

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.489 OF 2013

Muka Biren Rathod,

Age : 19 Years, Occu. : Nil,

R/at Wadiwale, Tal.Maval,

Dist.Pune.

At present in Yervada Central Prison,
Pune.

... **Appellant**

V/s.

The State of Maharashtra,

(Through P.S.O. Lonavala City

Police Station, Dist. Pune)

... **Respondent**

.....

Mrs.Indrayani M. Koparkar, Advocate for the Appellant.

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

....

CORAM : ABHAY M. THIPSAY J.

DATED : 8TH DECEMBER 2015

ORAL JUDGMENT :

1. The appellant was prosecuted on the allegation of having committed offences punishable under Sections 307 of the Indian Penal Code (For short, "IPC"), 457 of the IPC, 380 of the IPC and 511 of the IPC. The Ad-hoc Additional Sessions Judge, after holding a trial, sentenced the appellant to suffer Rigorous Imprisonment for 10 years and to pay a fine of Rs.5,000/- with

respect to the offence punishable under Section 307 of the IPC, to suffer Rigorous Imprisonment for 7 years and to pay a fine of Rs.3,000/- with respect to the offence punishable under Section 457 of the IPC, and to suffer Rigorous Imprisonment for 7 years and to pay a fine of Rs.3,000/- with respect of the offence punishable under Section 511 of the IPC. The learned Judge directed that an amount of Rs.5,000/- from out of the amount of fine, be paid to the First Informant as compensation.

Being aggrieved by his conviction and the sentences imposed upon him, the appellant has approached this Court, by filing the present appeal.

2. The prosecution case, as put forth before the trial Court, can be best gathered from the First Information Report lodged by Nitin Suryawanshi – a police Head Constable attached to Lonavala City Police Station, at the material time. It is, in brief, as follows :

That, on 07/08/2011, Nitin Suryawanshi (PW3) was on night patrolling duty, from 11.00 p.m. to 5.00 a.m. on the next date. He was patrolling in Bangarwadi area. Police Naik Jadhav (PW7), was also on duty with him. At about 4.30 a.m., Suryawanshi received a telephone call from Night Patrolling officer PSI Baban Yedge (PW10), that a telephone call had been received at the police station that robbers had come at 'Girish Jewellers Shop'. Yedge asked Suryawanshi to tighten the patrol in

Bangarwadi area and also informed that he himself was coming in Bangarwadi area. At about 4.45 p.m., PSI Yedge along with Police Head Constable Parghe (PW8) and police constable Rokade (PW2) came to Bangarwadi; and then all of them i.e. Yedge (PW10), Parghe (PW8), Rokade (PW2) as well as Suryawanshi (PW3) and Jadhav (PW7), noticed that two persons were breaking open the shop of Mahadev Jewellers. One of them – said to be present appellant – was caught by Parghe and Rokade on the spot. The other was caught by Nitin Suryawanshi (PW3). That other is said to be brother of the appellant and known as Sattan Rathod. The appellant then shouted that his brother should be released and then advised his brother that he should attack the police by a *subbal*, till they would release him (the appellant). Sattan then threw a crowbar towards Suryawanshi. Suryawanshi tried to avoid the blow, but the crowbar hit on the left leg of Suryawanshi. Suryawanshi got injured and sat down. Sattan took advantage of the dark and escaped. The appellant, who had been caught by Parghe (PW8), Rokade (PW2) and Yedge (PW10) gave his name as, 'Muka Biran Rathod' and also gave the name of one, who had escaped as, 'Sattan Rathod'.

3. The inquiries made with the appellant by the police revealed that a motorcycle, in the dicky of which certain properties i.e. an idol of white metal – of Lord Ganapati, a crown and a chain of white metal, and cash 'approximately' of Rs.1,000/-, consisting

of currency notes and coins, had been kept, was parked there. Suryawanshi then lodged a report which was treated as the First Information Report, on the basis of which a case in respect of offences punishable under Sections 457 of the IPC, 380 of the IPC and 511 of the IPC came to be registered.

4. The other accused Sattan, who had allegedly managed to escape, could not be found. As such, only the appellant came to be prosecuted.

5. During the trial, the prosecution examined totally ten (10) witnesses. The first witness, Bharat Soni is the owner of the shop 'Mahadev Jewellers'. The second witness, as aforesaid, is constable Amol Rokade, while the third, as aforesaid, is the First Informant constable Nitin Suryawanshi. The fourth witness, Omprakash Khandelwal is the neighbour of Bharat Soni, who had visited the spot after the appellant had been apprehended by the police. The fifth witness, Sanjay Bhalerao is a panch in respect of the spot panchanama (Exh.17) and also a panch in respect of the seizure of the clothes of the First Informant Suryawanshi, done at the police station. Bhalerao, however, did not support the prosecution with respect to the spot panchanama and even the seizure panchanama. His evidence shows that whatever he learnt was from police, and he himself had not seen anything except the articles seized, when the same were shown to him at the police

station. The sixth witness, Dinesh Khandelwal is the brother of Omprakash Khandelwal (PW4) and the neighbour of Bharat Soni. He had also gone to the spot after the apprehension of the appellant. The seventh witness, Jaysing Jadhav is the one, who was patrolling with Nitin Suryawanshi (PW3). The eighth witness, Vitthal Parghe - police head constable - was on duty as the driver of the police vehicle in which PSI Yedge was taking night round. The ninth witness Dr.Amol Agarwal is the one, who had treated First Informant Nitin Suryawanshi on 08/08/2011. His evidence shows that Nitin Suryawanshi had sustained a CLW admeasuring 3 x 3 c.m., on his left knee, The tenth and last witness is PSI Baban Yedge, the Investigating Officer himself.

6. I have heard Smt.Indrayani Koparkar, the learned counsel for the appellant. I have heard Smt.M.R.Tidke, the learned Additional Public Prosecutor for the State. I have been taken through the entire evidence adduced during the trial. I have carefully gone through the impugned Judgment.

7. The learned counsel for the appellant contended that the conviction of the appellant, as recorded by the learned trial Judge, is not in accordance with law. She submitted that there were a number of discrepancies in the evidence of the prosecution witnesses, which consisted basically of the police personnel only. She also submitted that even on the facts alleged, no case of an

offence punishable under Section 307 of the IPC was made out. She also submitted that though in the dicky of the motorcycle, which was supposedly in possession of the appellant, some articles are said to have been found, there is nothing to show that the same were stolen articles or stolen property.

8. Indeed, the charge of an offence punishable under Section 307 of the IPC cannot be said to have been proved against the appellant. *As a matter of fact, such a charge was not made out even from the charge-sheet, and even on taking the material in the charge-sheet at face value.* This charge or accusation is based on the alleged assault made on the First Informant Nitin Suryawanshi by the co-accused Sattan who, as aforesaid, absconded and could not be apprehended. The evidence of Nitin Suryawanshi itself shows that Sattan had thrown a crowbar (*pahar*) towards him for escaping from the clutches of Suryawanshi. That, the said co-accused Sattan could throw a crowbar towards Suryawanshi after Suryawanshi had apprehended him, (as per the prosecution case) is rather perplexing, and the possibility of things not having happened that way certainly exists; but, in any case, throwing a crowbar towards Suryawanshi after he was caught by Suryawanshi in an attempt to escape from his clutches, can hardly be said to be an act done with the intention requisite for making it an offence punishable under Section 307 of the IPC. The injury that was caused by such throwing of crowbar was on the left knee of

Suryawanshi, and was of an extremely minor nature. Moreover, the injury is not such, as can certainly be attributed to the throwing of a crowbar, inasmuch as, Dr.Amol Agarwal (PW9) had admitted in his evidence that the injury could be caused by a fall from the moving bike. Thus, coupled with the unlikelihood of a person physically apprehended by another, being able to throw a crowbar towards that another and the possibility of the injury on the knee having been caused by a fall on the ground, the theory of the said Sattan having thrown a crowbar towards Suryawanshi and having injured him, is rendered doubtful. Moreover, such throwing of the crowbar, which was thrown with the object of causing his escape from the clutches of the policemen, cannot be said to have been done with the intention requisite to make that act an offence punishable under Section 307 of the IPC. Lastly, that act has clearly been attributed only to the co-accused Sattan and not to the present appellant. Undoubtedly, the witnesses have said in the evidence that when the co-accused Sattan was apprehended, the appellant advised him to assault the police by throwing a *subble*, and that the police would release him (appellant) only then, but it is difficult to place reliance on this evidence. It is because co-accused Sattan did not actually act on this alleged advise by the appellant and ran away after throwing the crowbar towards Suryawanshi. However, even if it is assumed, for the sake of arguments, that the appellant did say so, still, the act of Sattan cannot be said to have been one coming

under penal provisions of Section 307 of the IPC. This is apart from the fact that the act was squarely committed by Sattan, and there was no charge that the same was abetted by the appellant, and/or that the said act was done in furtherance of the common intention of the appellant and the said Sattan. Not only such a charge has not been framed, but that is not even the allegation in the police report/charge-sheet.

9. Clearly, the charge of an offence punishable under Section 307 of the IPC was not established against the appellant.

10. The learned trial Judge has already held that the charge of an offence punishable under Section 380 of the IPC was not proved, though the trial Judge has not passed an order of acquittal with respect to the said charge. She ought to have done so. In fact, the charge of an offence punishable under Section 380 of the IPC ought not to have been framed at all, as there was no material to support such a charge in the charge-sheet itself.

11. The learned counsel for the appellant pointed out a number of discrepancies in the prosecution evidence, particularly in the evidence of Bharat Soni (PW1), Omprakash Khandelwal (PW4) and Dinesh Khandelwal (PW6). She pointed out that as per Bharat Soni (PW1), he learnt about the incident of receiving a telephone call from Omprakash Khandelwal. Omprakash Khandelwal, however, says that he learnt about the incident from

Bharat Soni, and that he had received a call from Bharat Soni. She submitted that the entire case of the prosecution is doubtful.

12. I have carefully considered the matter.

13. The complainant's allegation that needs to be considered is that the appellant was found to be making an attempt to open the shutter of the door of the shop of Mahadev Jewellers. It is true that merely because four policemen have said that they had seen him doing so, it is not to be accepted as true, and obviously, a deeper and meticulous scrutiny of such evidence cannot be prevented. However, the learned counsel for the appellant submitted that the appellant is already in custody since 08/08/2011 i.e. for a period of four years and four months, and that, including remissions he has suffered imprisonment for about six years. She, therefore, submitted that she would not advance any further arguments, in respect of the evidence which shows that the appellant was found and apprehended while making an attempt to open a shutter of the door of Mahadev Jewellers, but would only submit that this allegation, even if proved, would amount only to an offence punishable under Section 457 of the IPC read with Section 511 of the IPC. She submitted that a complete act of lurking house-trespass by night which is made punishable by Section 457 of the IPC, was not proved at all, and that, as a matter of fact, that was not even the case of the prosecution.

14. There is substance in this contention. The acts attributed to the appellant, if proved, would only amount to an 'attempt to commit lurking house-trespass by night'. Thus, the offence would be one punishable under Section 457 of the IPC read with Section 511 of the IPC, and not the offence punishable under Section 457 of the IPC, *simplicitor*.

15. The learned trial Judge has made a grave error in convicting the appellant of an offence punishable under Section 457 of the IPC. The learned trial Judge had made a graver error in convicting the appellant only of an offence punishable under Section 511 of the IPC-*simplicitor*. Section 511 punishes 'attempts to commit offences' and while holding a person guilty of making an attempt to commit *an* offence, what was the offence that was attempted to be committed, must be specified. A reading of the Judgment indicates that the trial Judge intended to hold the appellant guilty of an offence punishable under Section 457 of the IPC read with Section 511 of the IPC. In that case so, the trial Judge could not have convicted the appellant separately of an offence punishable under Section 457 of the IPC, and separately of an offence punishable under Section 511 of the IPC, *simplicitor*.

16. In result, the appeal is partly allowed.

17. The conviction of the appellant with respect to the offences punishable under Section 307 of the IPC and Section 457 of the IPC and the sentences imposed therefor, are set aside.

18. The conviction of the appellant of an offence punishable under Section 511 of the IPC, *simplicitor*, is corrected and altered as one in respect of an *offence punishable under Section 457 of the IPC read with Section 511 of the IPC*.

19. Thus, the appellant is convicted of an offence punishable under Section 457 read with Section 511 of the IPC, and is sentenced to suffer Rigorous Imprisonment for the period already undergone.

20. Fine, if paid, be refunded to the appellant.

21. However, if compensation has already been paid to the First Informant Nitin Suryawanshi, as ordered by the trial Court, then the same may not be recovered from him.

22. Appeal is disposed of in the aforesaid terms.

(ABHAY M. THIPSAY J.)

CERTIFICATE

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