

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.701 OF 2014

Anwar Ibrahim Ansari

Age: 25 years, Occu : Painter,
R/o.Shahad Phatak, Shivaji Road,
Ulhasnagar No.1, Behind Office
of Maji Nagar Sevak Ravi Bagul,
Near Thaili Medical,
Ulhasnagar (E), Dist.Thane

... **Appellant**

V/s.

The State of Maharashtra
(Through Dindoshi Police
Station)

... **Respondent**

.....

Ms.Priyanka P. Joshi, Advocate for the Appellant
Mr.Deepak Thakre, APP for the Respondent/State.

....

CORAM : ABHAY M. THIPSAY J.

DATED : 15TH JANUARY, 2015

ORAL JUDGMENT :

1. This appeal is directed against the judgment and order dated 6th February, 2014 delivered in Sessions Case No. 75 of 2013, whereby the appellant, who was the sole accused in the said case was convicted of an offence punishable under Section 398 of the Indian Penal Code read with Section 34 of the Indian Penal

Code and sentenced to suffer Rigorous Imprisonment for seven years and to pay a fine of Rs.2,000/- with a default sentence.

2. I have heard Ms.Joshi, the learned counsel for the appellant. I have heard Mr.Thakre, Additional Public Prosecutor for the respondent/State. With their assistance, I have gone through the impugned judgment and the evidence adduced during the trial.

3. The prosecution case before the trial Court was that the First Informant-Bhailal Patel was working in Shivam Om Rajeshri Lottery Center, Malad as a Manager. That, on 17/01/2013, he had as usual opened the lottery stall. At about 9.45 p.m., when he was counting the cash, two persons entered inside the stall. One of them, who is said to be the present appellant, took out a revolver and threatened Bhailal Patel, asking him to hand over the cash. Bhailal Patel, however, resisted, caught hold of the appellant and pushed him out of the shop. The other person, at that time, took out a knife from his pocket and rushed towards Bhailal Patel. When Bhailal Patel shouted, the persons working in the adjacent stalls rushed there. They caught hold of the appellant. The other accused, however, managed to escape after throwing away the knife. Two other persons – who, allegedly, were with the appellant and the said other person having knife, and were waiting outside the shop, also ran away.

The police arrived. The appellant who had been apprehended by the First Informant and other witnesses was handed over to the police. The revolver, which he was having, was also seized. It was found containing five live cartridges. In the course of investigation the revolver and the cartridges were sent to the Ballistic Expert for the examination. The revolver was found to be in a working condition. The cartridges were live and found to be capable of being fired.

4. The prosecution examined six witnesses during the trial. The first witness was Bhailal Shanulal Patel-the First Informant himself. One Riyaz Mohd.Shakib Shaikh - the panch witness - was examined as the second witness, while Ahmad Mohd.Shaikh, who claimed to have witnessed the incident, was the third witness. Ajay Atmaram Devkar, the police constable, who took the revolver and the live cartridges to the Forensic Science Laboratory, was examined as the fourth witness for the prosecution, while Arun Govind Chavan - Assistant Police Inspector, who recorded the FIR was examined as the fifth witness. The sixth and the last witness was Dilip Shyamrao Yadav - Police Inspector, the Investigating Officer.

5. The learned counsel for the appellant, who was appointed to prosecute the case under the Free Legal Aid Scheme, submitted that the impugned judgment is not in accordance with

law. She submitted that the incident had been witnessed by a number of independent persons, but none of them were examined during the course of trial. She also submitted that there were discrepancies in the versions of the First Informant and Ahmad Shaikh (PW3). She also submitted that the panch – Riyaz Shaikh (PW2) is not an independent person and is witness to the incident, and as such, ought not to have been selected as a panch. Lastly, she submitted that since no property was recovered from the appellant, he could not be held guilty of an offence punishable under Section 398 of the Indian Penal Code

6. I have carefully gone through the evidence of the First Informant and that of Ahmad Shaikh (PW3). I do not find any material discrepancy in their versions.

7. What is clear is that the appellant was caught on the spot, at the time of the incident. Interestingly, the appellant never disputed his presence on the spot at the time of the incident during the trial also. As a matter of fact, the case of the appellant was that, he had gone to the Lottery Stall for getting some amount which were receivable by him from the First Informant, and that as the First Informant did not want to give that amount to him, he falsely implicated the appellant.

8. The evidence adduced during the trial leaves no manner of doubt that the appellant was apprehended then and

there; and was handed over to the police. It also cannot be doubted that a revolver with live cartridges was also handed over to the police then and there.

9. It is, therefore, not possible to hold that the learned Judge was wrong in holding the prosecution case as 'proved'. The discrepancies sought to be highlighted by the learned counsel are with respect to minor matters, such as *where* the revolver was, *when* the police came or *when* the appellant was apprehended etc., which, in my opinion, are immaterial. The fact that the appellant was caught on the spot and that a revolver containing live cartridges was found with him at that time cannot be doubted at all.

10. The learned counsel placed reliance on the decision of the Supreme Court of India in *Chinnadurai v. State of Tamil Nadu*, 1995 Supp (3) Supreme Court Cases 686, in support of her contention that when no property was allegedly recovered from the appellant, the charge of offence punishable under Section 398 of the Indian Penal Code could not be levelled against him. I have gone through the said reported judgment. In that case, there was apparently no evidence to indicate any attempt of robbery and that, all that the evidence indicated that the appellant therein had entered inside the house of the First Informant along with his companions and had scattered the articles in the house presenting

a scene of ransacking. It was, under these circumstances, held by Their Lordships that there was nothing to indicate that an attempt to commit robbery was made. However, in the instant case, the evidence indicates that by using the revolver a demand of money was made from the First Informant. The evidence of Bhailal Patel shows that he was asked to hand over the cash after the revolver had been put on his neck. Thus, in this case, there is satisfactory evidence of there having been an attempt to commit robbery.

11. The judgment of conviction, as recorded by the trial Court, is proper and legal. Section 398 of the Indian Penal Code provides that the sentence in respect of the said offence shall not be less than seven years. Thus, the trial Court has only awarded the minimum sentence as prescribed by law.

12. When this order was being dictated, it was noticed that the conviction has been recorded by an Assistant Sessions Judge, and that as the substantive sentence imposed is not more than seven years, the appeal ought to have been filed in the Court of Sessions itself. Such appeal could have been heard by the Sessions Judge or an Additional Sessions Judge. However, since this was not pointed out earlier and since I have now examined the merits of the appeal, I do not think it appropriate to now direct it to be heard by the Court of Sessions. In my opinion, there would be no illegality, if, in the circumstances, the appeal is decided by this

Court as, even otherwise, this Court is empowered to have an appeal before the Court of Session transferred to and tried before itself, inter alia, on the ground of convenience or expediency.

13. The appeal is dismissed.

(ABHAY M. THIPSAY J.)