

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.641 OF 2010

Farooq K. Khan @ Farooq Chikna @
Farooq Ibrahim Khan @ Sunilkumar
Mahanand

.. Appellant

Versus

The State of Maharashtra

.. Respondent

Mr.Pravin G. Sawant, Advocate appointed for the appellant.

Mrs.S.Gajare Dhumal, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

DATED : 8th SEPTEMBER, 2015

ORAL JUDGMENT :-

1 The appellant was prosecuted on the allegation of having committed offences punishable under section 392 of the IPC read with section 397 of the IPC, and the offence punishable under section 135 of the Bombay Police Act. The learned Addl. Sessions Judge for Greater Bombay, after holding a trial, found the appellant guilty of the offence punishable under section 392 of the IPC read with section 397 of the IPC, and sentenced him to suffer Rigorous Imprisonment for 7(seven) years. The learned Addl. Sessions Judge found the appellant not guilty of the offence punishable under the Bombay Police Act, and acquitted him of the said offence. Being aggrieved by his conviction and the sentence

imposed upon him by the Addl. Sessions Judge, the appellant has approached this Court by filing the present Appeal.

2 As the counsel for the appellant did not remain present before the Court, at the time of final hearing of the Appeal, inspite of repeated adjournments granted, Shri P.G. Sawant, Advocate was appointed to prosecute the Appeal under the Free Legal Aid Scheme.

3 I have heard Mr.P.G.Sawant, the learned counsel for the appellant. I have heard Mrs.S.Gajare-Dhumal, learned APP for the State. With their assistance, I have gone through the evidence adduced during the trial. I have carefully gone through the impugned order.

4 The prosecution case, in brief, be stated thus :-

Mohd. Yunus (PW 1) is a taxi driver. At about 1.30 a.m on 6th May 2008, he came near Nair hospital, Agripada when he got a passenger who stopped his taxi, and told him that he wanted to go to Bandra. That passenger boarded the taxi. Mohd.Yunus brought him to Bandra. After coming there, the passenger said that he wanted to go to Railway Quarters at Khar. Mohd.Yunus then took the taxi towards the Railway Quarters at Khar. There was a big pit across the road because of which the taxi had to stop. The passenger asked Mohd Yunus about the fare, and Mohd. Yunus told him that it was Rs.130/-. The passenger then said that he had no money and that he would get it. Saying so, he alighted the taxi and went in the lane and called somebody by saying 'mama mama'. The passenger then called Mohd.Yunus

to take the money. When Mohd Yunus went near him, the passenger took out one knife, caught hold of the collar of Mohd. Yunus, and put the knife on his back. Mohd.Yunus sustained a scratch on his collar because of the knife. The passenger threatened Mohd.Yunus to hand over the cash. Mohd.Yunus gave the money that was with him to the passenger. The passenger then left the place, but Mohd.Yunus followed him. He reached the railway gate. A member of the Railway Protection Force (described as policemen by Mohd.Yunus) was standing near the Railway gate. Mohd.Yunus approached him and told him about the incident. When this was happening, Mohd.Yunus heard the ring tone of the mobile telephone which was similar to the ring tone of the telephone held by the said passenger. Because of the ringing of the mobile telephone, it was realized that the passenger was hiding somewhere near. The member of the Railway Protection Force had called 2 – 3 other persons in the meantime, and all of them surrounded the passenger who was ultimately apprehended. That passenger is said to be the appellant.

5 After his apprehension, information was given telephonically to the Khar Police Station. Mohd.Yunus lodged a report with the Khar Police Station, which was treated as the FIR. The appellant was handed over to the police. The robbed amount and articles were found on the person of the appellant. This, in short, was the case of the prosecution.

6 Mr.PG Sawant contended that the evidence adduced by the prosecution was not satisfactory. According to him, the prosecution case rested solely on the testimony of Mohd.Yunus which suffered from certain infirmities. He submitted that though

the prosecution case was that the appellant was apprehended by the members of the Railway Protection Force, not even one of them was examined as a witness. He submitted that though a number of witnesses were examined, they were all from the Khar Police Station who had no personal knowledge about the place where, and the time when the appellant was apprehended.

7 Smt.S.Gajare Dhumal, the learned Addl. PP conceded that no person, from out of the members of the Railway Protection Force, who had apprehended the appellant, was examined during the trial. She also accepted that the policemen from the Khar Police Station who were examined as witnesses had arrived on the scene later, and had no personal knowledge about the manner in which the apprehension of the appellant took place.

8 Indeed, this is a serious weakness in the case of the prosecution. The question, however, is whether this weakness by itself would render the case of the prosecution, unreliable. The answer, in my opinion, depends on whether the testimony of Mohd.Yunus is convincing, and finds support from the other circumstances which are either not disputed or are satisfactorily proved.

9 I have subjected the evidence of Mohd.Yunus to careful scrutiny. His story seems to be reliable. He has described how the incident took place. What happened after he had been robbed has also been properly described by him. The manner in which the presence of the appellant was realized by him and the Railway Protection Force staff, has also been given by him i.e. as

the Mobile telephone held by the appellant rang. It is not possible to hold that Mohd.Yunus is concocting this story with some ulterior motive, or at the instance of the police. In the first place, Mohd.Yunus is not shown to be having any connection with the police and in the second place, the police themselves had not apprehended the appellant, but he was already apprehended by the members of the Railway Protection Force. Though no member of the RPF has been examined as a witness, considering the evidence of the police witnesses, that the appellant was handed over to the police by members of the RPF at a particular time and place, cannot be disputed and this lends corroboration to the version of Mohd.Yunus.

10 The evidence of Vishwanath Sawant (PW 2), a panch, shows that Mohd Yunus, as also the appellant, were seen by him in the police station on 6th May 2008. The panchnama has been drawn at 4.40 hours. There is no challenge to the evidence of this witness with respect to the drawing of the panchnama and the timing thereof. This establishes one aspect with certainty i.e. that the appellant was already apprehended by the police in the early hours of 6th May 2008.

11 The evidence of Manohar Rane, Assistant Police Inspector (PW 3), Arun Chavade, Constable (PW 4), and Suryakant Vighate, Head Constable (PW 5), all attached to Khar Police Station at the material time, shows that at about 3.10 a.m, information was received that one person was robbed and that when they searched for him, they saw that the robber had been apprehended by the members of the Railway Protection Force. All of them speak of the presence of the taxi driver i.e. Mohd Yunus

also. Nothing which would discredit their version has been elicited from the cross-examination of these witnesses. Thus, that the appellant had been apprehended and was handed over to the Khar Police Station, cannot be doubted in the light of the evidence of these witnesses.

12 Girish Upadhyay (PW 6) is another important witness. He is the one who claims to have actually apprehended the appellant with the help of the members of the Railway Protection Force (described as policemen by him) Girish Upadhyay was in his house and when he heard the commotion, he came to the balcony of his flat. He noticed that 4 – 5 persons were chasing one person near the railway crossing and a policeman had stopped the said person by pointing out one rifle. According to this witness, he went down, approached the said person from behind and pounced upon him. After apprehending that person, that person was handed over to the police who came there by a van. He has identified that person as the appellant. In his cross-examination, nothing which would discredit him has been brought on record.

13 The evidence of Shashikant Bhat (PW 7) PSI attached to Khar Police Station, the Investigating Officer, shows that the appellant as well as Mohd Yunus were brought to the police station by ASI Rane and the staff at about 3.00 a.m on 6th May 2008.

14 Though the members of the Railway Protection Force have not been examined, since the evidence of Mohd Yunus is reliable, and since the evidence of the police witnesses leaves no manner of doubt that in early hours of 6th May 2008, the appellant

was apprehended by the police, the conclusion that the appellant is the person who had robbed Mohd Yunus can safely be arrived at. The evidence of Girish Upadhyay (PW 6) also corroborates the case of the prosecution and as aforesaid, his evidence has not been weakened, in any manner, by his cross-examination. Thus, non-examination of the members of the Railway Protection Force, has not proved fatal in this case.

15 I have carefully considered the possibility of the case being of mistaken identity, as contended by the learned counsel for the appellant. Admittedly, it was dark in the night, and therefore, whether Mohd. Yunus by mistake caught hold of someone else instead of the passengers who had travelled in his taxi, has been carefully considered by me. Such possibility, however, does not appear to be real. It cannot be overlooked that the robbed property was recovered from the appellant. There is no satisfactory challenge to the evidence in that regard. Moreover, Mohd Yunus does not appear to be lying and the question is only of 'mistaken identity'. In that regard, it may be observed that since the culprit had travelled in the taxi of Mohd Yunus, Mohd Yunus had sufficient opportunity to observe him, and there would be no possibility of his having mistaken the appellant for the passenger who actually travelled by his taxi.

16 Even otherwise, the appellant was apprehended at an odd place at odd hours. The lack of explanation of his presence at the material time adds strength to the prosecution case.

17 Though the entire reasoning of the learned trial Judge cannot be accepted, the appreciation of evidence as done by him

does not suffer from any serious infirmity or error. The conclusion arrived at by him is proper and legal.

18 In spite of the efforts made by Mr. Sawant, learned counsel for the appellant, who indeed raised valid points needing serious consideration, in what seemed to be an 'open-and-shut' case, the appeal fails in the ultimate analysis.

19 Appeal is dismissed.

(ABHAY M. THIPSAY, J)

CERTIFICATE

Certified to be true and correct copy of the original signed
Judgment/Order.