who had gone to answer nature's call had opened the room. There is no reference that the boy who had come from Ramesh Jewellers had opened the door.

12. Similar is the case in respect of the complainant who stated that the photographs were shown to them. It is pertinent to note that PW-2 Lallu Das, who happens to be one of the employees of the complainant, has deposed before the Court in his examination-in-chief that when he and Anup went inside the room of PI Yadav, he had shown the accused No.3 and 6 who were present in the room and Mr. Yadav informed them that they have arrested these two accused.

13. PW-5 Noor Hasan is another material witness. He has deposed before the Court that on 11.10.1992 at about 3.00 p.m., he had gone to answer nature's call. When he returned to the room, he saw his door was closed. He knocked the door from outside. At that time, he received a blow on his back. He had seen one person had already assaulted him from behind. He had then proceeded to give description of the accused who were standing guard outside the room. He has mentioned their age. According to him, he had entered the room. It is clear from his evidence that he has not been able to identify the present appellant before the Court and it appears that there has been mistaken identity. It is also admitted by him that he had seen the photographs shown to him by the police.

14. It appears from the evidence on record that all the witnesses were shown the photographs by the police. The evidence of the Investigating Officer i.e. PW-26 Hanmanta Jahagirdar shows that he had not obtained the signature of the complainant on the FIR form. He had also not enquired with the complainant about the name of the person who had called the police and had given telephonic information. That except the time mentioned in the form, he had no documentary evidence to show that

the complaint was obtained at 5 p.m. The complainant had informed the police that there was a delay in lodging the FIR since the complainant and his employees were in a frightened state of mind.

15. It is pertinent to note that in this case, recovery of gold is from original accused No.11 who had received the stolen property allegedly from the thief. They were not ornaments as the ornaments had been melted and there were gold bars. The original accused No.11 has been acquitted of the charge under Section 412 of IPC. It is further pertinent to note that what is recovered from the original accused No.3 is only a chopper. In fact, in this case, even according to the prosecution, three persons were holding choppers. It is a matter of record that choppers had not been used to assault the complainant or anybody else. Although the complainant submits that some of his employees were injured, there are no medical certificates on record to corroborate the same. There is no recovery of any stolen article from the original accused No.5.

16. In view of the discussion hereinabove, it is clear that as far as test identification parade is concerned, the prosecution has failed to establish the same and has further failed to establish the identity of the

original accused No.3 and 5 as the persons who were involved in the incident dated 11.10.1992 which had taken place at about 3.30 p.m. in the workshop of the complainant. The investigating officer has not assigned any specific reason for not recording statement of the neighbours to the workshop. Right from the complainant to the Special Executive Magistrate, all the witnesses are interested witnesses. It cannot be denied that the incident had taken place, but unless and until the authorship is established by the prosecution, it cannot be said that the present appellants had actually committed the said offence or were present at the scene of offence. The accused who had been identified by the witnesses have been acquitted. The very fact that the photographs of the thieves were shown to the witnesses would result in failure on the part of the prosecution to establish beyond reasonable doubt that the present appellants were identified either in the test identification parade or in the Court.

17. In view of this, the accused-appellants herein deserve benefit of doubt. Hence, the appeal is allowed. The conviction and sentence imposed by the Addl. Sessions Judge, Greater Bombay vide judgment and order dated 12.1.1995 is set aside. The appellants are given the benefit of doubt. The bail bonds are cancelled. Appeal stands disposed of.

18. The learned counsel appointed for the appellants has assisted the Court to the best of her capacity and this Court appreciate the efforts taken by her. Her professional fees are quantified at Rs.5,000/- (Rupees five thousand only), to be paid within three months from today.

(SMT.SADHANA S.JADHAV, J.)