

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.649 OF 2009

ARSHADALI SHAIKH USMANALI SHAIKH)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Dilip Mishra, Advocate for the Appellant.

Mrs.M.R.Tidke, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 7th JULY 2015.

ORAL JUDGMENT :

1 This appeal is directed against the judgment and order dated 7th March 2009 delivered by the 4th Ad-Hoc Additional Sessions Judge at Sewree, Mumbai, in Sessions Case No.536 of 2007 convicting the appellant, who was the accused in the said case, of offences punishable under Sections 392 and 341 of Indian

Penal Code (IPC). The learned Ad-hoc Additional Sessions Judge imposed a sentence of Rigorous Imprisonment for 4 years and a fine of Rs.500/- with respect to the offence punishable under Section 392 of the IPC, and a sentence of Simple Imprisonment for 1 month and a fine of Rs.200/- with respect to the offence punishable under Section 341 of the IPC. Being aggrieved by the conviction and the sentences imposed upon him, the appellant has filed the present appeal.

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

Sanjay Das is a goldsmith. He has his shop at Marol Naka, Andheri (East), which runs in the name and style of N.P.Jewelers. At the material time, one Palash Patra and one Santo Maiti were working with him as his employees, in his shop. On 6th August 2006, Sanjay Das (PW1) was in his shop with his employee Palash. The third one – Santo Maiti – had gone out. At about 9.55 a.m., one person entered in the shop. He was having a

revolver in his hands. He threatened Sanjay Das to keep quite. At that time, another person entered into the shop. He was having a knife with him. He gave blows to Sanjay Das and asked him to sit. Then, the third one entered in the shop and closed the door thereof. The third person then collected all the jewelery articles from the shop and put them in a plastic bag which was already with him. The person with the revolver then asked Sanjay Das for the key of the safe. Sanjay Das did not tell him anything, but then that person lifted the key which was on the drawer and went inside the inner room, opened the safe and took some cash. At that time, Santo Maiti, who had gone outside, came back and knocked the door of the shop. The hands of Sanjay Das had been tied with rope by one of the said three persons i.e. the second person, who had entered the shop with a knife. When the culprits were attempting to run away, Sanjay Das, who had by that time succeeded in loosening the rope tied on his hands and had got himself freed, caught the person who was holding the plastic bag containing the robbed property. Then, the person who was having revolver started beating Sanjay Das, as a result of which, the

person who had been caught by Sanjay Das escaped. Sanjay Das, however, then caught the person having revolver. Sanjay Das started shouting *chor-chor*. Members of public gathered there. Two of the culprits ran away but the one who had been caught by Sanjay Das could not run away and was handed over to the police. Some part of the robbed property was recovered from the possession of the said person, whose name was revealed to be Ashraf Ali.

3 In the course of investigation, two more persons came to be arrested – one Premsing Thakur, and the present appellant - Arshad Ali. Premsing Thakur was arrested on 11th August 2006. He was said to be the second person, who had entered the shop of Sanjay Das, and who, as aforesaid, was having a knife in his hand. The appellant was arrested on 11th march 2007. He is said to be the third person who had entered inside the shop and who had put the robbed property in a plastic bag and had taken the same away.

4 As the appellant could not be arrested for a long time, the other two - Ashraf Ali and Premsing Thakur - were prosecuted separately. Charge-sheet came to be filed against them only and they were prosecuted vide Sessions case No.1001 of 2006. The said case was decided on 16th April 2007 by another Ad-Hoc Additional Sessions Judge, Sewree, Mumbai, who convicted Ashraf Ali, but acquitted Premsing Thakur by giving benefit of doubt to him. The appellant, who was convicted and sentenced as aforesaid, was apprehended much later and tried separately vide Sessions Case No.536 of 2007.

5 I have heard Mr.Dilip Mishra, the learned counsel for the appellant, and Mrs.M.R.Tidke, the learned APP for the State. With their assistance, I have gone through the entire evidence adduced during the trial and the impugned judgment.

6 It is contended by the leaned counsel for the appellant that the case of the present appellant is on par with that of Premsing Thakur who has been acquitted by the trial court in a

different trial. He submitted that the nature of evidence available against the said Premsing Thakur and the nature of evidence available against the present appellant being the same, the appellant also should be acquitted. There is no substance in this contention, in as much as, Premsing Thakur and the appellant were tried separately in two different and separate trials. It is not that the evidence that was adduced against Premsing Thakur during that trial that led to his acquittal was identical to that brought before the trial court in the present case. As such, only because the said Premsing Thakur has been acquitted, the appellant cannot be acquitted, and the case against the appellant needs to be viewed independently on the basis of the evidence that was adduced against him. As a matter of fact, the judgment of acquittal of Premsing Thakur would not even be relevant in the trial of the appellant.

7 It is clear that the appellant made good his escape from the spot. It is also clear that the appellant was not previously known to Sanjay Das or the other witnesses – Palash

Patra and Santo Maiti, who had seen the culprits. During the trial, Palash Patra and Santo Maiti were not examined as witnesses. The evidence against the appellant consists of his identification as one of the three culprits, made by Sanjay Das, and the circumstance of the recovery of a part of the robbed property at the instance of the appellant, and allegedly, pursuant to the information disclosed by him.

8 Since the other witnesses who could have identified he appellant have not been examined, the identification evidence consists solely of Sanjay Das. This evidence of identification is said to have been supported by a Test Identification Parade (T.I.Parade) held on 5th April 2007. This evidence, therefore, needs to be carefully examined.

9 The incident or robbery took place on 6th August 2006. The appellant was apprehended on 11th March 2007 i.e. after about seven months from the incident. He was placed in T.I.Parade held on 5th April 2007.

10 Sanjay Das has stated in his evidence that he had been taken to Arthur Road jail by the police and *there he identified all the three culprits, who had entered the shop.* This suggests that all the three culprits were placed in the identification parade, but this, admittedly, is incorrect, and not the case of the prosecution at all. The other two – Ashraf Ali and Premsing Thakur – were tried together in a separate case, but even at that time, there was no question of Ashraf Ali being put for identification in any T.I.Parade, in as much as, he was apprehended on the spot. Thus, this statement of Sanjay Das, which is admittedly incorrect, creates a doubt as to whether the T.I.Parade was held at all.

11 We may, nevertheless, examine the evidence of Smt.Raeesa Gill, the Special Executive Officer, who is said to have conducted the T.I.Parade in the Arthur Road jail. According to her, Sanjay Das as well as Palash Patra, both, took part in the T.I.Parade, and both of them identified the appellant as one of the culprits. In her cross examination, she, however, stated that the accused persons were shown to her by the jail authorities in an

open place. She stated that she had no talk with the appellant, and that, she did not ask him whether he had been shown to the identifying witnesses by the police.

12 The learned trial Judge has held the evidence of the T.I.Parade unsatisfactory. He has observed that it was weak, and that, there were a number of shortcomings in conducting the T.I.Parade. He also held that the identification parade appears to be held in open space, and that, the appellant was exposed to the witnesses. He also observed that the evidence indicated presence of police persons at the time of the identification parade. He was of the view that it was unsafe to rely on the evidence of identification parade (paragraph 13 of the impugned judgment). The learned Judge, however, held that the evidence of identification of the appellant, as given by Sanjay Das in court, could safely be relied upon. He observed that Sanjay Das had sufficient opportunity to see the culprits properly and could identify them. The learned Judge did not pay much attention to the contention advanced by the defence that Sanjay Das claimed

to have identified *three culprits* in one identification parade, which was obviously and admittedly wrong, as the learned Judge was of the view that from the circumstances, 'it was obvious that only the appellant was placed in the T.I.Parade.' In this regard, it is not possible to agree with the learned Judge. The question was not about the factual position, but the question was – *what inference should be drawn from the claim of Sanjay Das that he identified three culprits in one parade, when that was factually incorrect and when that was not the case of the prosecution at all.*

13 When there were a number of shortcomings in the T.I.Parade as observed by the learned trial Judge himself, the evidence of the T.I.Parade could not be usefully taken into consideration to corroborate the evidence of identification of the appellant as one of the culprits, as given by Sanjay Das during the trial. It is well known that evidence of identification of a person not previously known as the culprit, given in a court of law for the first time, would be a weak piece of evidence. It is, therefore, that T.I.Parades are held which would lend support to the evidence of

identifying witnesses, if they identify the culprit later during the trial. Once the evidence of T.I.Parade is held to be not satisfactory, it fails to support the evidence of identification as given in the court and renders the same weak. It may be added that a defective T.I.Parade can be worse than not holding any T.I.Parade at all, as, after the defective identification parade, the subsequent identification made by an identifying witness in the court, is likely to be of the person seen by him during the T.I.Parade, and not of the persons seen by him at the time of the offence. The memory of the identifying witness would be about the person seen by him in the T.I.Parade and not about the person seen by him at the time of the incident.

14 Sanjay Das had already deposed in the previous trial held against the other two accused Ashraf Ali and Premsingh Thakur, and was clearly aware of the fact that the appellant against whom he was deposing, was the third culprit. Sanjay Das, therefore, was inclined to instinctly believe the appellant to be the third culprit. Even if he did not intend to deliberately speak a lie,

the statement made by him that he identified three persons in the T.I.Parade obviously shows his determination to support the prosecution case that the three who were prosecuted were the culprits. In the instant case, therefore, it would be difficult to rely on the evidence of identification, which was done after a period of about seven months from the date of incident, without any corroboration.

15 It may now be examined whether the other circumstance, viz., the recovery of part of the robbed property allegedly at the instance of the appellant, leads sufficient corroboration to the evidence of identification of the appellant as the culprit.

16 In this regard, the case of the prosecution is that on 16th March 2007, the appellant disclosed certain information before Maruti Jadhav, the Investigating Officer (PW8) and panchas – Jagdish Bishnoi (PW3) and Shashikant Dabhade, pursuant to which the police party and panchas were led to the

jewelery shop of Atish Parekh (PW5) at Khadki, near Pune, from where gold ornaments of different descriptions totally weighing 65 grams came to be recovered. To come to a conclusion as to whether part of the robbed property was indeed recovered pursuant to the information disclosed by the appellant, the evidence of the panch Jagdish Bishnoi (PW3), the jeweler Atish Parekh and Maruti Jadhav, Investigating Officer (PW8) needs to be examined. Jagdish Bishnoi does speak about his being called at the Police station on 16th March 2007, and the appellant who was in the custody of the police, disclosing certain information. He also states that after disclosure of the said information, the panchas and the police, by a private vehicle, left for Pune. That, they went to the shop of Sanghvi Jewelers which was pointed out by the appellant and then the appellant disclosed some further information. That, certain gold ornaments totally weighing about 6½ tolas were given to the police by the shopkeeper. These ornaments were shown to Jagdish Bishnoi in the court and he identified the Articles 20 Collectively, 21, 22, 23 and 24 as the same that were taken charge of by the police under a

panchnama. In the cross-examination, it was revealed that he himself is in the business of fabrication having his shop at Sahar Village. The shop is situated at a walking distance of about four minutes from Sahar Police Station. It is revealed that he was already acquainted with A.P.I. Jadhav. He was unable to give the number of the car by which the police party and panchas went to Pune, which he described as 'a white coloured Sumo car.' According to him, the information that was given by the shopkeeper was that the ornaments had been sold by the appellant to him about eight to nine months prior to the date, on which the police party and panchas had gone there.

17 The evidence of Atish Parekh also supports the case of the prosecution, as he indeed says that the appellant had come to the shop and had sold certain gold ornaments to him. Quite interestingly, he is unable to say how much was paid by him to the appellant for the said ornaments and says that he paid him 'Rs.30,000 to 35,000/-'. According to him, the appellant had come to him with his old customer, and that, that is why he

purchased the ornaments from the appellant. He was, however, unable to give the name or details of the said 'old customer.' Similar is the evidence of Maruti Jadhav, Investigating Officer (PW8) about the recovery of the ornaments allegedly at the instance of the appellant.

18 According to me, the evidence regarding the recovery of the part of the robbed property, at the instance of the appellant, is not satisfactory, for a number of reasons.

19 Maruti Jadhav, Investigating Officer (PW8) has admitted in the cross-examination that before leaving jurisdiction and local limits of the Police station, it would be necessary to inform the superiors, but in this case, he had not given any letter to his superiors. He claimed that he left the Police station with the directions of one Police Inspector Shri Shrirang Dhumale. However, P.I. Shrirang Dhumale, who was examined as prosecution witness no.7, does not speak about any such direction being given by him to Maruti Jadhav. There is also no clarification

as to why the police party and the panchas went to Pune by a private vehicle and from where the private vehicle was brought. There is also no record of the police party and the panchas traveling by a private vehicle to Pune.

20 However, that is not the most crucial aspect of the matter. Assuming that *some* property was indeed recovered at the instance of the appellant, the next question would be *whether it is indeed part of the robbed property*. Without this being established, the appellant cannot be connected with the robbery. The crucial aspect, therefore is, '*whether the identity of the property said to have been recovered from the shop of Atish Parekh as being a part of the robbed property, is satisfactorily established.*' Interestingly, it appears that, when the other two accused were prosecuted, as aforesaid, vide a separate sessions case, some property was said to have been recovered at the instance of Premsing Thakur – accused no.2 in the said case, and that the description of the property recovered at his instance, and that allegedly recovered at the instance of the appellant, is same. This has been observed by the

learned trial Judge also (paragraph 19 of the impugned judgment). The learned Judge, however, reasoned that during the robbery, a bunch of similar type of ornaments was taken away, and that, therefore, there would be nothing wrong if ornaments of similar description were recovered from the appellant and also from the other accused, who, as aforesaid, was tried separately. If one has to reason this way, the fact remains that the articles recovered are of a general description without any identification mark or special identification marks. Sanjay Das has admitted in his evidence that there were no special identification marks on the articles. What is further interesting to see is that the articles in question were not shown at all to Atish Parekh during his evidence. He was not asked whether the articles in question were the same which had been handed over by him to the police.

21 The evidence of recovery of the part of the robbed property at the instance of the appellant is open to a reasonable doubt. It may also be observed in this context that, in the first place, there was no reason for Atish Parekh, who deals in jewelery,

to keep the articles as it is for a period of about nine months, though he had purchased the same. Why did he keep those articles separately, is not clear.

22 For connecting a person with the offence of robbery on the basis that the robbed property came to be recovered at his instance, the identity of the property as the same must be established beyond reasonable doubt. When the property is an ordinary article found anywhere, it would be difficult to place reliance on the circumstance of the alleged recovery of such property at the instance of a person, to connect him with the offence of theft or robbery.

23 In this case, neither the evidence of identification of the appellant as one of the culprits was satisfactory, nor was the evidence of recovery of a part of the robbed property at his instance, was satisfactory. Sanjay Das had already given evidence in a previous case and was fully aware of the facts of the case, and also the fact that the appellant, who was yet to be prosecuted, was the third accused in the case.

24 This was a case where the learned Judge ought to have given the benefit of the doubt which indeed arises about the guilt of the appellant and should have acquitted him. The order of conviction being not in accordance with law, needs to be set aside.

25 The appeal is allowed.

The impugned judgment and order of conviction and the sentences imposed upon the appellant are set aside.

The appellant is acquitted.

The appellant, however, has committed the breach of the bail bond executed by him. The trial court shall, therefore, take necessary steps to recover the amount of the bond from the appellant and his surety, in accordance with law.

The trial court shall report compliance to this court.

The appeal is disposed of in the aforesaid terms.

(ABHAY M. THIPSAY, J.)