

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1191 OF 2009

Maqbal Ahmed Gulam Mohd.Shaikh .. Appellant

Versus

The State of Maharashtra and Anr .. Respondents

Mr.Khan Abdul Wahab, Advocate for the appellant.

Ms.R.M.Gadhvi, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

DATED : 1st DECEMBER 2015

ORAL JUDGMENT :-

1 The appellant and two others were prosecuted on the allegation of having committed offences punishable under Section 392 of the IPC read with section 397 IPC, 452 IPC, 342 IPC and 120B of the IPC. The appellant was the accused no.3 in the case which was tried by the Addl. Sessions Judge for Greater Mumbai. The learned Addl. Sessions Judge, by his judgment and order dated 14th October 2009 acquitted the other two accused, but convicted the appellant of offences punishable under Section 392 of the IPC r/w section 120B of the IPC, as also in respect of the offences punishable under Section 25 of the Arms Act r/w section

3/4 thereof. The learned Addl. Sessions Judge sentenced the appellant to suffer RI for 3(three) years and to pay a fine of Rs.25,000/- with respect to the offence punishable under Section 392 IPC r/w Section 120B of the IPC, and to suffer RI for 1(one) year and to pay a fine of Rs.10,000/- with respect to the offence punishable under Section 25 of the Arms Act. Being aggrieved by his conviction and the sentences imposed upon him, the appellant has approached this Court by filing the present Appeal.

2 I have heard Mr.Khan Abdul Wahab, the learned counsel for the appellant. I have heard Mrs.S.Gajare-Dhumal, learned APP for the State. With the assistance of the learned counsel, I have gone through the entire evidence adduced during the trial. I have carefully gone through the impugned judgment.

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

The First Informant Robin Pal (PW 1) does the business of manufacturing gold ornaments. He used to do this business in his shop situate at Narayan Dhuri Street, Pydhonie, Mumbai. On 5th April 2005, he had brought gold from one Suresh Seth (PW 5) and was doing the work of preparing the ornaments.

At about 7.00 p.m, four persons entered inside the shop. Robin Pal (PW 1) asked them as to why they had entered the shop. One of the said four persons then kept a knife on the forehead of Robin Pal, and asked him to hand over all the gold. That person also threatened Robin Pal that he would stab him, and then collected all the ornaments. He kept all the collected ornaments in a polythene bag. One of the said four persons took away the polythene bag containing the ornaments, with him. All four left the shop and closed the door of the shop from outside.

One of the said four persons was carrying a pistol and had threatened a worker of Robin Pal with the said pistol. The said four persons had threatened Robin Pal and his workers that if they would shout, they would be stabbed with a knife. It is thereafter that those four persons had left.

4 Robin Pal and his workers started shouting for help. After some time, some persons (who might have heard the cries) opened the door of the shop. The said four offenders had taken away about 700 gms of gold valued at about Rs.9,00,000 (Rupees Nine Lakhs) from the workshop of Robin Pal. Robin Pal (PW 1) then informed about the robbery to Sureshbhai (PW 5) telephonically. Sureshbhai then telephoned to Pydhonie Police

Station, and gave the information. Police came to the workshop of Robin Pal (PW 1). The police recorded the statement of Robin Pal which was treated as the First Information Report, and a crime report was registered on that basis.

5 The investigation commenced, but apparently, there was no break-through in the investigation. The matter was then transferred to the DCB CID for investigation on 30th July 2007 which was after about 2 years and 3 months from the date on which crime report was registered and investigation had commenced. As soon as the matter was assigned to the DCB CID for investigation, immediately, i.e. on the same day, PSI Gaikwad (PW 8) arrested the Accused No.1 Vikas, Accused no.2 Sachin and one Bagul who was found to be a juvenile, and was dealt with separately. The said Accused nos.1 and 2 were alleged to be one of the four persons who had actually committed the robbery. When the Accused no.1 was interrogated by the police, he disclosed information about the involvement of the present appellant pursuant to which the present appellant was arrested on 1st August 2007 from a place near Crawford market where he had been staying. Pursuant to the information disclosed by the appellant on 9th August 2007, a revolver – said to be the one used

in the alleged offences – and a gold ingot weighing about 110 gms – said to be a part of the robbed gold – was recovered. On completion of investigation, the appellant and the said Accused nos.1 and 2 were charge-sheeted and prosecuted. As aforesaid, the prosecution resulted in the acquittal of the Accused nos.1 and 2 and the conviction of the present appellant – the accused no.3.

6 It is not the case of the prosecution that the appellant was one of the four persons who had entered inside the workshop of the First Informant - Robin Pal, and had actually committed the robbery. The prosecution case is that those four persons were the Accused nos.1 and 2, the aforesaid juvenile and one Bablu – wanted accused. Naturally, therefore, in the course of investigation, the identity of the appellant was not attempted to be got established by placing him in the Test Identification Parade. The Accused nos.1 and 2 were placed in the Test Identification Parade, and were supposedly identified by the First Informant Robin Pal (PW 1). The Accused nos.1 and 2 were also identified by the said Robin Pal as two of the culprits, during his evidence in the Court.

7 The only material against the present appellant is the alleged recovery of a revolver and a gold ingot at his instance and

allegedly pursuant to the information disclosed by him to the police on 9th August 2007.

8. In view of the nature of material on the basis of which the appellant is said to be connected with the alleged offences, what needs to be examined is whether the evidence showing that a pistol and the gold ingot were indeed recovered pursuant to the information allegedly disclosed by the appellant, is reliable and trustworthy; and further, whether the articles – if indeed recovered at the instance of the appellant – established the connection of the appellant with the alleged offences. *In other words, whether the identity of the revolver allegedly recovered at the instance of the appellant as the same that was used in the commission of the robbery and the identity of the gold ingot as forming part of the robbed property has been satisfactorily established, would need determination.*

9 The relevant evidence in that regard is of PW 4 - Goga More and PW 8 - Satish Gaikwad, the Investigating Officer. Mr. Wahab Khan, the learned counsel for the appellant contended that no reliance can be placed on the evidence of panch Goga More (PW 4) and PSI Gaikwad (PW 8). He submitted that the incident had taken place on 5th April 2005 and the appellant was

apprehended on 1st August 2007. According to him, the time gap between the alleged incident and the date of arrest of the appellant itself renders the case of the prosecution, weak. Mr.Wahab Khan also submitted that the alleged disclosure from the appellant came only on 9th August 2007 though the appellant had been arrested on 1st August 2008 itself, *after allegedly ascertaining his involvement in the matter on the basis of the information disclosed by the accused no.1 Vikas.*

10 I have carefully considered the relevant evidence.

11 I find that the learned Addl. Sessions Judge has freely admitted in evidence, the statements allegedly made by the accused persons to police, to which the provisions of section 27 of the Indian Evidence Act would not apply. Much of the evidence that has been recorded by the learned Addl. Sessions Judge, is clearly inadmissible in law.

12 Anyway, the evidence of Goga More (PW 4) and PSI Gaikwad (PW 8) does show that pursuant to the information disclosed by the appellant, the police party and the panchas went to a building situate in Antop Hill area, and that the appellant showed Room No.706 situate on 7th floor of the said building to

the police party and panchas. That the appellant rang the door bell when one woman opened the door, and that the police party and the panchas entered inside. According to the evidence of Goga More and PSI Gaikwad, there was a steel cupboard in the room from which the appellant took out a gold ingot and the revolver containing two bullets inside. According to More (PW4) the cupboard was locked and that, the key thereto was brought by the lady who had opened the door of the premises and who was believed to be the wife of the appellant. According to More, the cupboard was opened with a key, and that there was a locker inside the cupboard, and that the articles were taken out from the locker which was also opened with the help of a key. More, could not give any details as to the size of the room, the colour or other description of the cupboard etc. According to PSI Gaikwad, however, the cupboard was open. He has categorically stated that the cupboard was not locked.

13 I am unable to place reliance on the evidence of the panch – Goga More and Investigating Officer – PSI Gaikwad. While appreciating their evidence, all the features of the prosecution case need to be kept in mind. In this case, as aforesaid, the offence had taken place on **6th April 2005, and the**

arrest of accused persons i.e. accused nos.1 and 2, came to be made – abruptly – on 30th July 2007 which was after more than 2 years and 3 months from the incident. What is further significant is that the arrest came to be made on the same day on which investigation was entrusted to PSI Gaikwad of the DCB CID. Thus, this would suggest that the crime which could not be detected by the Pydhonie Police Station for a period of more than 2 years and three months was immediately detected by the Officers of the DCB CID on the very date on which the investigation was entrusted to the DCB CID. In my opinion, this is rather unnatural. Apparently the officers from DCB CID had already received information about the alleged involvement of the accused persons and it is only thereafter the investigation was transferred to them. Thus, what exactly led to the arrest of the accused Nos.1 & 2 is not clear.

14 It is also significant that the appellant was arrested on 1st August 2007 after allegedly ascertaining his role from one of the co-accused i.e. the accused no.1 who had been arrested on 30th July 2007. The evidence of PSI Gaikwad shows that he had come to know about the complicity of the appellant and the role attributed to him on 1st August 2007 itself when the appellant was traced and arrested. Still, the recovery of the revolver and the ingot came to be effected only on 9th August 2007.

15 However, that is not the crucial aspect of the matter. *The real question is whether the ingot and/or the revolver can be said to be the **very articles** connected with the alleged offences.* It is obvious that it is only in that case, the appellant can be connected with the alleged offences.

16 The identity of the revolver is sought to be established by the evidence of Robin Pal (PW 1) who has said that the revolver produced before the Court *was the same revolver that was shown by one of the offender to his worker.* That worker has not been examined. In the cross-examination, Robin Pal has admitted that there are no special identification marks on the revolver. Under such circumstances, reliance on the evidence of identity or individuality of the revolver as the one that had been used in the commission of the robbery, cannot be placed. The learned trial Judge has accepted this evidence i.e. of the identity of the revolver as the same that had been used in the commission of the offences only on the basis of the claim to that effect made by Robin Pal (PW 1) without considering whether the same could be accepted as true and correct and could be relied upon. Interestingly, the learned trial Judge has disbelieved the evidence of Robin Pal as regards the identity of the accused persons. He has observed that

the evidence of identification of the accused nos.1 and 2 as given by Robin Pal could not be relied upon. When such was the situation, the learned Judge ought not to have relied upon the evidence of identity of the revolver as given by Robin Pal, in the absence of any identification marks on the revolver.

17 As regards the identity of the ingot, it is sought to be established by the evidence of Suresh Bafna (PW 5). He is the person referred to as Suresh Seth by Robin Pal, and he is supposed to have given 5 – 6 different gold pieces to Robin Pal for preparing the ornaments. It is however, interesting to observe that what was robbed was not gold ingots, but ornaments. Robin Pal has clearly stated that the robbers took away different types of gold ornaments and has given the description of the ornaments in the First Information Report. When gold ornaments were stolen and when a gold ingot came to be recovered, that too, after a period of more than two years and three months, it was not reasonable to connect the recovered gold ingot with the robbed property.

18 In my opinion, the appreciation of evidence – so far as the applicant is concerned – as done by the learned Additional Sessions Judge and the conclusion arrived at by him is not proper or legal. This was a case where – to say the least – there was

certainly a reasonable doubt on the involvement of the appellant in the alleged offences. The learned Addl. Sessions Judge should have acquitted the appellant.

19 The Appeal is allowed.

20 The impugned judgment and order is set aside.

21 The appellant stands acquitted.

22 His bail bonds are discharged.

23 Fine, if paid, be refunded to him.

(ABHAY M. THIPSAY, J)

CERTIFICATE

***Certified to be true and correct copy of the original signed
Judgment/Order.***