

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1044 OF 2005

MEHBUB ALI YUSUF MOHD. PATEL)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Smt.Pooja Sejpal, Advocate for the Appellant.

Smt.R.M.Gadhvi, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 17th NOVEMBER 2015.

ORAL JUDGMENT :

1 The appellant and five others were prosecuted on the allegation that they had committed offences punishable under Section 395 of the IPC read with Section 397 of the IPC and Section 307 of the IPC read with Section 34 of the IPC. The

appellant was the accused no.1 in the said case. The learned Additional Sessions Judge for Greater Mumbai, after holding a trial, found the appellant and two others, i.e., accused nos.4 and 5 guilty. He found the others not guilty and passed an order of acquittal, so far as they were concerned. The appellant has been convicted of an offence punishable under Section 395 of the IPC read with Section 397 of the IPC by the learned Additional Sessions Judge. The learned Additional Sessions Judge sentenced the appellant to suffer Rigorous Imprisonment for 8 years and also to pay a fine of Rs.5,000/-, in default, to suffer Rigorous Imprisonment for 6 months. The learned Additional Sessions Judge, however, acquitted the appellant of the offence punishable under Section 307 of the IPC read with Section 34 of the IPC.

2 Being aggrieved by his conviction in respect of an offence punishable under Section 395 of the IPC read with Section 397 of the IPC, the appellant has approached this court by filing the present appeal.

3 By the time the appeal came up for final hearing, the appellant had already undergone the sentence imposed upon him and had been released from prison. The learned counsel for the appellant, nevertheless, submitted that the conviction of the appellant was not in accordance with law, and that, the appeal be heard and decided on merits, notwithstanding the fact that the appellant has already undergone the sentence.

4 It is under these circumstances, that I have heard Smt.Pooja Bhojane, the learned counsel for the appellant. I have also heard Smt.R.M.Gadhvi, the learned APP for the State. With their assistance, I have gone through the entire evidence that was adduced during the trial. I have carefully gone through the impugned judgment.

5 In view of the fact that the appellant has already undergone the sentence, I do not propose to write a detailed judgment.

6 That, the incident of dacoity, as narrated by the victim Gangji Gala, indeed took place, cannot be doubted or disputed at all. As a matter of fact, it has not been disputed by the learned counsel for the appellant. Therefore, that a dacoity indeed took place on 14th July 2001, as spoken about by Gangji Gala (PW1), has been satisfactorily established.

7 The offenders were not previously known to the said Gala. The incident of dacoity is supposed to have been witnessed by a number of other persons, but the offenders were not known to any of those persons also.

8 The evidence against the appellant consists of two circumstances – the first being his identification as one of the culprits made by Gala in his evidence given in the trial, and the second is the recovery of two choppers at the instance of the appellant from his house. According to the prosecution, one of the choppers that came to be so recovered, had been used in the commission of the said dacoity.

9 The correctness of the findings arrived at by the learned Judge depends on the reliability of the aforesaid evidence, i.e., the evidence in respect of the identity of the appellant as one of the culprits, and the evidence of the alleged recovery of the weapon of assault, at his instance.

10 The incident took place on 14th July 2001. The appellant came to be arrested on 27th July 2001. He was placed in the Test Identification Parade (TIP) held on 26th August 2001. The TIP was held by Sharad Vichare, Special Executive Magistrate (PW-15). The learned counsel for the appellant submitted that, the evidence of identification of the appellant as one of the culprits, said to have been made by Gala in the TIP, could not be relied upon. According to her, there were a number of infirmities in the manner in which the TIP was held.

11 After going through the evidence of Vichare (PW15) it does not appear that there were any obvious infirmities in the procedure adopted by him. However, it also appears that the

accuracy of the record of the Memorandum of TIP and the claim made by him, viz., that 'he wrote the same on the spot as the events were taking place, is extremely doubtful. The learned counsel for the appellant has pointed out that the Memorandum, of TIP, as per the recording made by Vichare, commenced at 12.15 p.m. and was over by 1.30 p.m. She contended that the Memorandum of TIP runs into 37 pages and considering the admission given by the witness that it would require about 3 to 4 minutes to complete one page, he could not have written the memorandum of TIP while the same was being held. According to her, therefore, this claim of Vichare could not be accepted, and that, this would affect the reliability of his evidence. Though it is quite likely that the entire recording of the memorandum of TIP was not made by Vichare at the time when he claims to have made it, this fact by itself, would not render the evidence in respect of the TIP unreliable. However, I do not wish to discuss it any further for the simple reason that the learned Judge himself has observed that it would be dangerous to hold the appellant guilty by placing reliance on the identification of the appellant as

one of the culprits by a solitary witness. In paragraph 37 of the impugned judgment, the learned Judge observed that *the evidence of Gangji Gala (PW-1), even with the corroboration of the evidence of identification parade, would not be sufficient, unless there would be further corroboration of any material in the form of recovery of weapons and the recovery of the robbed property.*

12 Out of a number of persons, who according to the prosecution had seen the offenders at about the time when the offence was committed, Rajesh Surve (PW-13) and Ali Adenwala (PW11) were examined. Now, Rajesh Surve did not support the case of the prosecution and was declared as hostile. Adenwala claimed that he had identified someone in the TIP as the culprit, but that he was unable to identify anyone as the same person, in the court, because of the time gap.

13 Anyway, since the learned Judge has not felt the evidence of identification as sufficient to hold the appellant guilty, and since this proposition, as put forth by the learned Judge, is

consistent with the well settled parameters of appreciation of evidence, further discussion on this is not necessary, and what needs to be seen is, whether the circumstance of the recovery of the weapons from the appellant, as claimed by the prosecution, was satisfactorily proved, and if so, whether the same together with the evidence of identification, is sufficient to prove the case against the appellant, beyond reasonable doubt.

14 In connection with the alleged recovery of two choppers, the relevant evidence is that of Rajaram Gadhave (PW4), a panch, and P.I. Janardan Parabkar (PW17). Though Rajaram Gadhave (PW4) does not seem to have acted as a panch previously, he had been working at a place situate close to Nagpada Police Station, and admittedly, was well acquainted with the police from Nagpada Police Station. Infact, he claims to have known the cabin of Police Officer Laxman Gore (PW16) thereby indicating that he knew the Police Officers attached to Nagpada Police Station by their names. However, that is not crucial aspect of the matter, in my opinion. The recovery is said to have taken

place from the house of the appellant. The crucial question would be, whether the identity of atleast one of the choppers out of the two, said to have been recovered, as the same, as was used in the commission of the alleged offence, is established. It is because – it may be recalled – the learned Judge has held that the evidence of identification of the appellant as one of the culprits as given by Gangji Gala, was not sufficient to hold the appellant guilty, *unless corroborated by some other evidence*. Needless to say, that such corroboration would be available, only if the identity of one of the weapons allegedly recovered from the appellant, as the same that was used in the commission of the offence, would be established.

15 Gangji Gala has identified one of these choppers as the one, with which he was assaulted. No reliance on such identification can be placed. The chopper was sent to the Chemical Analyser for examination and opinion, in the course of investigation, and the examination revealed that it contained human blood, but the group thereof could not be determined. Undoubtedly, finding of human blood on the chopper is an

incriminating circumstance against the appellant, but the question is, firstly, whether this circumstance was satisfactorily proved, and secondly, whether this, coupled with the evidence of identification, was sufficient to hold the appellant guilty.

16 It needs to be kept in mind that no part of the robbed property was recovered at the instance of the appellant.

17 The learned counsel for the appellant has pointed out that the choppers, as aforesaid, were recovered from the house of the appellant. The learned counsel for the appellant has also pointed out that they were sent to the Chemical Analyser after four days. According to her, when the report of the Chemical Analyser about the group of the blood was inconclusive, the possibility of some evidence having been fabricated could not be ruled out.

18 In my opinion, the evidence of the recovery of choppers, and more particularly, that of the identity of the

choppers, as the one used in the commission of the alleged offence, cannot be relied upon. Moreover, the corroboration afforded by the recovery of the weapon of assault to the evidence of identification, was not sufficient to prove the guilt of the appellant beyond reasonable doubt. It is well settled, that a weak piece of evidence cannot support another weak piece of evidence, that is, 'identification' in the instant case.

19 In my opinion, this was a case, where the possibility of the appellant being guilty was no more than the possibility of his being innocent. In criminal trials, the guilt of an accused is required to be proved beyond reasonable doubt. In my opinion, the learned Judge should have given the benefit of doubt, that arises out of the evidence adduced during the trial, to the appellant, and should have acquitted him.

20 The appeal is allowed.

 The appellant is acquitted.

 Fine, if paid, be refunded to him.

22 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.**