

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1302 OF 2004

MANISHKUKAR alias RAJNISHKUMAR)
RAMPRIT PASWAN)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

None for the Appellant.

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

CORAM : ABHAY M. THIPSAY, J.

DATE : 5th OCTOBER 2015.

ORAL JUDGMENT :

1 This appeal is directed against the judgment and order dated 24th August 2004 passed by the learned Ad-hoc Assistant Sessions Judge, Pune, in Sessions Case No.143 of 2003, convicting the appellant who was the accused in the said case, of offences

punishable under Section 392 of the IPC read with Section 34 of the IPC, Section 394 of the IPC read with Section 34 of the IPC, and Section 397 of the IPC read with Section 34 of the IPC. The learned Ad-hoc Assistant Sessions Judge held the appellant guilty also of an offence punishable under Sections 25 read with Section 3 of the Arms Act. The learned Ad-hoc Assistant Sessions Judge sentenced the appellant as follows :

OFFENCE	SENTENCE
Section 392 IPC r/w Section 34 IPC	Rigorous Imprisonment for 5 years and to pay a fine of Rs.1,000/-
Section 394 IPC r/w Section 34 IPC	Rigorous Imprisonment for 6 years and to pay a fine of Rs.1,000/-
Section 397 IPC r/w Section 34 IPC	Rigorous Imprisonment for 8 years and to pay a fine of Rs.2,000/-
Section 25 r/w Section 3 of Arms Act	Rigorous Imprisonment for 1 year and to pay a fine of Rs.250/-

The learned Ad-hoc Assistant Sessions Judge directed that the sentences would run concurrently.

2 When the appeal came up for final hearing, the appellant had been released from prison after having undergone the sentences imposed upon him. Nevertheless, the appeal having been admitted, was required to be decided on merits and in accordance with law. Repeated opportunities were given to the counsel for the appellant to remain present and argue the matter. But the counsel did not remain present and did not make any submissions in support of the appeal. The appeal is, therefore, being decided, after carefully going through the appeal memo, the entire evidence adduced during the trial, the impugned judgment, the record of the examination of the accused, the written arguments filed before the trial court, and after hearing the learned APP.

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

That, on 1st December 2002, Police Constable Anil Mane (PW4), Police Head Constable S.N.Dalvi (PW1), Police Constable Ashok Tupsaundar and Police Constable Shekhar Jagtap, all attached to Bund Garden Police Station, Pune, were

proceeding towards Jejuri in a Tata Sumo jeep in connection with a missing complaint registered at the Bund Garden Police Station. One Kiran Shah, who was a friend of the person who had lodged the missing complaint, was also accompanying the police. The Sumo Jeep reached near Vitthal Petrol Pump at Jejuri. The police wanted to make enquiries about the address of rickshaw driver in which the property had been left by the complainant and regarding which he had lodged a missing complaint. When Mane (PW4) went to the petrol pump to make enquiries, he found that a person who had covered his face with handkerchief was there. That person told Mane that diesel was over and he should go. Mane then told him that they were policemen. Two more persons, who had similarly covered their faces with handkerchief, came out of the cabin of the petrol pump and they also said to Mane that he should go from there. Those persons were having country made pistols in their hands. Mane suspected that something improper was taking place. The persons who had covered their faces, started going away, but apparently the police wanted and tried to apprehend them, and therefore, one of them fired from his firearm

towards Police Constable Dalvi, who sustained a bullet injury. Kiran Shah ran towards the road. Mane caught one of the culprits. A revolver was also found with that culprit, who was brought to Jejuri Police Station, where Mane lodged a report. The appellant is said to be the person who was caught by Police Constable Mane.

4 Thus, the case of the prosecution in short is that while the police had gone to Vitthal Petrol pump, Jejuri, for making enquiries in connection with some other matter, they accidentally came across an incident of robbery that was taking place. The appellant was one of the culprits. Due to the unexpected arrival of the police, which was purely by chance, the appellant and the other assailants were perplexed and though the others managed to run away, the appellant was caught on the spot with a weapon.

5 The prosecution examined seven witnesses during the trial. Dalvi and Mane, both were examined, and both said that the appellant was one of the culprits, and that, he was caught on the

spot by Mane. Both of them also said that a revolver was found with him, and that, he was taken to Jejuri Police Station where the First Information Report (FIR) came to be lodged.

6 Dr.Yogesh Jain (PW5) and Dr.Sharad Choudhari (PW6), both attached to Jehangir hospital, Pune, at the material time, were examined during the trial, and their evidence undoubtedly establishes that Constable Dalvi had sustained an injury by a firearm.

7 The evidence of Suresh Bhosale (PW7), Assistant Police Inspector, attached to Jejuri Police Station at the material time, who registered the FIR, establishes that the appellant was brought by Mane and others to the police station on 2nd December 2002, and that, the appellant was having a country made pistol with him.

8 It appears that the prosecution wanted to examine some more witnesses, but such opportunity was not granted by

the learned trial Judge. Since the case is that the appellant was caught on the spot, the fate of the matter depends on the evidence of Dalvi (PW1) and Mane (PW4). I do not find anything which would lead to disbelief about their testimony to that effect. It needs to be observed that Dalvi had sustained a serious injury by a firearm, and obviously, the incident was not a got up incident. It is also absolutely clear that the appellant was taken by Dalvi, Mane and other members of the police team attached to Bund Garden Police Station of Jejuri Police Station, and he was there with the police at the time of lodging the FIR itself. As a matter of fact, the place and time of his apprehension has not been disputed by the appellant. He merely said that he was wrongly caught by the police while he was passing from the road.

9 The learned trial Judge rightly believed the evidence adduced by the prosecution and rightly discarded the theory of the appellant. The order of conviction of the appellant, as recorded by the learned trial Judge, does not suffer from any error or infirmity, needing interference.

10 However, while sentencing and passing the operative order, the learned trial Judge appears to have committed an error. He has convicted and sentenced the appellant with respect to the offence punishable under Section 392 of the IPC read with Section 34 of the IPC, as also with respect to the offence punishable under Section 394 of the IPC read with Section 34 of the IPC. The offence punishable under Section 394 of the IPC is an aggravated form of the offence punishable under Section 392 of the IPC, and it was not proper to sentence the appellant separately for both the offences. Similarly, the learned trial Judge has convicted the appellant simplicitor of an offence punishable under Section 397 of the IPC read with Section 34 of the IPC. In fact, Section 397 of the IPC does not create any substantive offence. It merely regulates the punishment by providing for a minimum punishment for the offender who commits robbery or dacoity, should such offender use a deadly weapon, or cause hurt to any person while committing robbery or dacoity. Thus, the proper operative order that should have been passed by the learned trial Judge would be convicting the appellant of an offence punishable under Section

394 of the IPC read with Section 397 of the IPC. The learned trial Judge has, while convicting and sentencing the appellant with respect to a number of offences, imposed the highest sentence of Rigorous Imprisonment for 8 years. That sentence, in the facts and circumstances of the case, appears to be proper.

11 The conviction of the appellant with respect to the offences punishable under Section 25 of the Arms Act read with Section 3 thereof is not proper or legal, as there was nothing to show that sanction for the prosecution of the appellant with respect to the said offence had been granted. Since cognizance of the said offence could not be taken without a valid sanction under Section 39 of the Arms Act, the learned trial Judge could not have convicted the appellant of the said offence when there was nothing to show that any such sanction had been granted.

12 In the result, the appeal is being disposed of as follows:

(a) The appeal is partly allowed.

- (b) The conviction of the appellant with respect to the offence punishable under Section 25 of the Arms Act read with Section 3 thereof, as also the sentence imposed therefor, is set aside.
- (c) The appellant is convicted of an offence punishable under Section 394 of the IPC read with Section 397 of the IPC and is sentenced to suffer Rigorous Imprisonment for 8(eight) years and to pay a fine of Rs.2,000/-, in default, to suffer Rigorous Imprisonment for 1(One) year.
- (d) The conviction of the appellant, as recorded by the learned trial Judge, with respect to the offence punishable under Section 392 of the IPC read with Section 34 of the IPC, and with respect to the offence punishable under Section 394 of the IPC read with Section 34 of the IPC simplicitor is set aside, in view of his conviction and sentence in respect of the offence punishable under Section 394 of the IPC read with Section 397 of the IPC.

13 Since the appellant has already been released from the
prison after undergoing the sentence, no further direction is
necessary.

14 The 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.**