

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.920 OF 2012

RAJESH JATIHUSAIN ANSARI)
Age 35 years, Occupation : Labour,)
Address : 90 Feet Road, Beside Ansar)
Hotel Zopadpatti, Dharavi, Mumbai.)
Native Place Address :)
Paras Pakadi Chanayan, Bandh Paras)
Pakardi, Achal : Mazaullya, Dist.Paschim)
Champaran, State Bihar.)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)
At the instance of Kurla Railway Police)
Station, vide C.R.No.19 of 2012)...RESPONDENT

Mr.H.V.Akolkar i/b. Dr.Yug Mohit Choudhary, Advocate for the Appellant.

Mr.Deepak Thakre, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 10th MARCH 2015.

JUDGMENT :

1 The appellant was prosecuted on the allegation of having committed offences punishable under Sections 328 and 379 of Indian Penal Code (IPC). The learned Assistant Sessions Judge, Mumbai, after holding a trial, found him guilty and sentenced him to suffer Rigorous Imprisonment for 8 years, and to pay a fine of Rs.15,000/- with respect to the offence punishable under Section 328 of the IPC and Rigorous Imprisonment for 3 years and to pay a fine of Rs.3000/- with respect to the offence punishable under Section 379 of the IPC. The appellant is aggrieved by the judgment and order convicting and sentencing him, and has, therefore, appealed to this court.

2 The prosecution case, as was put forth before the trial court, may, in brief, be stated thus :

Jitendra Raj Mangalram (PW3) on 24th October 2011, had gone to Kurla Terminus Railway Station for going to his native place near Patna. He was standing in the queue for purchasing a railway ticket. At that time, a person, not previously known to

him, approached him and started chitchatting with him. This person is said to be the present appellant (hereinafter referred to as “the accused”). The accused asked Jitendra as to where he was going and Jitendra informed him that he had to go to Patna. The accused informed Jitendra that he had also to go to Patna. Jitendra and accused then both boarded Karmabhumi Express for going to Patna. The accused had given his name as Raju Mishra to Jitendra. The accused and Jitendra travelled together and developed acquaintance with each other. The accused gave a banana to Jitendra to eat during the journey. On 26th October 2011 they reached Patna. The further journey to their respective native places was to be done by bus. They both then had meals together in a hotel at Patna and on the request of the accused, who stated that he had no change, the bill of the meals was paid by Jitendra. The accused had said that he would purchase the bus ticket for Jitendra to compensate for the monies spent by Jitendra towards the payment of the hotel bill.

Jitendra was travelling with a cash of Rs.22,500/- which had been kept by him in his underwear. Jitendra, being conscious of

having that much amount with him, was frequently touching it by his hand, which was observed by the accused.

After having meals, accused and Jitendra boarded a bus for going to Chirayya, near Village Sitamadhi. The accused wanted to go to another village near Sitamadhi. The accused brought two opened cold drink bottles and gave one of them to Jitendra. Both consumed the cold drink from their respective bottles. Jitendra, thereafter, felt giddy and slept. It is only after the bus-conductor had splashed water on his face, after the bus had reached Sitamadhi – the last stop, that Jitendra got up. He then realized that he had lost the said amount of Rs.22,500/-. The accused was not seen anywhere. Jitendra borrowed money from others and reached his native place Chirayya.

Jitendra stayed at his native place for about 3 months and then returned to Mumbai. Regarding the incident of theft, he did not lodge any report anywhere. He, however, was certain that his money was stolen by the accused only, and had searched for the accused in nearby villages, but could not trace him out.

On 24th January 2012, Jitendra had been to Kurla Terminus Railway Station again to see off his friend. Jitendra's friend, Laxman, had occupied a seat in the train. Jitendra had purchased a platform ticket and while he was going towards the train, he saw the accused on the same platform. The accused also saw Jitendra and started walking away. Jitendra then caught the accused and demanded his money back. Jitendra shouted *chor chor*, whereupon the accused said that he was not *chor* but that Jitendra was *chor*. Two members of the Railway Protection Force came there. Jitendra narrated the incident to them and then they took Jitendra and the accused to their office. Jitendra and the accused were then sent to the Kurla Railway Police Station. The statement of Jitendra, which was treated as First Information Report (FIR), was recorded. The accused was arrested. On completion of investigation, he was charge-sheeted and prosecuted, which prosecution resulted in his conviction, as aforesaid.

3 I have heard Mr.H.V.Akolkar, the learned counsel for the appellant. I have heard Mr.Deepak Thakre, the learned APP for the State. With their assistance, I have gone through the impugned judgment and the entire evidence adduced during the trial.

4 The prosecution examined six witnesses during the trial. The first one – Anilkumar Sen – is a constable attached to Kurla Railway Protection Force. His evidence shows that on 24th January 2012, while he was on duty, he heard some commotion and found two persons – Jitendra and the accused – quarreling with each other. Jitendra informed this witness that the accused had given some food articles to him and after consuming which, he had become unconscious and then the accused had taken away an amount of Rs.20,000/- or Rs.22,000/- from him. Jitendra also told that the incident had occurred about 2 to 3 months back. Anilkumar Sen, then, brought both of them to the booth of the Railway Protection Force, reported the matter to his superior – one Mr.Rawla – and then referred the matter to Railway Police. The accused was handed over to Railway Police.

5 The second witness Santosh Gupta is a panch. In his presence, the personal search of the accused was taken at Kurla Railway Police Station. According to him, an amount of Rs.200/- 3 sim cards and one railway ticket was found with the accused. The money and the railway ticket was returned to the accused. That, on 27th January 2012, again this witness was called at the police station and when he went there, in his presence, the accused gave certain information, pursuant to which, the police party along with this witness, and the accused went to Dharavi. The accused took the police party and the panch to a premises on the third floor of a building, and pointed out one person, stating that, 'that friend had an amount of Rs.6,000/- belonging to the accused.' The said person then produced an amount of Rs.6,000/- consisting of 12 currency notes of Rs.500 denomination each. These notes were taken charge of under a panchnama. In the cross-examination of this witness, it is revealed that he is a hawker, whose stall is near Kurla Railway Police Station, and that, since he has no permission or license to put a stall in that area, his business is often interrupted by the officers of the Municipal

Corporation and police. It also transpired that he had acted as a panch in some previous cases also. It may be observed that, even in this case, he has been a panch in respect of two different panchnamas – one at the time of the arrest of the accused, and the other on 27th January 2012, which is in respect of the alleged recovery of the currency notes.

6 The third witness is the First Informant – Jitendra himself. He has narrated the incident in details. In the cross-examination, it transpired that the amount of Rs.22,500/-, which was with him, consisted of the amount of Rs.1500/- given to him by some villagers for giving the same to their houses for *Chat Puja*. Thus, what transpires is that, Jitendra was carrying the amount given to him by others, which amount was to be given to the relatives of those persons in the native place of Jitendra and the said persons. In the cross-examination, it is also revealed that, the amount was stolen by giving a cut to the jeans full pant, which Jitendra was wearing. The cut was given near the thigh portion. Jitendra was questioned as to whether he had shown the said

jeans pant to the police, to which, he answered in affirmative, but added that the police did not seize it. A suggestion was given to him that the accused had not travelled with him and had not offered him any drink, and that, Jitendra himself had spent the amount of other villagers and was falsely implicating the accused. These suggestions have been denied by Jitendra.

7 The fourth witness – Arjun Baliram Kendre, is a Head Constable, who was attached to Kurla Railway Police Station, at the material time. His evidence shows that on 24th January 2012, staff of Railway Protection Force came to him with two persons, one of whom was the accused and the other is supposed to be Jitendra. His evidence shows that one unreserved railway ticket from Kurla to Raksol, cash of Rs.200/- and 3 sim cards were found with the accused.

8 The fifth witness – Sanjay Kulkarni – is the Sub-Inspector of Police, attached to Kurla Police Station. His evidence is to the effect that, pursuant to the information disclosed by the

accused, an amount of Rs.6,000/- was recovered from one Sarfaraj Shaikh. In the cross-examination he agreed that the panch witnesses associated by him in the 'discovery', had acted as such in other cases also, but stated that he still took them, as he did not get any other panch witnesses.

9 The sixth witness is also a Police Officer. He was Inspector of Police, attached to Kurla Railway Police Station, at the material time. He had registered the FIR and had also filed the charge-sheet.

10 It is contended by the learned counsel for the accused that there is absolutely no evidence to hold the accused guilty. He submitted that there was no evidence of the accused having administered any stupefying substance to the said Jitendra and just because Jitendra says that he felt giddy and slept, it cannot be presumed that it was because the accused had administered some stupefying substance to him. It is also submitted that simply because the accused was not found when Jitendra was woken up

by the bus-conductor, it could not be presumed that it must be the accused, who had taken away the cash, that was in possession of Jitendra. It is also suggested that, the possibility of the story of theft being false, cannot be overlooked, particularly because, the amount was not belonging entirely to Jitendra, and consisted of the amounts of other villagers, to whom Jitendra was answerable.

11 I have carefully considered the matter.

12 It is not possible to hold that the version of Jitendra that he had met the accused, that they had travelled together, etc., is false. Even on the basis that Jitendra was accountable for the loss of cash, and did owe an explanation to other villagers, it cannot be accepted that he would, therefore, arbitrarily, or at random, select a person to level such an accusation.

13 That, Jitendra did not lodge any report with the police after the incident also, cannot weigh very adversely to the prosecution case. It is because, Jitendra might not have realized

as to how he should react in the given circumstances. Undoubtedly, not reporting the matter to the police, casts some doubt on the case of the prosecution, but it cannot be thrown out simply on that ground.

14 That, there could be an error on the part of Jitendra in identifying the accused, also does not seem likely to me. Jitendra and accused had travelled together in the train for a long distance from Mumbai to Patna, were seating near each other and chitchatting during this period, and therefore, the identification of the accused as the passenger who had travelled with Jitendra, ought to be believed and accepted.

15 However, the difficulties of the prosecution start here. Undoubtedly, there was proper and sufficient basis for leveling the accusation against the accused and for his apprehension by the police. However, what cannot be ignored is that, the claim of Jitendra about what the accused has done, is itself based on inferences. The accused felt sleepy or giddy after taking 'some

cold drink' which he had chosen to drink. Admittedly, till the train reached Patna and till they sat in the bus for going to their native places, nothing objectionable was administered to Jitendra by the accused. Obviously, there has been no evidence in support of the consumption of any '*stupefying substance*' or '*drug*' by the accused, and as aforesaid, simply because Jitendra felt giddy and slept after consuming 'some cold drink', he inferred that the accused must have administered some stupefying substance to him through the said cold drink.

16 Similarly, to infer about the guilt of the accused from his disappearance, before Jitendra was woken up by the conductor of the bus, there ought to have been some evidence to indicate that the accused was also to travel up to Sitamadhi. There is, however, no such evidence. There is no evidence that the accused was not to get down at any place before Sitamadhi, which was, as aforesaid, last stop of the bus.

17 Under these circumstances, when and where exactly, the amount that was with Jitendra, went missing, is not clear.

18 It was necessary for the investigating agency to have collected the evidence in support of the allegation leveled by Jitendra against the accused. If indeed Jitendra had been administered some stupefying substance by the accused, the accused must have been in possession of such substance. How, from where, and in what manner, he had acquired the same, was required to be discovered in the course of investigation. The same has not been done and no explanation regarding it has been given. In other words, even slightest efforts to ascertain whether the accused had in his possession any stupefying substance, and if so, what the substance was, from where the accused had procured it, etc., were not made.

19 So far as the recovery of the currency notes, allegedly at the instance of the accused, and pursuant to the information allegedly disclosed by him to the police is concerned, it may be

observed that, that the cash that was recovered from one Sarfaraj Shaikh was part of the amount that had been stolen from Jitendra, has not sought to be established. It is understandable that since the property stolen was cash, the identity thereof would be difficult to be established. Nevertheless, the difficulty in gathering the evidence cannot be a ground for dispensing with the necessity of the same. Simply because some amount – Rs.6000/- - was recovered from a person to whom the police party and panchas were led by the accused, it cannot be presumed that, that amount was forming a part of the amount that was stolen from Jitendra.

20 Interestingly, the said Sarfaraj Shaikh from whom the amount is said to have been recovered, has not been examined as a witness. Apparently, his statement was also not recorded in the course of investigation. Sarfaraj Shaikh would have been a material witness and could have atleast deposed as to when, and under what circumstances, the cash in question had been handed over to him by the accused, if at all it was handed over to him by the accused. Holding back the evidence of Sarfaraj Shaikh,

creates a serious doubt about the truth of the prosecution version and the *bonafides* of the investigating agency.

21 Undoubtedly, since the testimony of the Informant Jitendra cannot be discarded as false or unbelievable, some suspicion – rather strong suspicion – indeed exists against the accused. However, in the course of investigation, the investigating agency was supposed to have collected evidence to strengthen the suspicion felt by Jitendra about the accused. At the cost of repetition, it may be observed that even the suspicion felt by Jitendra is based on certain inferences drawn by him. It is not that, in this case, evidence to support or strengthen the allegation or accusation, could not have been found at all. As aforesaid, investigation could have been done to ascertain, whether the accused had in possession any stupefying substance at that time and this would have sealed the fate of the accused.

22 It is a fundamental principle of criminal jurisprudence that the charge against an accused must be proved by a requisite

standard which is often described by saying that it should be proved *beyond reasonable doubt*. It is also well settled that suspicion, howsoever strong, cannot by itself take the place of proof. Here, even otherwise, the suspicion is subjective, that is, it is suspicion of Jitendra, and even if this is accepted as genuine and reasonable, the same by itself would not amount to the proof of the fact that the accused had committed the alleged offences. It is also a settled proposition of criminal jurisprudence that should there arise any reasonable doubt about the guilt of an accused, the accused would be entitled to have the benefit of such doubt, and to be acquitted.

23 I have examined the judgment delivered by the learned Assistant Sessions Judge carefully. Apparently, the learned Judge has not viewed the matter in proper perspective and was carried away by the enormity of the crime and a claim put forth by the prosecution that the incidents of robbing passengers travelling by trains were on increase. In paragraph 13 of the impugned judgment, the learned Judge has observed as follows :

"All these witnesses have identified the accused present in the court to be the same person involved in this case."

This observation is rather strange. There was no question of accused being identified as the person 'involved in this case' as it was nobody's case that the accused was not arrested and was not being prosecuted on the allegations of having committed the offences which were the subject matter of the case before the learned Assistant Sessions Judge. The question of the identity of the accused, was relevant only in the context of his being the same person, who had travelled with Jitendra, as per the prosecution case. Thus, that Jitendra identified him as such, was certainly material, but only that identification was material, and therefore, the observations that "all the witnesses identified the accused" as "the same person *involved* in this case" are quite strange. The observations made by the learned Judge that Jitendra had sufficient opportunity to be with the accused for a long time, and therefore, he could identify him, are correct. However, the

identification was only 'as the person who had travelled with Jitendra', and though, this could be stated as a fact, the other aspects, namely, that he had administered some stupefying substance to Jitendra and had taken away the money, were mere inferences. The inferences may be quite logical, but a distinction has to be borne in mind – as to the facts which are stated by the witness and as to the inferences which are drawn by him and put forth as facts. This distinction has not been kept in mind by the learned Assistant Sessions Judge. The learned Assistant Sessions Judge also weighed the circumstance, that, the accused was found on the railway station by Jitendra, as an incriminating circumstance against the accused. What the learned Judge, however, ignored, is, if it was to be accepted that the accused was again in search of a victim, and was intending to travel by the train to commit a similar offence – as inferred by the learned Judge – then, the absence of any stupefying drug or substance with him, at the time of his apprehension, does not fit in, with this theory. In the theory, that was sought to be suggested on behalf of the prosecution and accepted by the learned Assistant Sessions

Judge, there is no explanation as to how the accused, in that case, was not found to be possessing any drug or substance, at the time of his apprehension on 24th January 2012, at the instance of Jitendra.

24 Considered as a whole, though it can be stated that suspicion indeed existed against the accused, the prosecution could not take the case further than the suspicion, that existed against him, at the time of his arrest. There was no evidence of the accused having administered any stupefying substance to Jitendra. The story in the FIR was first disclosed by Jitendra, only after the accused was apprehended, and though Jitendra cannot be said to be an untruthful witness, that he would have a natural tendency to mould the story suitably in such circumstances, needs to be kept in mind while appreciating his evidence. These factors made it risky to accept the theory of the accused having committed an offence punishable under Section 328 of the IPC. Similarly, when exactly, and under what circumstances, the money was lost by Jitendra, could not be established, and therefore, it was dangerous

to conclude that it must be the accused only, who had taken away the money, though it could be accepted that the accused was the person, who had travelled along with Jitendra. The evidence given by Jitendra does not give a clear idea as to, what the accused had told Jitendra about his place of destination, and where he was to get down, etc. In the absence of such details, it would be unsafe to blindly accept the story of Jitendra, as sufficient in itself, to hold the accused guilty, particularly because, the version of Jitendra – which came to be disclosed for the first time after the apprehension of the accused – is a mixture of facts and the inferences drawn by him, which also are put forth by him as facts.

25 The evidence adduced before the trial court was not sufficient to prove the charges against the accused beyond reasonable doubt. The order of conviction, as recorded by the learned Assistant Sessions Judge, is not proper or legal.

26 The appeal, therefore succeeds.

- 27 The judgment and order of conviction of the appellant, as recorded by the Assistant Sessions Judge, and the sentences imposed upon the appellant, are set aside. The appellant stands acquitted. He be set at liberty, forthwith, unless required to be detained in connection with some other case.
- 28 The appeal is allowed accordingly.

(ABHAY M. THIPSAY, J.)