

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 172 OF 1999

- | | | | |
|----|---------------------------------------|---|-----------------|
| 1. | Shri Ramesh Tarachand Bhosale @ |) | |
| | Shri Ramesh Tarachand Kale @ |) | |
| | Shri Vilas Tarachand Kale. |) | |
| | Aged 21 years, R/o. Suryagaon Shivar, |) | |
| | Kolpewadi, Shahajapur Zopadpatti, |) | |
| | Taluka : Kopargaon, |) | |
| | Dist. Ahmednagar. |) | |
| | |) | |
| 2. | Shri Ankush Jalinder Shinde |) | |
| | @ Ankush Jairam Shinde, |) | |
| | Age 19 years, R/o. Laxminagar, |) | |
| | Dharamgaon Road, Kopargaon, |) | |
| | Dist. Ahmednagar. |) | |
| | |) | |
| 3. | Shri Deepak Bansi Chavan |) | |
| | @ Adesh @ Lahauji Gangaram Chavan, |) | |
| | Aged 20 years, R/o. Ashok Nagar, |) | |
| | Chowky No. 40, Kopargaon, |) | |
| | Dist. Ahmed Nagar. |) | ... Appellants. |

Versus

The State of Maharashtra.	)	
(The Sub-Inspector of Police,	)	
Lasalgaon Police Station, Taluka	)	
Niphad, Dist. Nashik.)	)	... Respondent.

Ms. Rupali Shinde, advocate appointed for Appellant/Accused No. 1.

Ms. Farhana Shah, advocate appointed for Appellant/Accused No. 2.

Mr. Arfan Sait, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J
DATE : NOVEMBER 16, 2015

JUDGMENT:

1 Heard the learned Counsel appointed for the appellants and the learned APP for State.

2 At the threshold the learned Counsel appointed for the appellant No. 3 Deepak Chavan submits that the original Accused No. 3 Deepak Chavan has expired on 16/1/2011. Hence, the appeal stands abated as far as the original accused No. 3 is concerned.

3 The appellants herein are original accused Nos. 1 and 2 in Sessions Case No. 153 of 1998. By Judgment and Order dated 16/2/1999, the appellants herein are convicted for offence punishable under Section 457, 380, 394 read with Section 34 of the Indian Penal Code and are sentenced to suffer R.I. for 5 years and fine of Rs. 250/-

each on each count, in default, further R.I. for 3 months. The appellants were tried as under-trial prisoners. Hence, this appeal.

4 At the time of admission of the appeal, the appellants were enlarged on bail. Their substantive sentence was suspended by an order dated 12/4/1999. It appears from the record that the original accused No. 2 had not furnished bail bond. The original accused No. 1 Ramesh Bhosale had furnished bail bond. However, he had not complied with the conditions imposed upon him. The matter was called out for hearing on 6/2/2012. None appeared for the appellant. Hence, this Court had issued non-bailable warrant returnable on 21/2/2012. The original accused No. 1 was arrested and produced before the Court on 1/4/2012 and till today he is in jail. However, the original accused No. 2 Ankush Shinde has undergone the substantive sentence imposed upon him. Hence, the appeal is heard as a jail appeal.

5 Such of the facts necessary for decision of this appeal are as follows :

On 6/7/1998 one Ratnakar Kapse lodged a report at Lasalgaon Police Station alleging therein that in the intervening night of 5/7/1998 and 6/7/1998 he was sleeping in his hotel. At about 2 to 2.30 a.m. his brother Santosh who was residing in his neighbourhood rushed to the hotel and informed him that he had heard some noise in the house of the complainant and he suspected that thieves have entered in the house. The complainant rushed home. He found that the door of the house was unlocked. He entered the room. He saw unidentified persons standing near the cupboard. They had broke open the cupboard. They had removed the articles from the cupboard. He had made efforts to resist them. At that time, he was assaulted. He had sustained stab wound on his arm. Similarly, one of the thief had twisted his testicles and therefore, he could not nab the thieves, as he felt giddiness. Taking advantage of the situation that the complainant is in injured condition, the thieves had left the house with the stolen articles. His brother had arrived at the spot. They

approached Lasalgaon Police Station. Before going to the police station, the complainant was given first aid at Vinchur. On the basis of the report lodged by Ratnakar Kapse, Crime No. 42 of 1998 was registered against unidentified persons for an offence punishable under Section 394, 459 read with Section 34 of the Indian Penal Code.

6 It is the case of the prosecution that in the early hours of 6/7/1998 PSI Sanjay Deshmukh who was holding additional charge of Lasalgaon Police Station had learnt that 3 persons had been apprehended in Deshmane Shivar. He had sought the aid of dog squad. He had also summoned finger print expert who had taken photographs. It appears that at the same time, the thieves had committed theft in the same locality in atleast 4 to 5 houses. In Deshmane Shivar, the villagers had nabbed these three persons. The dog squad had pointed out to three accused persons. The police with the help of panchas had conducted the arrest panchanama and seizure panchanama. The police had found the accused with silver

articles, cash amount and clothes. The complainant was called to the police station. The complainant had identified the articles, which were stolen from his house. Similarly, the other persons in whose house the theft was conducted had given description of the articles which were stolen. They were found in the custody of the nabbed persons.

7 On 7/7/1998, test identification parade was conducted in the Zilla Parishad Rest House, Niphad. The complainant Ratnakar Kapse had identified the accused persons from the row of dummies placed for identification.

8 After completion of investigation, charge-sheet was filed. Charge was framed against the accused. The accused pleaded not guilty and therefore, they were tried. The learned Sessions Judge had rightly observed that it is an admitted position that there was house breaking in the said vicinity. There was theft in the house of Ratnakar Kapse and Laxman Salunke. The learned Sessions Judge had also

rightly held that the complainant had given description and the valuation of the articles at the time of lodging of the first information report and same articles were found in possession of the accused persons at the time of arrest panchanama and seizure panchanama. It was clear that the muddemal property was seized from the possession of the accused persons and that the accused persons could not get any plausible explanation to disclose as to how the articles were found in their possession. Similarly, they did not claim ownership of the said articles. Hence, the panchanama at Exh. 14 was proved.

9 The prosecution has examined as many as 11 witnesses to prove the guilt of the accused.

10 P.W. 1 Vasant Pawar happens to be a panch witness for the arrest panchanama as well as seizure panchanama. The witness has identified the accused person who was arrested in his presence. He could not identify the articles. He had admitted that he is from

Kolpewadi whereas the accused were nabbed in Deshmane Shivar which is admittedly at a distance of 4 to 5 km. He is an independent witness. He had identified the accused before the court and hence, it is a substantive evidence.

11 At this stage, the learned Counsel appointed for the accused has rightly submitted that P.W. 1 was not called for the test identification parade. The learned APP submits that the evidence of identifying the accused at the test identification parade is corroborative piece of evidence whereas identification before the court is a substantive piece of evidence and therefore, no fault can be found with the evidence of P.W. 1 who has identified the accused persons and that he is a witness to their arrest panchanama.

12 P.W. 3 Ratnakar Vasant Kapse, original complainant is the material witness. He had deposed before the Court in consonance with the first information report which is marked at Exh. 18. In the substantive evidence, the complainant has specifically stated that

before he was taken to the police station by his brother, he had opened the cupboard and he had found that the silver articles like Gulabdani, Attardani, Agarbatti stand, wrist watch, silver coins embossed with the image of goddess Laxmi and one saree were missing from his cupboard. He had described the said articles in the first information report. He had also given the description of the accused as well as the description of the clothes worn by the accused in the first information report.

13 He has further stated that on the third day of lodging of the first information report, he was summoned by the police to Tahasildar Office at Niphad. He had identified the thieves in the test identification parade. Thereafter, he was shown the articles which were seized from the custody of the accused at the time of their arrest panchanama and he had identified all the articles, as he had described them in the first information report.

14 It is pertinent to note that the complainant has not been shattered in the cross-examination. A stray admission is elicited in the cross-examination that before leaving for the hospital, he had not opened the cupboard and had not verified about the articles which was stolen. He had admitted in the cross-examination that at the time of leaving his house for going to hospital he had seen that house of his brother was unlocked. Testimony of the complainant appears to be of a sterling nature. Moreover, the articles described were found in the possession of the accused at the time of arrest panchanama. The test identification parade was conducted on 8/7/1998.

15 The learned Counsel for the appellant vehemently submits that the test identification parade was not conducted in consonance with the criminal manual. It is submitted that the accused No. 1 i.e. Ramesh Bhosale was initially identified by the complainant. However, the complainant has not specified the role of the identified accused. On behalf of the appellant No. 2 i.e. original accused no. 2,

it is vehemently submitted that the dummies who were presented at the time of test identification parade of the original accused no. 1 were not changed. Only after exit of original accused No. 1, the original accused no. 2 has taken his place in the same row. Therefore, the same witness could easily identify the accused No. 2. Hence, according to the learned Counsel for the appellant i.e. the original accused No. 2, it cannot be said that the witness had identified the original accused No. 2.

16 It is also submitted by the respective Counsel that the version of the complainant that zero bulb was switched on at the time when he entered in the house, cannot be believed. It is also submitted that the complainant could not have remembered the features of the accused persons in a dim light and therefore, the identification parade would lose its significance.

17 As against this, the learned APP submits that the incident has occurred in the intervening night of 5th and 6th July, 1998. The

complainant had a scuffle with the accused persons. He had seen them while they were assaulting him. The incident must have lasted for more than 5 to 10 minutes and therefore, within 3 days, he could not have forgotten features of the persons with whom he had scuffle.

18 In any case, seizure of the stolen articles from the person of the accused soon after incident is a relevant factor which needs to be considered under Section 8 of the Indian Evidence Act. Moreover, the accused had been nabbed in the neighbouring village by the villagers. The canine inference is also another corroborative piece of evidence, which cannot be ignored at this stage. The evidence of the Investigating Officer also shows that the accused persons had been nabbed by the villagers in neighbouring village.

19 P.W.6 Dr. Ramchandra Chavan who was working as medical officer, Nimgaon Wakda, Taluka Niphad had examined Ratnakar Kapse on 6/7/1998. He had observed that there were abrasions on his left arm. The injuries were caused within 12 hours prior to

examination. He had given the history of assault by three unknown persons in the midnight at about 3 a.m. The injury certificate is at Exh. 23. On the same day, the accused were also referred to him for medical examination by Lasalgaon Police Station. There were contusions on their person, which was a clear indication that there was scuffle between the complainant and the accused persons on or about the same time. This is an important piece of evidence, which speaks volumes for itself. It is not the defence of the accused that after they were nabbed at Deshmane Shivar, they were assaulted by the villagers and therefore, it is clear that the prosecution has clearly established that there was a scuffle between the complainant and the accused persons at relevant time. The complainant had also stated in his first information report as well as in the substantive evidence that he was assaulted on his left arm and the same stands corroborated by the injury certificate.

20 The defence of the accused Nos. 1 and 2 in their statements under Section 313 of the Code of Criminal Procedure, 1973, is that a

day prior to the alleged incident they had gone to Saptashruni gad for darshan. They had halted there and that early in the morning at about 6.30 a.m. they had been to village Vani by truck and then had reached Bharvas approach road at about 8.30 a.m.. While they were waiting for vehicle to go to village Kolpewadi, police jeep arrived there and assaulted them. That they were taken to police station at Vinchur and detained there. They have feigned ignorance about the theft at the house of the complainant and Laxman Salunke. In short, their evidence is of false implication.

21 The said defence taken by accused does not inspire confidence. Moreover the police had no reason to falsely implicate the accused persons. Moreover, they had been nabbed by the villagers and villagers had summoned the police and thereafter, they were taken into custody. The accused are silent about the articles, which were seized from their possession. Therefore, it is clear that the prosecution has established guilt of the accused beyond reasonable doubt.

22 In view of the above observations, the conviction of the appellant No. 1 and 2 (original accused Nos. 1 and 2) needs to be maintained. However, the accused No. 1 has undergone approximately 4 years and 6 months in the custody, since he was taken into custody on 1/4/2012 and he is in the custody till today. As an under-trial also he has suffered R.I. from 6/7/1998 till 14/4/1998. Hence, this Court is of the opinion that the appellant No. 1 deserves to be sentenced to the period already undergone. The original accused No. 2 Ankush Jalinder Shinde has undergone entire sentence awarded to him. In view of this, the appeal of the appellant No. 1 Ramesh Tarachand Bhosale deserves to be partly allowed to the extent that the sentence is modified to the sentence already undergone. However, the conviction of all charges is maintained.

23 The learned Counsel appointed for the appellants have put in the best of their efforts to espouse the cause of the appellants. The Judgment cannot be completed without recording an appreciation for

both the Counsel. Their professional fees are quantified at Rs. 3000/- each to be paid to them within 3 months.

24 Hence, following order is passed:

ORDER

- (i) The appeal is partly allowed.
- (ii) The conviction of the appellant No. 1 and 2 (original accused Nos. 1 and 2) is maintained.
- (iii) The appeal of the appellant No. 1 Ramesh Tarachand Bhosale is partly allowed to the extent that the sentence is modified to the sentence already undergone.
- (iv) The appellant No. 1 Ramesh Tarachand Bhosale be released forthwith, if not required in any other case.
- (v) Since the appellant No. 2 Ankush Jalinder Shinde has already undergone his sentence, he be released forthwith, if not released, if not required in any other case.
- (vi) The appeal stands abated as far as the original accused No. 3 is concerned.
- (vii) Writ be issued forthwith.

(viii) Office to communicate this order to the original accused accused No. 1, who is in Nashikroad Central Jail.

25 The appeal is disposed of accordingly.

(SMT. SADHANA S. JADHAV,J)