

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.509 OF 2013

**MOHAMMED RIYAZ BHIKKI KHAN)
MANSURI @ RAJU @ CHANDBABU & ANR.)...APPLICANTS**

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.S.V.Marwadi, Advocate for the Applicants.

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

CORAM : ABHAY M. THIPSAY, J.

DATE : 12th FEBRUARY, 2015.

ORAL JUDGMENT :

1 This appeal is directed against the judgment and order dated 6th April, 2013, passed by the Additional Sessions Judge, Dindoshi, in Sessions Case No.72 of 2010, convicting the appellants who were the accused in the said case of an offence punishable under Section 304 of the Indian Penal Code (IPC) read

with Section 34 thereof and sentencing them to suffer Rigorous Imprisonment for a period of 10 years each, and to pay a fine of Rs.10,000/- each, with a default sentence of 6 months. The learned Judge also convicted the appellants of an offence “punishable under Section 397 of IPC read with Section 34 thereof,” and sentenced them to suffer Rigorous Imprisonment for a period of 7 years each, and to pay a fine of Rs.5,000/- each, with a default sentence of 6 months. The learned Additional Sessions Judge directed that the substantive sentence would run concurrently.

2 The allegation against the appellants was that they had committed the offence punishable under Section 302 of IPC read with Section 34 of IPC, and also that they had committed robbery by using deadly weapons.

3 I have heard Mr.S.V.Marwadi, the learned counsel for the appellants. I have heard Mrs.M.R.Tidke, the learned APP for the State.

4 A number of contentions have been advanced by the learned counsel for the appellants. He submitted that the case against the appellants was not at all satisfactorily proved. He also submitted that the impugned judgment is not sustainable for another reason also. He submitted that the conclusion arrived at, by the learned Judge, to the effect that the offence allegedly committed by the appellants was punishable under Section 304 of IPC and not under Section 302 of IPC, is based on conjectures and surmises, without any basis. Mr.Marwadi submits that, though according to him there was a case for giving benefit of doubt to the appellants, there was no question of converting the alleged offence into one punishable under Section 304 of IPC from the one punishable under Section 302 of IPC, without any evidence or without any material before the court. Among other things, it was contended that the evidence of two prosecution witnesses was not completed during the trial. It was submitted that the examination-in-chief of these witnesses was left incomplete and the matter was adjourned at the instance of the APP in-charge of the matter, and that, thereafter, the witnesses were never again

examined. According to Mr.Marwadi, these witnesses, namely, Prosecution Witness No.9 – Omprakash Pandey, and Prosecution Witness No.10 – Sartaraj Khan, were crucial witnesses, in as much as, they were supposed to prove the recovery of certain incriminating articles at the instance of the accused persons.

5 In order to verify this aspect of the matter, a report was called from the court of Sessions. Accordingly, a report has been received and I have gone through the same. What has been revealed from the said report is indeed shocking and distressing.

6 It appears that PW9 – Omprakash Pandey, a panch in respect of a discovery / recovery panchnama (Exhibit 46) was partly examined on 14th March, 2012. His examination-in-chief remained incomplete. The endorsement made at the foot of the notes of the examination-in-chief reads thus :

“Examination in chief is adjourned as per
request of APP for pointing out seized
article stick to witness.”

The matter was then adjourned to 27th March, 2012. It also appears that on that day, there was no reference to the further examination of PW9 and it appears that further cross-examination of PW7 Sadashiv Sawant was carried out on that date. Thereafter, on 3rd April, 2012, PW10 Sartaraj Khan was partly examined and his examination-in-chief also remained incomplete. Endorsement at the foot of the notes of his deposition shows that the examination-in-chief was adjourned as per the request of the learned APP. The matter was then adjourned to 21st April, 2012. It appears that on 21st April, 2012, the witness was not present, and thereafter also, on three dates i.e. on 7th May, 2012, 4th June, 2012, and 27th June, 2012, there was no progress in the trial. It also appears that even thereafter, i.e. on 4th July, 2012, 11th July, 2012, and 26th July, 2012, which were the dates given by the learned Judge for the trial, no witnesses were examined. It appears that on 16th August, 2012, the evidence of PW11 Mohd.Rias was recorded. Chemical Analyser's reports were also produced.

7 Ultimately, after granting some adjournments in the matter, the evidence of the prosecution was treated as closed, and the examination of the accused persons under Section 313 of the Cr.P.C. was done on 12th March, 2013. It is not necessary to mention the other details, as observed from the record, except that the judgment was pronounced on 6th April, 2013, holding the appellants guilty of the aforesaid offences.

8 **It is clear that the recording of the evidence of PW9 Omprakash Pandey and PW10 Sartaraj Khan was never completed. The examination-in-chief of these two witnesses was left incomplete.**

9 There is substance in the contention advanced by the learned counsel for the appellants that the evidence of these witnesses was relevant, in as much as, they purported to show recovery of certain incriminating articles, at the instance of the appellants. I do find that a reference to the evidence of these witnesses has been made in the impugned judgment.

10 Mr.Marwadi submitted that the appellants are poor persons and have remained in custody for a period of about five years. He submitted that, there is an obvious error in arriving at the findings, in as much as, the findings have been based *inter alia* on incomplete evidence of witnesses, whom the appellants never had any opportunity of cross-examining. In my opinion, the impugned judgment and order of conviction needs to be interfered with, on this count itself. Since the evidence of these witnesses was recorded, it was necessary for the trial court to have given an opportunity to the appellants to cross-examine these witnesses. Even assuming that the prosecutor did not want to examine them further, still, since their evidence was on record, the appellants ought to have been given an opportunity to cross-examine these two witnesses. Denial of such opportunity to the appellants has vitiated the findings of conviction and the sentence.

11 There is also substance in the contention advanced by Mr.Marwadi, the learned counsel for the appellants, that the

finding, as to 'which offence the appellants had allegedly committed', is also based on surmises and conjectures, without any support from the evidence adduced.

12 There is also another error committed by the trial court in recording conviction in respect of an offence punishable under Section 397 of the IPC simplicitor. Section 397 of the IPC does not create any separate offence. It merely refers to an aggravated form of robbery or dacoity and provides for a minimum punishment for such aggravated form. The conviction of the appellants, simplicitor in respect of an offence punishable under Section 397 of the IPC, is incorrect.

13 The learned APP does not dispute before me that the evidence of the prosecution witness nos.9 and 10 was not completed, and that, the appellants had no opportunity of cross-examining these witnesses.

14 Mr.Marwadi also points out that the prayer of the appellants to recall Prosecution Witness No.6 Kamlesh Vishwas for cross-examination was also turned down by the trial court, and that, actually, it ought to have been allowed in the interest of justice.

15 After considering all the relevant aspects of the matter, I think it proper to set aside the impugned judgment and order of conviction, as recorded by the trial court, and to remand the matter back with appropriate directions to the trial court.

16 The appeal is partly allowed.

 The impugned judgment and order is set aside.

17 The trial court shall call upon the prosecution to make available the Prosecution Witness No.9 Omprakash Pandey and Prosecution Witness No.10 Sartaraj Khan, for examination-in-chief. In case the the Additional Public Prosecutor in-charge of the

matter does not wish to examine them further, such witnesses shall nevertheless be made available for enabling the appellants to cross-examine them.

18 The trial court shall also allow the application made by the appellants and permit recall of Prosecution Witness No.6 Kamlesh Vishwas for cross-examination on behalf of the appellants.

19 If the defence so requires, after the evidence of Prosecution Witness No.6, Prosecution Witness No.9 and Prosecution Witness No.10 is completed, the Investigating Officers - Pralhad Ghodke (Prosecution Witness No.12) and Vasudeo Jamdade (Prosecution Witness No.13) be recalled for further cross-examination.

20 It is, after considering the further evidence, as may be adduced before it, and after giving to the prosecution and to the defence, an opportunity of advancing arguments in support of

their respective cases, that the trial court shall deliver a judgment, afresh and in accordance with law.

21 If Mr.Marwadi, the learned counsel for the appellants, expresses a desire to represent the appellants in the trial court, the trial court shall permit him to appear for the appellants i.e. the accused persons, subject ofcourse, to the consent of the accused persons.

Otherwise, Mr.Marwadi may be permitted to assist the court as amicus curiae.

22 The matter shall be decided afresh by the trial court expeditiously, and as early as possible, keeping in mind that the appellants are already in custody for a period of about 5 years.

23 The appeal is disposed of in the aforesaid terms.

(ABHAY M. THIPSAY, J.)