

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.713 OF 2014

SATYAWEL DORAKKAN HARIJAN)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Shri Sandeep Dere, Appointed Advocate for the Appellant.

Shri Deepak Thakre, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 19th OCTOBER 2015.

ORAL JUDGMENT :

1 This appeal from jail, is directed against the judgment and order dated 18th April 2012, passed by the Ad-hoc Assistant Sessions Judge for Greater Mumbai, convicting the appellant, who was the sole accused in Sessions Case No.499 of 2011, of an offence punishable under Section 394 of the IPC read with Section 397 of the IPC and sentencing him to suffer Rigorous

Imprisonment for 7 years and to pay a fine of Rs.2,000/-, in default to suffer Rigorous Imprisonment for 6 months.

2 The prosecution case, as put forth before the trial court, may in brief, be stated thus :

Digesh Shah (PW1), at the material time, was residing at Santacruz (West), Mumbai. Between 9.30 p.m. to 10.00 p.m., he usually used to go out of his house for a walk. On 4th February 2011, at about 10.40 p.m., he was taking his daily walk as usual. When he reached near a building known as 'Swati', situate near Sarojini Market, he noticed an auto rickshaw in which a person was sitting. That person told Digesh Shah, in Hindi, that one person had been occupying his auto rickshaw and was refusing to get down. Digesh Shah, probably anticipating some trouble, changed his way and proceeded in another direction. When he had gone a little farther, the same rickshaw, which was being driven by the appellant, came there and stopped in front of Digesh Shah. By that time, it was about 11.00 p.m. The appellant got down from the said rickshaw and attempted to cause hurt to

Digesh Shah by a knife, which the appellant was holding. Digesh Shah sustained an injury on his left hand. The appellant snatched the gold chain which Digesh Shah was wearing around his neck. Digesh Shah, however, managed to catch the appellant and dragged him for some distance, and to a place where a few persons had gathered. Unfortunately, none of those persons came to help Digesh Shah and the appellant managed to run away. Digesh Shah went to the hospital, where he was treated for the injuries sustained by him. In the hospital, the police recorded the statement of Digesh Shah, which was treated as First Information Report (FIR). On the basis of this report, a case in respect of offences punishable under Section 392 of the IPC, Section 394 of the IPC, and Section 392 of the IPC read with Section 397 of the IPC was registered and investigation commenced. In the course of investigation, the appellant came to be arrested. It was on 25th February 2011. On the same day, pursuant to the information disclosed by the appellant, the robbed chain came to be recovered from the house of the appellant. On 19th May 2011, the appellant was placed in a Test Identification Parade (TIP) which was held by

Ashwini Powale, an Executive Magistrate (PW2). In this TIP, Digesh Shah identified the appellant. About 7 to 8 days thereafter, Digesh Shah was called to the police station for the identification of the chain that had been recovered, allegedly, at the instance of the appellant. The chain was identified by Digesh Shah as the same that had been robbed.

3 On completion of investigation, charge-sheet was filed against the appellant, who was prosecuted and convicted, as aforesaid.

4 As the appeal had been preferred from jail, and the appellant was not represented by any one, Advocate Sandeep Dere was appointed, under the Free Legal Aid Scheme, to prosecute the appeal.

5 I have heard Shri Sandeep Dere, the learned counsel for the appellant. I have heard Shri Deepak Thakre, the learned APP for the State. With their assistance, I have gone through the

entire evidence adduced during the trial. I have carefully gone through the impugned judgment and order.

6 The prosecution examined totally six witnesses during the trial. The first witness, as aforesaid, is Digesh Shah, and the second witness Ashwini Powale, the Executive Magistrate, who held the TIP. The third witness Ashok Salunkhe, a Sub-Inspector of Police, who was attached to Santacruz Police Station, at the material time, is the one who had registered the FIR on 5th February 2011, by going to Leelavati Hospital, where Digesh Shah had been admitted. The fourth witness Vikram Chavan, Assistant Police Inspector, who was attached to Santacruz Police Station at the material time, is the one who had carried out investigation and filed charge-sheet. PW5 Ramesh Chavan, A.S.I. attached to Santacruz Police Station at the material time, is the one who had, on 25th February 2011, apprehended the appellant, and who had, pursuant to the information disclosed by the appellant, recovered the robbed gold chain – said to be the property involved in the present case, and two more gold chains from the house of the

appellant. The sixth witness Shrirang Purohit is the doctor, who had treated Digesh Shah in Leelavati Hospital.

7 The first point needing determination is, whether the incident of robbery had indeed taken place, as claimed by Digesh Shah. In that regard, there is sufficient and satisfactory evidence. There is no challenge to that evidence. Therefore, that Digesh Shah was indeed robbed at the point of knife of his gold chain on 4th February 2011, cannot be doubted or disputed.

8 The next question that needs determination is, whether the appellant is one, who had committed the robbery in question. Admittedly, the appellant was not previously known to Digesh Shah, and the question would be of the reliability of the evidence of the identification of the appellant as the culprit, made by Digesh Shah, which identification is supported by the evidence of previous identification of the appellant by Digesh Shah in a TIP. The other circumstance connecting the appellant with the robbery is the recovery of the robbed property from him.

9 I have carefully gone through the evidence of Digesh Shah. He does say that the appellant is the one, who had committed the robbery in question. He also speaks of having identified the appellant previously in the TIP held on 19th May 2011. The evidence of Ashwini Powale also shows that Digesh Shah had identified the appellant as the culprit in TIP that was duly held.

10 However, though there is no basic or fundamental weakness or infirmity in the evidence of Digesh Shah, or of Ashwini Powale, it cannot be overlooked that the TIP in this case was held on 19th May 2011. The appellant was apprehended on 25th February 2011. There is no satisfactory explanation as to why there was an inordinate delay in holding the TIP. This is particularly so, because, even the robbed property was said to have been recovered from the appellant on 25th February 2011 itself. When there was such delay in holding a TIP, for which no satisfactory explanation is available from the evidence on record,

it was necessary for the prosecution to have established that there was no possibility of the appellant being shown to Digesh Shah before the TIP. Obviously, the appellant must have been taken out of lockup, for taking him to the court for obtaining his remand, on a number of occasions during this period. There is no claim – much less, any evidence to show – that the face of the appellant used to be covered whenever he was being taken to the court. It is, therefore, not safe to place reliance on the evidence of the identification of the appellant as the offender, made by a solitary witness.

11 Regarding the recovery of the gold chain, the same was effected by A.S.I. Ramesh Chavan (PW5), who was not investigating into the present case. The prosecution case is that on 25th February 2011, Ramesh Chavan, along with other policemen, apprehended the appellant and brought him to the police station. The case is that, in his personal search, a knife was found. The personal search is said to have taken place in the presence of panchas, but no panch witness has been examined to

support the testimony of Ramesh Chavan. According to Ramesh Chavan, on the same day, the appellant made a disclosure statement, pursuant to which, the police party and panchas went to his house, and that, the appellant produced three gold chains from his house. These chains were taken charge of under a panchnama. However, no panch witness, with respect to the alleged disclosure statement made by the appellant, or recovery of the gold chain pursuant thereto, was examined during the trial.

12 Obviously, when the chains were recovered, it was not realized by any one, at that time, that one of the chains pertained to the present case. The evidence indicates that, it is only after the TIP was held, and the appellant was said to have been identified in the TIP, which was on 19th May 2011, that the gold chain was shown to Digesh Shah, who claimed it to be his.

13 There is no explanation for not holding the TIP within a reasonable time. There is also no explanation, as to, why no attempt was made to ascertain whether the chain in question

indeed belonged to Digesh Shah. Why it was not shown to Digesh Shah till the identity of the appellant was said to have been fixed by the identification made by him on 19th May 2011, is not clear.

14 Since the panch witnesses to the disclosure statement made by the appellant and the recovery of the gold chain were not examined, it was not safe to place reliance on that evidence. This was not a case where the prosecution had been successful in proving the guilt of the appellant beyond reasonable doubt. The appellant was entitled to the benefit of doubt. The learned Ad-hoc Assistant Sessions Judge should have acquitted him.

15 The appeal is allowed.

The impugned judgment and order is set aside.

The appellant is acquitted. He be set at liberty forthwith.

Fine, if paid, be refunded to him.

(ABHAY M. THIPSAY, J.)

CERTIFICATE

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