

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.809 OF 2013

GAGALSINGH BADALSINGH KALYANI)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Shri Vikas Shivarkar, Advocate for the Appellant.

Smt.S.Gajare-Dhumal, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 11th SEPTEMBER 2015.

ORAL JUDGMENT :

1 This appeal is directed against the judgment and order dated 26th June 2013, delivered by the Additional Sessions Judge, Pune, in Sessions Case No.506 of 2012, convicting the appellant of an offence punishable under Section 392 of the Indian Penal Code (IPC) and sentencing him to suffer Rigorous Imprisonment for 4

years and to pay a fine of Rs.5,000/-, in default, to suffer Rigorous Imprisonment for 4 months. There were four other accused in the said case. The appellant and the said other accused, all were charged of an offence punishable under Section 395 of the IPC read with Section 34 of the IPC. The learned Additional Sessions Judge, however, after holding a trial, held that the charge of an offence punishable under Section 395 of the IPC was not proved. He held that the charge of an offence punishable under Section 392 of the IPC was proved, and that too, only against the present appellant, who was accused no.1 in the said case. The learned Additional Sessions Judge acquitted the other accused.

2 I have heard Shri Vikas Shivarkar, the learned counsel for the appellant. I have heard Smt.S.Gajare-Dhumal, the learned APP for the State. With their assistance, I have gone through the entire evidence adduced during the trial. I have carefully gone through the impugned judgment.

3 The prosecution case, in brief, be stated thus :

Indrajeet Jadhav (PW1), the First Informant, had, along with his friend Chetan Mokashi (PW3), gone to a *pan* stall at about 10.30 p.m. on 28th April 2012. At that time, five to seven persons belonging to Shikalkar community came there and as one of the said persons dashed against Chetan, a quarrel took place between Indrajeet and Chetan on one hand and the Shikalkar boys on the other hand. After the quarrel, the boys left the pan stall, waited at some distance and again came back. After coming back, they started beating Chetan. Indrajeet tried to intervene, but the boys beat Indrajeet also. During the incident, the gold chain which Indrajeet was wearing and the money purse which he was having, was taken away by the said boys. The boys then ran away from the spot. While running away, one of the boys shouted – '*Gogalsingh chal bhag*'. Three of the boys ran away by motorcycle bearing number MH-12 HS 4984. There was an ATM card, a cash of Rs.600/- and the driving license of Indrajeet in his money purse. The gold chain was weighing 6 gms. When the incident was going on, Chetan, on being frightened had run away. Indrajeet went to the Police Station and lodged a report which

was treated as First Information Report (FIR) (Exhibit 17).
Indrajeet showed the spot of incident to the police.

4 In the course of investigation, the appellant and the other accused were arrested. The robbed gold chain of Indrajeet was recovered. Part of the same was recovered from the appellant and the remaining part was recovered from accused no.4 Sangatsingh. On completion of investigation, charge-sheet alleging commission of an offence punishable under Section 395 of the IPC was filed against the appellant and the other accused.

5 During the trial, the prosecution examined eight witnesses. The first witness, as aforesaid, is the First Informant Indrajeet. The second one is Sanjay Thite, a panch in respect of the panchnama under which a part of the robbed gold chain was allegedly recovered from the house of the appellant. The third witness is Chetan Mokashi. The fourth one is Pintu Sharma, who is the owner of the pan stall, before whom the alleged incident had taken place. It may be observed here itself that this witness

claimed that he could not identify any of the persons as it was dark. The fifth witness P.I. Vishambar Golde is the Investigating Officer. He had arrested the appellant and accused no.2 Jaypalsingh. He had also seized the motorcycle bearing number MH-12 HS 4984. The sixth witness Sanjay Sinnalkar is a panch in respect of the disclosure statement made by accused no.4 Sangatsingh. His evidence is not relevant in the context of the present appeal. The seventh witness A.P.I. Satish Chavan has carried out part of the investigation which related to recovery of other part of the gold chain, allegedly, at the instance of the accused no.4 Sangatsingh. His evidence is also not relevant in the context of the present case. The eighth witness is Dr.Virendra Ghogare, attached to Sasoon hospital, who was on duty as a Casualty Medical Officer on 29th April 2012, and who had examined the First Informant Indrajeet. He had noticed certain injuries on the person of Indrajeet.

6 Shri Shivarkar submitted that the case of the present appellant was not different from that of the co-accused, who were

acquitted. He submitted that the evidence against the appellant consisted of his identification as one of the culprits by Indrajeet (PW1) and Chetan (PW3), and the recovery of a part of the robbed property, allegedly at his instance, and from his house. He submitted that, the two other accused, who were also identified by Indrajeet, were, however, acquitted by the learned trial Judge. He also pointed out that the remaining part of the robbed property was allegedly recovered from accused no.4 Sangatsingh, but he was also acquitted by the learned trial Judge. Thus, the substance of his contention is that there was no basic difference between the case of the appellant and that of the other accused, who have been acquitted.

7 After carefully going through the impugned judgment, it appears that the learned Judge held the appellant guilty as a result of the combination of the incriminating circumstances against the appellant, which combination was not available against any of the other accused. The learned Judge has observed in paragraph 29 of the judgment that the case of the appellant

was on a different footing from the remaining accused. The learned Judge categorically observed that there were mainly three incriminating circumstances against the appellant and listed those circumstances as follows :

- i) his identification in the court by the First Informant,
- ii) the specific mention of his name in the FIR in view of the call given by his associate at the time of commission of crime, and
- iii) recovery of stolen property i.e. broken piece of gold chain.

8 To the extent that the learned Judge treated the case of the appellant differently from the other accused, he was certainly right, but the question is whether this difference was sufficient to hold the appellant guilty beyond reasonable doubt. This needs consideration, particularly because, the nature of the prosecution evidence, has not been believed by the learned Judge with respect to the other accused, and he has refused to hold any of them guilty on the strength of a single incriminating circumstance.

9 It is true that Indrajeet and Chetan, both, have identified the appellant as one of the culprits. This identification was done by them for the first time in the court. The learned trial Judge has not given any value to the identification of the appellant as one of the culprits by Chetan, in view of the admission of Chetan that the appellant was shown to him at the Police station on his apprehension by the police.

10 Admittedly, in this case, no Test Identification Parade was held. Why it was not held, has not been explained. When the offenders were not previously known to the victims, and had made good their escape from the spot, there would ordinarily be no justification for not holding the Test Identification Parade. No reason has been given for not holding a Test Identification Parade.

11 There is one circumstance against the appellant, which, if believed, would lend credence to the evidence of identification. This circumstance, which is believed by the learned

Additional Sessions Judge, is that, when the offenders were running away, one of them shouted '*Gogalsingh chal bhag.*' Gogalsingh being the name of the appellant, it is claimed, that his presence on the spot among the offenders, is indicated by such utterance.

12 After carefully considering the matter, I am unable to place reliance on this circumstance. The possibility of this circumstance having been manipulated to show the involvement of the appellant cannot be ruled out for the following reasons.

13 Admittedly, the appellant has 18 previous cases pending against him. Though the exact number of cases pending against him may be open to doubt, it is a fact that the appellant has past criminal record, and as such, was clearly known to the police. The description of the offenders was given as persons from Shikalkar community, who keep a bun, and the appellant fits in that description. If this circumstance is to be relied upon, it must be felt certain that the FIR – which mentions it – was lodged

immediately after the incident. However, such satisfaction cannot be arrived at, in the instant case. The incident is said to have taken place at 10.30 p.m. and the matter was reported to the police telephonically within ten minutes thereafter. The FIR is shown to have been registered at the police station at about 11.30 p.m. This, however, does not appear to be correct from the evidence adduced by the prosecution witnesses themselves. It is clear that after the matter was reported to the police, the police came on the scene, and search for the offenders was being taken, with the help of Indrajeet as well as Chetan, who were accompanying them. The search was being taken till about 1.30 a.m. and Indrajeet, Chetan and the police returned to the police station thereafter. It is, thereafter, that the FIR came to be registered. Thus, the statement that one of the offenders while running away shouted '*Gogalsingh chal bhag*' was not made by the First Informant immediately after the incident, but after he had been with the police searching for the offenders, for more than two hours. The learned APP submitted that the incident was reported to the police immediately after its happening,

telephonically, and though this is true, what was the information given on telephone and whether entry was made in the Station House Diary on the basis of that report, has not been disclosed. It is not the case that there had been an entry showing the name of the appellant as one of the offenders in the General / Station House Diary at the Police Station immediately after the incident.

14 This suspicion – about the circumstance of one of the offender uttering the appellant at the time of the incident – becomes graver because of two other factors. The first is that, the prosecution has avoided to give the details of the arrest of the appellant, such as the time and place. According to the Investigating Officer Shri Golde (PW5), prior to the arrest of the appellant, he was chased and that the appellant was driving motorcycle bearing registration number MH-12 HS 4984. The appellant and the motorcycle were brought to the police station at the same time. The evidence of Sanjay Thite (PW2) shows that on 29th April 2012, in the afternoon, the said motorcycle was already at the police station, and that, the appellant was also at the police

station. The second factor is that, neither the investigation nor the evidence was directed towards pointing out or ascertaining who was the offender who made that utterance. This factor makes this circumstance further suspicious.

15 Coming to the third incriminating circumstance, viz., recovery of the stolen property i.e. a part of the gold chain which was allegedly broken during the incident, the same also does not appear to have been satisfactorily established. In that regard also, there is evidence of PW2 Sanjay Thite, a panch, and the Investigating Officer Golde (PW5). According to Sanjay Thite, when he was called at the police station on 3rd May 2012, the other panch Sanjay Sinnalkar (PW6) was also present at the police station, and that, in the presence of Sanjay Thite and Sanjay Sinnalkar, the appellant made a statement that he would produce the broken piece of gold chain kept in his house. The police party then went to the house of the appellant and from there, the appellant allegedly produced a broken piece of gold chain. The broken piece of gold chain produced before the court was

identified by the witness as the same that was recovered in his presence. This witness is a regular panch of the police, and that, it is so, has been admitted by him. Even the other panch selected is a regular panch of the police. Both the panchas are tea vendors doing their business without license within the vicinity of the police station. Apart from this, the evidence of Investigating Officer Golde (PW5) with respect to the recovery is not in conformity with the evidence of panch Sanjay Thite (PW2). According to Investigating Officer Golde (PW5), the appellant took the police party and the panchas towards a room which was latched from outside. The latch was allegedly removed by the appellant and then the police party and the panchas entered inside. Now the question is, when the appellant was in custody of the police, how come the key of the premises remained with him. In this context, it is significant that the arrest panchnama has not been produced and what was on the person of the appellant when he was apprehended, is not disclosed. The panch Sanjay Thite did not speak about the door being closed or latched and the appellant opening it. This casts a doubt about the truth of the

matter. This is more so, because the recovery was effected after about four days from the apprehension of the appellant, and that too from his house.

16 Thus, in my opinion, none of the circumstances relied upon against the appellant, was satisfactorily established. Even the learned trial Judge appears to be of the same view, in as much as, he has not relied on either the evidence of the identification or the evidence of recovery, so far as the other accused who have been acquitted were concerned. Thus, clearly, he did not find any single circumstance as free from suspicion. He has held the appellant guilty only because there was a combination of the incriminating circumstances against the appellant, while such combination was not there in respect of the other accused. However, just by multiplying the incriminating circumstances, the requisite satisfaction about the appellant being one of the offenders, cannot be arrived at, particularly, when none of these circumstances is satisfactorily established.

17 So far as the identification is concerned, the same is not preceded by the Test Identification Parade. Strength is sought to be given to the identification on the basis of the disclosure of the name of the appellant by one of the offenders by making a utterance at the time of the offence itself, but this circumstance is itself suspicious in the light of the fact that, when and under what circumstances the appellant came to be arrested, is not brought on record, and that, the FIR has been ante-timed. This circumstance having been introduced just to implicate the appellant, who is already known to the police, cannot be ruled out. The evidence of recovery of a part of the property also cannot be believed, in view of the fact that the evidence of the panch and the evidence of Investigating Officer Golde (PW5) differs on some relevant and material aspects. Investigating Officer Golde has gone to the extent of claiming that a goldsmith was kept present by him at the time of recovery of the gold chain, though such a fact is not at all recorded in the panchnama and is also not spoken by the panch witnesses. This fact, which is absurd in itself, has been introduced by the Investigating Officer Golde just to explain how the weight

of the broken part of the gold chain is appearing in the panchnama. If the witnesses are of such type, implicit reliance on their testimony cannot be placed.

18 The learned Additional Sessions Judge has not placed implicit reliance on any of the incriminating circumstances, by itself. He was, however, influenced by the fact that there were three incriminating circumstances against the appellant. Since all the incriminating circumstances were weak, just by their addition, the appellant ought not to have been convicted. The appellant also ought to have been given the benefit of doubt like the other accused, and should have been acquitted.

19 The appeal is allowed.
The impugned judgment and order is set aside.
The appellant is acquitted. He be set at liberty forthwith.
Fine, if paid, be refunded to him.

(ABHAY M. THIPSAY, J.)

CERTIFICATE

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