

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.399 OF 2013

MOHD.HUSSAIN KAYYUM SHAIKH)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Salimuddin A. Shaikh, Advocate for the Appellant.

Mr.D.P.Adsule, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 3rd SEPTEMBER 2015.

ORAL JUDGMENT :

1 This appeal is directed against the judgment and order dated 11th February 2013, delivered by the Ad-hoc Additional Sessions Judge, Thane, in Sessions Case No.340 of 2009 convicting the appellant who was the accused no.1 in the said case of offences punishable under Sections 307 and 397 of the Indian

Penal Code (IPC). The learned Ad-hoc Additional Sessions Judge sentenced the appellant to suffer Rigorous Imprisonment for 10 years and to pay a fine of Rs.1,000/- with respect to the offence punishable under Section 307 of the IPC, and to suffer Rigorous Imprisonment for 10 years with respect to the offence punishable under Section 397 of the IPC. The learned Judge directed that the substantive sentences would run concurrently.

2 There was one more accused – accused no.2 – in the said case, but the learned Ad-hoc Additional Sessions Judge found him not guilty and acquitted him. The appellant and the other accused were charged also of offences punishable under Section 25 of the Arms Act read with Section 34 thereof, and Section 135 of the Bombay Police Act, but with respect to these offences, the learned Ad-hoc Additional Sessions Judge found even the appellant not guilty and acquitted him.

3 The prosecution case, as put forth before the trial court was that, on 4th May 2009, at about 12.00 Noon,

Draupadabai (PW6) was proceeding from road to attend the *Haldi* ceremony in the neighbourhood. At that time, the appellant came there, caught hold of her right hand and snatched the golden chain, which she was wearing. Draupadabai raised cries when her son Jayendra (PW3) came there. He was told by Draupadabai about her chain having been snatched and the offender having run away. Jayendra started chasing the offender. In the meantime, Shivaji (PW1), nephew of Draupadabai, came there, learnt about the theft and chased the offender on his motorbike. Jayendra (PW3) and Shivaji (PW1) both chased the offender by two different lanes. Shivaji found the offender and noticed him entering into the lane at Bhusaval compound. When Shivaji attempted to catch hold of the offender, the offender opened fire upon him by taking out a country made handgun. Shivaji bent down and avoided getting shot. The offender then again ran and again opened fire on Shivaji. The shot was, however, missed. The offender then entered into a mosque. By this time, Jayendra reached there. Shivaji asked Jayendra to keep a watch on the offender as he had concealed himself in the mosque and he

himself went to call the police. After sometime, Shivaji returned along with the police, but the offender jumped into a water tank / well. He was then apprehended by the police. During his search, a broken chain having golden beads which was the chain of Draupadabai was found in his possession. A country made handgun with one shell in its barrel was also recovered from him under a panchnama. Shivaji lodged a report of the incident, after which a case in respect of offences punishable under Sections 307 and 397 read with Section 34 of the IPC was registered, and investigation commenced. In the course of investigation, it was revealed that the country made handgun and ammunition were provided to the appellant by the accused no.2 and therefore the accused no.2 was also arrested.

4 The prosecution examined nine witnesses during the trial. Shivaji (PW1), Jayendra (PW3), Draupadabai (PW6) have already been referred to earlier. The second witness Nilesh Patil is a panch in respect of the personal search of the appellant after his apprehension. The fourth witness Rais Khan is also a panch in

respect of the spot panchnama. The fifth witness Dr.Jayshree Mhaske, a Medical Officer attached to IGM hospital, Bhiwandi, is the one, who had examined Draupadabai and had found that there was a blunt trauma with swelling over her right shoulder and right arm. The seventh witness Bharat Nimbalkar is the Senior Inspector of Police, who had actually apprehended the offender. The eighth witness Rajendra Hulawale A.P.I., and the ninth witness Dilip Yadav, Inspector of Police, are the Police Officers who have taken part in the investigation of the case.

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

6 The case of the prosecution is that the appellant had snatched the golden chain, and that, while he was attempting to run away, he was chased and apprehended. In connection with this, the learned counsel for the appellant, contended that the case has been made out, as if, the appellant was caught red handed,

but actually, the evidence indicates that the offender had made good his escape and the appellant came to be apprehended after some time gap and at quite some distance. He submitted that this could very well be a case of mistaken identity. He submitted that the identity of the appellant as the offender, as was sought to be established through Draupadabai, is not reliable, in as much as, Draupadabai had been shown the appellant at the police station and also in the court before she gave her evidence.

7 Undoubtedly, there is substance in this contention of the learned counsel. It does appear that the offender was not continuously under the sight of Draupadabai, Jayendra or Shivaji or any other witness. However, it also appears that he was, for most of the time after the offence was committed, and till he was apprehended, under the sight of some or other witness.

8 From the evidence of Draupadabai, which is unchallenged, it is clear that, that the incident indeed took place, cannot be doubted at all. The fact that she did sustain an injury

corroborates her version about the happening of the incident. The evidence of Jayendra and Shivaji shows that though the offender was not continuously in the sight of these witnesses, he was not away from their sight also, for a long period. Thus, two witnesses were watching his actions and had seen him running. Shivaji had seen the offender entering into a mosque, and thereafter, jumping into a well. It is not necessary to subject the evidence of these witnesses to any further minor scrutiny, as the evidence of these witnesses, which shows that when the appellant was apprehended, the broken golden chain and a country made handgun was recovered from him, is not seriously challenged in the course of cross-examination. As a matter of fact, this evidence is corroborated by the evidence of Bharat Nimbalkar (PW7), who, after he received information from Shivaji, had come to the place where the offender had concealed himself and had, with the help of police party, cordoned off the area. He categorically stated about the offender having jumped from the wall of the compound into the water tank, and the offender being taken out from the water tank. That the person, who is apprehended, is the

appellant, is not in dispute at all. This witness categorically states that he took the personal search of the appellant and found not only the country made revolver with one empty cartridge therein, but also the broken golden chain with him.

9 This evidence is corroborated by the evidence of Rajendra Hulawale (PW8) and Dilip Yadav (PW9), who were also present at the time of the apprehension of the appellant from the water tank.

10 That, the chain found with the appellant was broken, and that, it was identified by Draupadabai as her chain is satisfactorily established by the evidence that was adduced during the trial.

11 Considering the evidence adduced during the trial, that it was the appellant, who had snatched the golden chain, which Draupadabai was wearing, and had attempted to run away, cannot be doubted at all.

12 The learned counsel for the appellant contended that the conviction of the appellant with respect to the offence punishable under Section 307 of the IPC was not justified. The learned APP submitted that since the appellant was armed and since he had fired from the firearm with him, the conclusion that he had attempted to commit murder of Shivaji, is proper and legal. I am unable to accept that the evidence adduced during the trial establishes the appellant to be guilty of an offence of attempting to commit murder, which is punishable under Section 307 of the IPC. It is very obvious from the prosecution case itself and from the narration of witnesses itself, that the appellant had fired two rounds from his handgun only to frighten the persons who were chasing him and in a bid to escape. He cannot be attributed with the requisite *mens rea*, as would be necessary to make him guilty of the offence punishable under Section 307 of the IPC. The conviction of the appellant with respect to the offence punishable under Section 307 of the IPC is not correct or legal and needs to be interfered with.

13 The learned Judge has acquitted the appellant in respect of the offence punishable under the Arms Act and the Bombay Police Act. He has observed that there was no sanction for the prosecution of the offence punishable under the Arms Act, and that, there was no evidence that there was any prohibitory order passed by the competent authority, which was duly promulgated prohibiting the possession of any arms or weapon. These findings of the learned Judge appear to be proper, and no attempt has been made to challenge these findings of the learned Judge by the learned APP.

14 The learned counsel for the appellant contended that the appellant would be guilty only of receiving stolen property or at the most of theft, but not of robbery. However, after carefully considering the evidence on record, it is not possible to hold that the appellant had merely received the stolen property. It is satisfactorily established that the appellant is the one, who had snatched the golden chain. Now the question is, whether the act of

the appellant would amount merely to the offence of theft or it would amount to robbery. Section 390 of the IPC which defines robbery *inter alia* stipulates that – *theft is robbery if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.* In this case, though it is doubtful whether the appellant had voluntarily caused hurt to Draupadabai, he certainly had attempted to cause fear of death to the witnesses, in carrying away the golden chain snatched by him. The appellant was being chased by witnesses after he had snatched the chain and the appellant had used a firearm by firing from it. The object of this firing was to put the persons chasing him in fear of instant death or hurt and the object behind putting them under fear was to enable him to carry away the property snatched by him successfully. Thus, the offence committed by the appellant would be of robbery which is punishable under Section 392 of the IPC.

15 It needs to be observed at this stage that the conviction of the appellant simplicitor in respect of the offence punishable under Section 397 of the IPC is not correct. The learned Judge had merely framed the charge of offence punishable under Section 397 of the IPC simplicitor, overlooking that Section 397 of the IPC does not create a substantive evidence at all. It is complementary to Section 392 and Section 395 of the IPC. It merely provides for a minimum sentence to the offender who committed robbery or dacoity if in the commission of the said offence, any deadly weapon is used or grievous hurt is caused to any person etc., by the offender. Thus, the proper charge in the instant case ought to have been the charge of an offence punishable under Section 392 of the IPC read with Section 397 of the IPC.

16 The learned Judge has imposed a sentence of Rigorous Imprisonment for 10 years upon the offender. This sentence is the maximum that was provided for by law. Even with respect to Section 307 of the IPC, the maximum sentence that could be

imposed upon the appellant was 10 years, as no hurt had been caused to any one by the firing. The question is, whether this was a fit case where the maximum punishment prescribed by law for the alleged offences ought to have been imposed upon the appellant. A perusal of the judgment delivered by the learned Ad-hoc Additional Sessions Judge does not show that any reasons, for imposing the maximum sentence prescribed by law, were put forth before the learned Judge, by the prosecution. The judgment also does not disclose any reasons as to why such maximum punishment was called for, particularly when there was nothing to show that the appellant had any past criminal record.

17 It was also overlooked by the learned Judge that no actual gain was made by the appellant by committing the offence in question, which aspect was relevant in determining the quantum of sentence to be imposed upon him.

18 In my opinion, ends of justice would be met by imposing a sentence of Rigorous Imprisonment for 7 years upon

the appellant with respect to the offence punishable under Section 392 of the IPC read with Section 397 of the IPC.

19 In the result, the appeal is partly allowed.

20 The conviction of the appellant with respect to the offence punishable under Section 307 of the IPC is set aside.

The appellant is acquitted of the said charge.

Fine, if paid by him with respect to the sentence imposed for the said offence, be refunded to him.

The error in convicting the appellant simplicitor in respect of an offence punishable under Section 397 of the IPC is corrected by stipulating that the appellant is convicted of an offence punishable under Section 392 of the IPC read with Section 397 of the IPC.

The sentence imposed upon the appellant with respect to the said offence shall be reduced to Rigorous Imprisonment for a period of 7 years.

The appeal is disposed of in the aforesaid terms.

(ABHAY M. THIPSAY, J.)