

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.1343 OF 2008

Indrabali Patai Rajbhar

Age : 22 Yrs.,R/at.Waghoba

Nagar, Near Mukund Company,

Kalwa(E), Thane.

... **Appellant**

V/s.

The State of Maharashtra

(At the distance of Chembur

Police Station.)

... **Respondent**

.....

Mr.Aniket Vagal with Mr.Munsif Khan i/b. Somet S.Shirsat,
Advocate for the Appellant

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

....

CORAM : ABHAY M. THIPSAY J.

DATED : 30TH JULY 2015

ORAL JUDGMENT :

1. This appeal is directed against the Judgment and Order dated 25/09/2008 passed by the Assistant Sessions Judge for Greater Bombay in Sessions Case No.524 of 2005 convicting the appellant, who was the sole accused who had faced the trial, of offences punishable under Section 452 of the Indian Penal Code (For Short, "the IPC") and Section 395 of the IPC. The learned Assistant Sessions Judge imposed a sentence of Simple Imprisonment for a period of three years and a fine of Rs.500/-

with respect to the offence punishable under Section 452 of the IPC and a sentence of Rigorous Imprisonment for three years and to pay a fine of Rs.500/- with respect to the offence punishable under Section 395 of the IPC. The learned Assistant Sessions Judge directed that the substantive sentences would run concurrently.

2. In this case, the offenders were said to be seven. Five out of them, including the appellant, were apprehended and charge-sheeted. The other four, however, absconded after a charge was framed and before the recording of evidence was to commence. It is under these circumstances that the appellant alone was prosecuted and convicted, as aforesaid.

3. Since the conviction was recorded on a trial held by Assistant Sessions Judge and the sentences imposed upon the appellant were only of three years, the appeal ought to have been filed before the Court of Sessions itself. However, somehow it was filed in this Court and without noticing that it ought to be filed before the Court of Sessions, it was admitted by this Court about seven years back. That, it should have been filed before the Court of Sessions was revealed only when the appeal was taken up for final hearing and the arguments commenced. Under these circumstances, I have thought it fit to have the appeal decided by this Court only.

4. The prosecution case, as put forth before the trial Court, was as follows :

The First Informant – Sanjay Katpal (PW1) was, at the material time, doing business of selling and repairing mobile telephone instruments. His business was being done at Shop No.19, Telecom Junction, Shop No.19, Shivaji Nagar Society, Chembur, Mumbai – 400 071. He had employed three workers in the said shop - Bharat Nandu, Khitesh and Dinesh. That, on 30/12/2004, the shop was opened as usual. At about 1.55 p.m., there were three customers including one Siddharth (PW 3) in the shop. At that time, two persons entered in the shop. These two persons took out *Khanjirs* and threatened all the others present in the shop, asking them sit at one side. Thereafter, two more persons entered inside the shop. They were having country-made revolvers in their hands. Those two persons also threatened Sanjay and others present in the shop, including the customers. Thereafter, three more persons entered inside the shop, and one of them started picking up mobile telephone instruments from the showcase, and also from the customers. Mobile of the First Informant Sanjay (PW1) was also taken by the said person. Cash of Rs.7,900/- was also taken away by those persons.

After the robbery, five out of the said seven persons, left in a Maruti 800 car, which had been parked opposite the shop, on the other side of the road. The remaining two went on a motorcycle. Sanjay (PW1) raised cries as, 'chor chor' (चोर चोर), but

the culprits managed to run away. The matter was then reported to the police. Bharat Patil, Sub-Inspector of Police (PW2) attached to the Chembur Police Station at the material time, recorded the First Information Report. Investigation commenced, which was carried out by Tulshiram Nagre (PW4) Inspector of Police attached to Chembur Police Station, at the material time. In the course of investigation, Nagare received information that five persons, who had been arrested by Thane City Police Station were involved in the present offence and, therefore, obtained their custody. A Test Identification Parade was held on 17/02/2005 in which the accused No.1 Sanjay Pande was placed. Thereafter, another Test Identification Parade was held on 23/02/2005, wherein the remaining accused - including the present appellant - were placed for identification. The Test Identification Parade was held by a Special Executive Magistrate – Arun Shinde (PW5). Bharat Mani, the servant of the First Informant and the customer Siddharth (PW3), identified the appellant in the Test Identification Parade.

5. I have heard Mr.Aniket Vagal, the learned counsel for the appellant. I have heard Mr.Deepak Thakre, the learned Additional Public Prosecutor for the respondent/State. With their assistance, I have gone through entire evidence adduced during the trial. I have been taken through the relevant parts of the impugned Judgment.

6. The prosecution examined five witnesses during the trial, all of whom have been referred to earlier, while narrating the prosecution case.

7. Admittedly, in this case, the robbed property was not recovered in the course of investigation. Not even a small part thereof could be recovered from any of the apprehended accused. No weapon allegedly used by any of the culprits was recovered. The case, thus, rests only on the identification of the appellant as one of the seven persons, who had entered the shop of the First Informant, and who allegedly committed the dacoity.

8. It is well settled that identification of a person, not previously known to the identifying witnesses, as the culprit, for the first time in Court, is a weak piece of evidence. It is for this reason that the Investigating Agencies hold Test Identification Parades which serve a dual purpose. In the first place, if a suspect is identified by a witness in a Test Identification Parade, it provides an assurance to the Investigating Agency that the investigation is proceeding on proper lines. Secondly, the identification of suspects in the Test Identification Parade would lend credence to the subsequent identification of the culprit, if made in the Court by the identifying witness.

9. In the instant case, the First Informant Sanjay Katpal was not asked to take part in the Test Identification Parade at all.

Interestingly, he does say that he had taken part in the Test Identification Parade and had identified the culprits, but this is clearly not true. It is not the case of the prosecution that the First Informant Sanjay was asked to identify the culprits in a Test Identification Parade.

10. Anyway, since he has identified the appellant as one of the culprits in the Court, and at that time of giving evidence, the value to be attached to it may be considered. According to Sanjay, the appellant is the person, who entered the shop last. As per his version, appearing in the evidence, initially, two persons entered inside the shop with Khanjirs. Then, two more persons entered with revolvers and then three more persons entered. According to him, thus, the appellant is one of the three, who last entered. However, a variation in respect of this sequence of entry has been brought on record by confronting him with the version appearing in the FIR, which is to the effect that initially, two persons entered, then three entered and then again two entered. Anyway, I am not inclined to give much importance to this variation.

11. The fact, however, remains that the appellant had not been identified by Sanjay in a Test Identification Parade. What is further significant is that Sanjay appears to have made a wrong statement to the effect that he was asked to identify the culprits in the Test Identification Parade, and that he did identify the appellant. Interestingly, Bharat - worker of Sanjay - who was an

eye-witness to the incident, was not examined during the trial. The other two workers, who had obviously seen the culprits, were also not examined. Instead of examining the workers, Siddharth (PW3) a customer, who was a chance witness, has been examined.

12. I have gone through the evidence of Siddharth (PW3). In this case, on information received from the Thane Police Station, all of the accused including the appellant were arrested on 01/02/2005. The incident had taken place on 30/12/2004. The statement of Siddharth came to be recorded on 03/02/2005 i.e. after the appellant and the other accused were already apprehended. Siddharth is supposed to have identified three culprits in the Test Identification Parade that was held on 23/02/2005 and one of them is said to be the appellant. Siddharth has given the role of 'threatening him by sickle' to the appellant, which is not in conformity with the role attributed to him by the First Informant Sanjay. According to Sanjay, the appellant was one of those who were not armed.

13. The Test Identification Parade was not held in a satisfactory manner at all. Interestingly, the Special Executive Magistrate Arun Shinde was directly cross-examined, as the memorandum of Test Identification Parade was already tendered in evidence and marked as Exhibit-37. The propriety of such a procedure is highly doubtful - to say the least; but in any case,

even on the basis that the statements in the memorandum of the Test Identification Parade are to be treated as statements made by witness on oath and as his examination-in-chief, still, it is apparent that the Test Identification Parade was not at all properly held. In the first place, all the four suspects were placed in the Test Identification Parade with 24 dummies, which is contrary to the guidelines issued by the State of Maharashtra for ensuring that the Test Identification Parades are held in conformity with the Judicial requirements that can be gathered from the authoritative pronouncements of the Apex Court and the High Courts. These guidelines are included in the Criminal Manual issued by the High Court of Judicature at Bombay, for the guidance of subordinate Courts. Secondly, the Special Executive Magistrate, admittedly did not ask the identifying witnesses whether they had any occasion to see the culprits after the incident and before the parade. He also did not ask the suspects as to whether they had been shown to the identifying witnesses before the parade.

14. Since the Test Identification Parade was held in a totally unsatisfactory manner, the identification of the appellant as one of the culprits as made by Siddharth in the Court, is rendered weak. Moreover, the role attributed to the appellant, as stated by Siddharth, is different from that attributed to him by Sanjay.

It was unsafe to hold the appellant guilty only on the basis of his identification as one of the culprits.

15. To sum up, the appellant was identified as one of the culprits by two witnesses during the trial, but the role attributed by them to the appellant was not uniform. Secondly, Sanjay - one of them - had no occasion to identify him in the Test Identification Parade. Significantly, Sanjay claimed that he had identified the appellant in Test Identification Parade, and thus, there is a doubt on the credibility of Sanjay as a witness. Siddharth (PW3) is supposed to have identified the appellant in Test Identification Parade also, but, as aforesaid, he was a chance witness. His statement was recorded after the arrest of the accused persons. The other eye-witnesses were not examined to establish the identity of the appellant. Except the identification there was no other evidence to connect the appellant with the alleged offences. There is absolutely no explanation as to what happened to the robbed property, which should have been recovered, if the police had found the culprits. There is no recovery of any weapon - not only from the appellant, but also from any of the other accused, who were arrested.

16. This was a case where the prosecution had failed to establish the charges against the appellant. The appellant ought to have been acquitted.

17. The appeal is allowed.
18. The impugned Judgment and Order of conviction and the sentences imposed upon the appellant are set aside.
19. The appellant is acquitted.
20. His bail bonds are discharged.
21. Fine, if paid, be refunded to the appellant.
22. Appeal is disposed of accordingly.

(ABHAY M. THIPSAY J.)