

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1333 OF 2011

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|-----------------------------|---|-------------------|
| 1. Dulesh Jamal Vasuniya |] | |
| Age 22 Yrs., Occ.: Labour, |] | |
| R/o. Jahinda, Dist. Zabuva, |] | |
| Madhya Pradesh. |] | |
| |] | |
| 2. Dipu Hamaji Vasuniya |] | |
| Age 25 Yrs., Occ.: Labour, |] | Appellants / |
| R/o. Jahinda, Dist. Zabuva, |] | (Original Accused |
| Madhya Pradesh. |] | Nos.2 and 3) |

Versus

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| 1. The State of Maharashtra |] | |
| |] | |
| 2. Prashant Ananda Sutar |] | |
| Age 24 Yrs., Occ.: Service, |] | |
| R/o. Somwar Peth, Dabas Galli, |] | |
| Taluka Tasgaon, District Sangli. |] | |
| |] | |
| 3. Santosh Gourihar Kheradkar |] | |
| Age 31 Yrs., |] | |
| Occ.: Shopkeeper & Agriculturist, |] | |
| R/o. Shimpi Galli, Somwar Peth, |] | |
| Tasgaon, Taluka Tasgaon, |] | |
| District Sangli. |] | |
| |] | |
| 4. Appasaheb Ganpati Mokale |] | |
| Age 50 Yrs., Occ.: Service, |] | |
| R/o. Dabas Galli, Taluka Tasgaon, |] | |
| District Sangli. |] | Respondents |
| |] | (Respondent Nos.2 to |
| 5. Ramesh Shrirang Gosavi |] | 5 are made party |
| Age 32 Yrs., Occ.: Driver, |] | Respondents since |
| R/o. Punadi, (T) Tasgaon, |] | Compensation is |
| Taluka Tasgaon, District Sangli. |] | granted to them) |

ALONG WITH
CRIMINAL APPEAL NO.45 OF 2012

1. Kamalu Gajhing Vasuniya	]	 Appellants /
2. Ramesh Gajhing Vasuniya	]	(Org. Accu. Nos.1 & 4)

Versus

The State of Maharashtra	]	 Respondent
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Mr. Amit Sale for the Appellants in Cr. Appeal No.1333 of 2011.

Ms. R.M. Gadhvi, A.P.P., for Respondent No.1/State in both the Appeals.

Mr. Abhaykumar Apte, Appointed Advocate, for the Appellants in Cr. Appeal No.45 of 2012.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 1ST JULY, 2015.

ORAL JUDGMENT :

1. Both these Appeals are arising out of the Judgment dated 6th April, 2011 of the Additional Sessions Judge, Sangli in Sessions Case No.111 of 2009, thereby convicting the Appellants in both these Appeals for the offence punishable under Section 395 of the IPC and sentencing them to suffer R.I. for ten years and to pay fine of Rs.10,000/- each, in default to suffer R.I. for three years. No separate punishment was imposed for the offence punishable under Section 452 of the IPC, though the Appellants were held guilty for that offence also.

2. Facts, in brief, for decision of these Appeals can be stated as follows :-

PW-6 Santosh Kheradkar owns the shop of gold and silver ornaments at APMC Complex in Tasgaon under the name and style as '*Rudrapanna Shankarsheth Kheradkar*'. PW-5 Prashant Sutar, Appasaheb Mokale and Ramesh Gosavi, (Respondent Nos.4 and 5, respectively, in Criminal Appeal No.1333 of 2011), were working in his shop.

3. On 17th August, 2007, at about 7:30 pm, when they were in the shop, one customer by name Jayantilal Shaha came there with his wife for repair of Mangalsutra. At that time, 7 to 8 persons, armed with axe and sticks, all of a sudden, entered into the shop and started assaulting the witnesses present in the shop. They forced them to bring the keys of the show-cases and then committed the dacoity of the gold and silver ornaments and the cash amount. After collecting the gold and silver ornaments and cash amount, they left the shop. In the said incident, due to the assault by those persons with sticks, axe and stones, PW-5 Prashant, PW-6 Santosh and Ramesh Gosavi sustained the simple injuries, whereas Appasaheb Mokale sustained the fracture. They were taken to PW-15 Dr. Vidyasagar Kambale and thereafter to PW-14 Dr. Manojkumar Ingalkar. PW-5 Prashant, on the same night, went to the Police Station and lodged complaint about the incident vide Exhibit-68.

4. On his complaint, C.R. No.60 of 2007 came to be registered. The Spot Panchanama was prepared and at that time, some stolen articles thrown by the dacoits in the field of one Uttam Mali came to be seized under Panchanama. The blood stained clothes of the injured were also seized.

5. The information of the dacoity was flashed to all the nearby Police Stations. In the combing operation undertaken by Mohadi Police Station of District Dhule, PW-30 PI Kishor Navale stopped one S.T. Bus to verify the passengers therein. Absconding Accused No.1 Kamalu Vasuniya was found in the said bus in suspicious condition. He was asked to step down from the bus. In pursuance of the information given by him, his five companions, namely, Original Accused Nos.2 to 6, were found in the luxury bus, carrying with them the bag containing gold and silver ornaments and the cash. It was seized under Panchanama (Exhibit-30) in the presence of the Panch PW-11 Vithal Gavade.

6. The seized property, along with the arrested Accused, was transferred to Palus Police Station, where PW-31 Dy.S.P. Pravin Chougule was carrying out investigation of this C.R.. During police custody, at the instance of the Accused, the weapons of assault, like, sticks and axe, were seized. The Test Identification Parade of the arrested Accused Nos.1

to 6 was also conducted by Nayab Tahasildar PW-13 Dagadu Kumbhar, in which the witnesses identified the present Accused and co-Accused. The seized gold and silver ornaments were identified by PW-6 Santosh. Hence, further to completion of investigation, Charge-Sheet came to be filed against Accused Nos.1 to 6.

7. After the remaining Accused were arrested, Supplementary Charge-Sheet was filed against them. Thus, the case proceeded against in all 9 Accused.

8. On committal of both the cases to the Sessions Court, the Trial Court framed charge against the Accused vide Exhibit-28. The Accused pleaded not guilty and claimed trial, raising the plea of false implication.

9. In support of its case, Prosecution examined in all 31 witnesses and on appreciation of their evidence, Trial Court held the guilt of the present Appellants, i.e. Original Accused Nos.1 to 4, to be proved beyond reasonable doubt for the offences punishable under Sections 395 and 452 of the IPC and convicted and sentenced them, as aforesaid. The Trial Court, however, acquitted them and other remaining Accused for the offences punishable under Sections 397, 452 and 120(B) of the IPC. The State has not preferred any Appeal against the impugned Judgment.

10. This Judgment of the Trial Court is challenged by learned Counsel

for the Appellants, whereas supported by learned A.P.P. for the Respondent No.1/State.

11. The Prosecution case stands against the Accused on the evidence of two eye witnesses, namely, PW-5 Prashant and PW-6 Santosh and the recovery of the gold and silver ornaments from possession of the Accused.

12. In this respect, the evidence of PW-5 Prashant, who was working in the jewellery shop of PW-6 Santosh, goes to reveal that on the date of incident, at about 7:30 pm, in all 7 to 8 persons, armed with sticks, axe and gunny bags, entered into the shop, assaulted him, PW-6 Santosh, Ramesh and Appasaheb with sticks and axe and then committed the theft of the gold and silver ornaments and cash amount of Rs.65,000/-. In his supplementary statement, he has given the details of the 29 gold and silver ornaments, which were stolen from the shop. His evidence reveals that the said gold and silver ornaments bear the name of their shop as "RK", "MS" and "AG". Therefore, on recovery of these gold and silver ornaments from the possession of the Accused, he was able to identify them.

13. There is corresponding and corroborating evidence of PW-6 Santosh, who is the owner of the shop and at the relevant time was

present in the shop. According to him also, those 7 to 8 persons, who entered into the shop, assaulted him and others and committed the theft of the gold and silver ornaments and the cash amount. According to evidence of both these witnesses, 4 to 5 persons were standing outside the shop and they were pelting stones on the persons present there. The complaint of this incident is lodged immediately. The Police have carried out the combing operation, in which present Accused came to be arrested from the luxury bus and from their possession, these stolen articles and the cash amount was seized. There is evidence to that effect of PW-30 PI Kishor Navale, who has carried out this combing operation, and also the evidence of PW-11 Panch Vithal Gavade, in whose presence the personal search of these Accused was carried out. In the course of investigation, even the weapons used in the offence, like, the axe and the sticks, were also recovered under Panchanama.

14. Further, there is evidence of PW-14 Dr. Manojkumar Ingalkar, who has examined PW-6 Santosh in his hospital and found following injuries on his person, which, according to him, can be caused by the hard and blunt object like sticks :-

- (i) *CLW over right occipital parital region, 4 cm x 3 cm x bone deep. Active bleeding present.*
- (ii) *CLW over left occipital parietal region, 3 cm x 3 cm x bone deep. No evidence of fracture clinically. Active bleeding present.*

- (iii) *Blunt trauma to left forearm. Abrasion about 1 cm x 1 cm.*
- (iv) *Multiple contusions over back. No evidence of fracture or dislocation clinically.*
- (v) *Multiple contusion on abdomen. No internal injury.*
- (vi) *Abrasion over right of little toe. No evidence of fracture clinically.*

15. On the same day, he has also examined PW-5 Prashant and found abrasion with active bleeding present on his left ear and blunt trauma to left arm near wrist on ulna side. The Injury Certificates of both these witnesses are produced at Exhibits "105" and "106". The history given by these two witnesses of assault in the dacoity with sticks and axe is also reflected in the Injury Certificates. He has also examined other two injured, namely, Appasaheb Mokale and Ramesh Gosavi, who were present in the shop and found injuries on their person.

16. Further, there is evidence of PW-15 Dr. Vidyasagar Kambale, in whose hospital PW-6 Santosh and Appasaheb Mokale were taken for treatment.

17. Thus, in this case, the ocular account of PW-5 Prashant and PW-6 Santosh gets complete corroboration and support from the corroborating circumstance, like, recovery of the stolen articles immediately within few

hours from the possession of these Accused and also from the medical evidence.

18. The fact that these Accused, Appellants herein, were found in possession of the stolen articles immediately after the incident of dacoity, makes it necessary to invoke the presumption under Section 114(a) of the Evidence Act. As the Accused, in their statements recorded under Section 313 of the Cr.P.C., have not offered any explanation about the recent possession, it has to be held that the Trial Court has rightly invoked the presumption under Section 114(a) of the Evidence Act, to hold the guilt of the Appellants as proved.

19. The real disputed issue raised by learned Counsel for the Appellants is about the identification of the Accused. According to learned Counsel for the Appellants, the evidence relating to Test Identification Parade of the Accused is very shaky and not at all inspiring confidence in the judicial mind. The Trial Court itself has disbelieved and not acted upon the evidence of Test Identification Parade conducted by PW-17 Archana Patil, Residential Nayab Tahasildar, in respect of the acquitted Accused, namely, Original Accused No.7 Jamsing Shingadiya and Original Accused No.9 Juwan Vasuniya. Hence, according to learned Counsel for the Accused, the present Appellants also are entitled to the same benefit of doubt.

20. As regards the present Accused, their Test Identification Parade is conducted by Nayab Tahasildar PW-13 Dagadu Kumbhar. It may be true that in his cross-examination, some infirmities and flaws are brought out in the manner in which the Test Identification Parade was conducted. However, as observed by the Apex Court in the case of ***State of Maharashtra Vs. Suresh, 2000 SCC (Cri.) 263***, no Test Identification Parade as such is full proof and if the lacunae, infirmities and pot-holes are to be ferreted out from the proceedings of the Magistrate holding such parades, possibly no TIP can escape from one or two lapses. If a scrutiny is made from that angle alone and the result of the parade is treated as vitiated, every TIP would become unusable. However, when there are some fatal lacunae, then TIP becomes bereft of credence, as in the instant case. Hence, merely on the basis of some flaws in conduct of Test Identification Parade, the evidence relating thereto cannot be discarded.

21. Moreover, the evidence relating to Test Identification Parade is merely of a corroborating nature and not a substantive one. The substantive evidence about identification of the Accused is their identification in the Court by the eye witnesses at the time of trial. Here in the case, both the eye witnesses, namely, PW-5 Prashant and PW-6 Santosh, have identified these Accused in the Court at the time of trial. They had also sufficient opportunity to observe the persons, who had

come in the shop, as they were in the shop for substantial time for collecting the number of gold and silver ornaments and cash amount by breaking open the show-cases and cupboards. Those persons had also assaulted these witnesses and, therefore, these witnesses had opportunity to see them from proximity. Hence, their substantive evidence as to identification of these Accused cannot be disbelieved.

22. Though learned Counsel for the Accused has advanced the submission that no specific role is attributed to any of these Accused in the course of incident, in my considered opinion, it was not possible to do so. When 7 to 8 persons had entered into the shop and 4 to 5 additional persons were standing outside the shop and pelting stones and all those persons were acting at the same time, in melee of such assembly, it cannot be possible to attribute a specific role to each of the Accused. As a matter of fact, if the witnesses had done so, their evidence would have become artificial and hence not believable.

23. The last contention raised by learned Counsel for the Accused is that in the same Test Identification Parade conducted by Nayab Tahasildar PW-13 Dagadu Kumbhar, Accused No.9 Juwan was also put up for identification. The Trial Court has, however, acquitted him but convicted these four Accused only. However, this argument also cannot be accepted, because the evidence of PW-17 Archana Patil, Residential

Nayab Tahasildar, goes to reveal that the acquitted Accused Juwan was put up in Identification Parade conducted by her also. Hence, the Trial Court found the evidence relating to identification of Accused Juwan as shaky and hence benefit of doubt was extended to him. So far as the present Appellants are concerned, no such doubts are created about their identification and involvement in the incident. Hence, as regards the conviction of the Appellants for the offence punishable under Section 395 of the IPC, it has to be held that the Prosecution has succeeded in proving the same beyond reasonable doubt.

24. On the question of sentence, it is submitted by learned Counsel for the Accused that the Trial Court has imposed the R.I. for a term of 10 years and also the fine of Rs.10,000/- each, in default to pay fine, imprisonment for 3 years, which is excessive and hence it needs to be reduced. Considering the fact that throughout this period of eight years, the Appellants are in Jail, from the date of their arrest, I find some substance in his submission, as the imprisonment imposed in default of payment of fine appears to be on higher side, especially as the Trial Court has imposed the substantive sentence of imprisonment of 10 years. Hence, to that extent, the interference is warranted.

25. Consequently, both the Criminal Appeals are partly allowed. Conviction of the Appellants for the offences punishable under Section

395 and Section 452 of the IPC as also the substantive sentence of imprisonment of R.I. for 10 years is maintained. However, the fine amount of Rs.10,000/- each is reduced to the amount of Rs.5,000/- each, and the default punishment is accordingly reduced to 6 months each.

[DR. SHALINI PHANSALKAR-JOSHI, J.]