

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1291 of 2012

ARUN MARUTI WAGHCHAURE)
Age : 23 years, Adult, Indian Inhabitant,)
Residing at : Adiwashi Wadi, Taluka Karjat)
District : Raigad.)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)
Through Khalapur Police Station, Raigad.)...RESPONDENT

Mr.Satyavrat Joshi, Advocate for the Appellant.

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

CORAM : ABHAY M. THIPSAY, J.

DATE : 19th MARCH 2015.

JUDGMENT :

1 This appeal is directed against the judgment and order dated 1st December 2011, passed by the Additional Sessions Judge, Raigad, Alibaug, in Sessions Case No.51 of 2012, convicting the appellant of an offence punishable under Section

395 of the Indian Penal Code (IPC) and sentencing him to suffer Rigorous Imprisonment for a period of seven years and to pay a fine of Rs.3,000/-, in default, to suffer Rigorous Imprisonment for 2 months. The appellant was the accused no.1 in the said case and there were four others, who were also prosecuted along with the appellant. However, the learned Additional Sessions Judge found the said four persons not guilty and acquitted them.

2 The prosecution case, as found in the 'brief facts of the case', mentioned in column no.17 of the printed prescribed proforma of the Police Report, is, as follows :

That, on 12th September 2007, at about 10.00 p.m., the First Informant – Ashok Joshi – was driving his motor vehicle – Tavera car – on the Mumbai – Pune Road. When the First Informant got down from the car to remove a stone that was lying on the road, the appellant and the other accused robbed him of his gold bracelet, mobile telephone and gold chain, totally worth about Rs.36,000/-, and thereby, committed an offence punishable under Section 395 of the IPC.

3 In order to prove its case against the appellant and the other accused, the prosecution examined eight witnesses during the trial. As aforesaid, upon considering the evidence adduced, the learned Additional Sessions Judge found the appellant guilty, but, the others not guilty.

4 I have heard Mr.Satyavrat Joshi, 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 entire evidence adduced during the trial. I have also carefully gone through the impugned judgment.

5 The details of the prosecution case are to be found in the testimony of the First Informant – Ashok Jadhav (PW4). According to him, he was working as a driver on Tavera jeep, owned by one Manish Vishwanath Balavali. *This is inconsistent with the facts of the case mentioned in the printed prescribed proforma of the chargesheet, where the First Informant is said to be the 'owner' of the Tavera vehicle in question. This, though shows*

non-application of mind by the Investigating Officer while submitting the police report, is actually of no consequence in determining the guilt or innocence of the appellant. It has been mentioned only to point out how careless the Investigating Officer has been, even in mentioning the 'facts of the case' in the police report. The evidence of Ashok Jadhav (PW4) shows that on 12th September 2006, he took passengers in the said Tavera jeep from Borivali to Pune. Those passengers – husband and wife – were dropped at Pune Airport, at about 6.30 p.m. Ashok was then coming back to Borivali. After he had crossed Khalapur Chowk, he saw that two stones had been put on the road. He, therefore, reduced the speed of the Tavera jeep. At that time, two persons came and stopped in front of the Tavera jeep. At the same time, about 4 to 5 persons came from behind and dragged Ashok out of the jeep. The said persons snatched the gold chain, gold bracelet, mobile telephone instrument of Nokia company, a wrist watch and cash of Rs.7,000/- from Ashok and ran away. Ashok, then, went to Borivali, and told about the incident to his master. On the next day, he lodged a report with the Khalapur Police Station, which

was treated as the First Information Report (FIR). Ashok showed the spot of the incident to the police. In the course of investigation, the police called Ashok to Tahsildar Office, at Khalapur. There, he identified the appellant. Some articles were shown to Ashok in his examination-in-chief, which he identified as the same articles, that were snatched away from him by the culprits.

6 It is evident that the appellant – and even the other accused – were not previously known to Ashok. The evidence against the appellant consists of his identification, as one of the culprits, by Ashok, and the recovery of certain articles, said to be part of the robbed property, at the instance of the appellant.

7 Mr.Satyavrat Joshi, the learned counsel for the appellant, submitted that, the evidence of identification of the appellant, as one of the culprits, was not at all satisfactory, and that, as a matter of fact, the evidence in respect of the appellant's identification – as one of the culprits – in the Test Identification

Parade, was not believed by the learned Additional Sessions Judge. He also submitted that the evidence of recovery of part of the robbed property, allegedly, at the instance of the police, was also not reliable. He submitted that the identity of the recovered articles, as the same that were robbed, was not at all established.

8 I have examined the evidence, adduced during the trial, on these aspects.

9 The first circumstance against the appellant is of the alleged recovery of a mobile telephone instrument of Nokia company, and also of a gold bracelet – both said to be a part of the robbed property, allegedly at his instance.

The prosecution case is that pursuant to the information disclosed by the appellant, a mobile telephone instrument, which formed part of the robbed property, came to be recovered from Sameer Bhase (PW1) under a panchnama. In this context, the evidence of Sameer Bhase (PW1) and that of Ravindra Patil (PW6) – who is a panch in respect of the said recovery, is relevant, apart from the evidence of P.I. Devkar (PW8).

10 The evidence of Sameer shows that Police Officer Devkar of Khalapur Police Station (PW8) had come to him for making enquiries in respect of a mobile, and that, he produced a mobile of Nokia company before Devkar. Sameer, then, states that the said mobile had been given to him by the appellant, saying that he was in need of money, and that, the appellant had taken an amount of Rs.2,000/- from Sameer, against the said mobile. That, the Police Officer told Sameer that the mobile was part of the property involved in the offence of dacoity, and that, therefore, he gave the same to the police. A mobile telephone, marked as Article No.5, was shown to him, when he identified it, as the same that had been given to him by the appellant.

11 In his cross-examination, he admitted that such type of mobile handsets are available in the market. He, however, denied that he was making a false allegation against the appellant, at the instance of the police.

12 Ravindra Patil (PW6) – a panch, however, did not support the case of the prosecution. According to him, the police had called him and one Bhagwan Chavan - the other panch – in Tahisldar Office, on 17th October 2006, and they obtained his signature and that of Bhagwan Chavan, without making any enquiries or without telling anything to them. Ravindra Patil was declared hostile, and in the questions put by the learned APP to him, thereafter, he admitted that Sameer Bhase had produced one mobile before the Police, in his presence. In the cross examination, that was taken on behalf of the accused, he admitted that Sameer Bhase had taken him and the panch to Khalapur Police Station, and that Sameer Bhase instructed them to sign the panchanama. According to him, he came to know the contents of the panchanama from Sameer Bhase. The evidence of this witness is rather absurd and is not worth taking into consideration, either for or against the prosecution.

13 Ashok did identify the mobile telephone instrument that was shown to him during his evidence. However, the question is, whether the identity of the said mobile telephone instrument, as the same one, that had been robbed, has been satisfactorily established. It may be recalled that the IMEI number of the mobile telephone instrument has not been brought on record. It was easily possible for the investigating agency to have collected such information, so as to fix the identity of the mobile telephone instrument, as the same that was being used by the first informant Ashok. Even assuming that Ashok did not know the IMEI number, it was easily possible to ascertain the same from the connectivity number i.e. the mobile telephone number itself. The same, however, has not been done.

14 Certainly, merely because the IMEI number of the mobile telephone instrument has not been established or attempted to be established, the evidence of the identity thereof, as the same article of which Ashok was robbed, may not be

discarded, but in the instant case, the evidence of Sameer Bhasse and panch Ravindra Patil, which seeks to establish the recovery of the mobile instrument at the instance of the appellant, is itself highly unsatisfactory. Sameer Bhasse does not give any details, such as the time and / or date of the appellant giving to him, or handing over to him the mobile telephone.

15 So far as the alleged recovery of the gold bracelet – also said to be a part of the robbed property – pursuant to the information disclosed by the appellant to the police is concerned, the evidence that is relevant in that context is that of Kamlesh Oswal (PW3), who is the owner of a jewellery shop, and Bhausaheb Kolape (PW5). According to Kamlesh Oswal, police of Khalapur Police Station came to him with the appellant on 15th October 2006, and made enquiries with him, when he told the police that the appellant had pledged a bracelet with him, by saying that his daughter was sick. According to Kamlesh, he had paid Rs.3,000/- to the appellant. That, he produced bracelet before the police. He identified the bracelet (Article No.3), which

was shown to him, *as the same which was produced by him before the police*. In the cross-examination, he admitted that, he had no license to accept the gold jewellery, by way of pledge. The omission to state before the police that the appellant had said that his daughter was sick, and that, therefore, he was pledging the ornament, was brought on record in the cross-examination. In the cross-examination, he claimed that he had noted in writing in his notebook, the fact of the appellant having kept the bracelet with him, and his having paid Rs.3,000/- to the appellant, but that the police did not seize the said notebook. He also admitted in the cross-examination, that '*the bracelet appeared to be newly made*'. The suggestion that Police Officer Devkar got the said bracelet made from his shop, was denied by him.

16 Bhausahab Kolape (PW5) is one of the panchas, in whose presence, the bracelet was allegedly recovered from Kamlesh Oswal. Bhausahab appears to have acted as a panch in respect of different panchanamas. He appears to have acted as a panch in respect of a disclosure statement, allegedly made by a

co-accused i.e. accused no.2 - Ram Hari Pawar also. His evidence is not at all satisfactory, but it is not necessary to discuss the same in detail, in as much as, when the bracelet (Article 3) was shown to him, he stated that he was unable to identify whether it was the same bracelet. Moreover, in the cross examination, he admitted that when he went to the police station, the panchanama was ready. His evidence fails to lend any support to the testimony of Kamlesh Oswal, which itself is highly unsatisfactory.

17 Thus, in my opinion, the evidence of recovery of a bracelet and a mobile telephone instrument of a Nokia Company, which are said to be part of the robbed properties at the instance of the appellant, is not satisfactory. In any case, the evidence fails to establish the identity of these articles as the same that were stolen. It may be recalled that, admittedly, the bracelet appeared to be new, and the individuality of the mobile telephone instrument, *which could have been easily established, was not even attempted to be established.*

18 The question is now about the identification of the appellant, as one of the culprits, as done by Ashok. Interestingly, Ashok was not asked '*whether any of the persons, who robbed him, were present in the Court.*' He does not say so in his evidence. As a matter of fact, a reading of his evidence does not show that he identified the appellant, as one of the culprits. His evidence in that regard, reads as under :-

"Police called me to Tahasildar Office at Khalapur. It was for purpose of identification of accused. I identified one accused. He is present in the Court. He is accused no.1"

Thus, his statement about the identity relates to the identification of the accused done by him in the Tahsildar Office. In other words, what he says is that, '*he identified the accused in the Test Identification Parade.*' I am afraid, this does not amount to his identifying him, as one of the culprits. The manner in which the evidence of the witness, with regard to the identity of the

appellant, has been recorded, is far from satisfactory. Anyway, since the witness has claimed that he identified the appellant because he had stood in front of the jeep, and that he had seen the appellant in the head light of the jeep, it may be *presumed* that he had identified the appellant in the test identification parade, as one of the culprits, though the witness has not stated this directly.

19 It is well settled that evidence of the identification of the persons, not previously known to the identifying witness, for the first time in court, is a weak piece of evidence. It is because of the possibility of witnesses making a mistake with respect to the identity, which may result from the fact that a particular person is already alleged to be the culprit. It is for this reason, that, Test Identification Parades are held. The Test Identification Parades serve a dual purpose. First and foremost is, that, they give an assurance to the Investigating Officer, that the investigation is proceeding on the right lines. The second purpose, which the Test Identification Parades serve, is that, they lend support to the evidence of the identification, which the witness would give in the

court. The fact of having identified the person as the culprit previously, from amongst several others, would lend support to the identification of the culprit, that would be subsequently made by a witness, during his evidence before the court. In this case, the evidence of the Test Identification Parade is not found to be acceptable by the learned Additional Sessions Judge. He has not placed any reliance on the evidence of the Test Identification Parade. The learned Judge observed that, the identification parade held by Nayab Tahsildar – Chandrasen Pawar, was not in conformity with the guidelines in that regard. If that was so, this was certainly not a case, where implicit reliance on the identification of the appellant as one of the culprits, could be placed. As already observed, Ashok, infact, does not say that the appellant was one of the culprits, and the evidence is not that he identified the appellant as the culprit, but the evidence is that, 'he identified one of the *accused* in the office of the Nayab Tahsildar, and that the person identified by him, at that time, was the appellant.' Thus, that the appellant was one of the culprits, is not directly stated by Ashok, but the same is required to be inferred, with the reasoning that, since he identified the appellant in the office of Nayab Tahsildar, he must have identified him as

one of the culprits. Not much value to such type of identification can be given.

19 The weaknesses in the prosecution case were noticed by the learned Additional Sessions Judge also, but he sought to overcome them with a certain peculiar reasoning. The learned Judge observed that 'the identity of the recovered bracelet was not satisfactorily established', but still accepted the theory of the prosecution by observing that, 'though the bracelet *appeared* to be *newly made* it was of 13 grams', and that, 'it was very unlikely that the jeweler could produce gold article of his own before the police.' In other words, the learned Judge thought that, since the bracelet had been given to the police by the jeweler Kamlesh Oswal, it must have been given to him by the appellant. This reasoning is not correct. When the claim was that it was the same bracelet, which had been robbed by the appellant from Ashok, why and how it could appear as new, needed some explanation, which is not provided by the sort of reasoning resorted to, by the learned Judge. Moreover, there could be several reasons for a

jeweler, who is perhaps indulging into acts of receiving stolen property, to handover a particular article to the police. One obvious reason would be to avoid himself being accused of knowingly receiving stolen property, arrested and prosecuted.

20 The manner in which the evidence was recorded during the trial, leaves much to be desired. The evidence has been recorded in a perfunctory manner, without requiring necessary details to be given by the witnesses. For instance, even Kamlesh Oswal's evidence does not categorically say that '*the appellant had pledged the bracelet with him*', but what it says is, that, 'the police came to him with the appellant, that, when the police inquired with him, *he told the police that the appellant had pledged bracelet with him*', and that, 'he then produced the bracelet before the police.' Thus, his evidence only relates to what had happened, *after* the police had come to him with the appellant, and like in the case of identification of appellant by Ashok, we are required to infer that 'since he told the police that the appellant had pledged the bracelet with him, it had indeed happened that

way.' The learned Judge did not realize that, the evidence of this witness is **not** that the appellant had pledged a bracelet with this witness, but the evidence is that, he **told** the police that appellant had pledged the bracelet with him.

21 Considering that neither the recovery of the robbed property, allegedly at the instance of the appellant, was satisfactorily established, nor the evidence of the identification of the appellant, as one of the culprits, was satisfactory, this was a case, where the appellant should have been given the benefit of doubt, and should have been acquitted. The order of conviction, as recorded by the learned trial Judge, is not proper or legal.

22 The Appeal is allowed.

23 The judgment and order of conviction of the appellant, as recorded by the learned Additional Sessions Judge and the sentences imposed by him upon the appellant are set aside.

24 The appellant stands acquitted.

25 He be set at liberty forthwith, unless required to be
detained in some other case.

26 Fine, if paid, be refunded to him.

(ABHAY M. THIPSAY, J.)