

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 11 OF 2012

- 1 Kalusingh Damodar Shingadiya
age 53 years,
 - 2 Mansingh Kalusingh Shingadiya
age 33 years.
 - 3 Ramsingh Kalusingh Shingadiya
age 31 years.
 - 4 Paheladsingh Bhana Bhill
age 49 years.
R/o. Accused No.1, 2, 3 and 4
Khangela, Taluka Dahod,
District Godhra, Gujrat.
(All Accused lodged in Nasik Road
Central Prison, Nasik)
- .. Appellants/
(Original Accused
No.1, 2, 3 and 4.)

V/s

The State of Maharashtra
(Through Taluka Police Station),
Taluka Malegaon, District Nasik,
C.R. No.204/2010

.. Respondents.

.....

Mrs. Nasreen S.K. Ayubi, for the Appellants/Original Accused No. 1,
2, 3 and 4.
Mr. H.J. Dedhia, for the State.

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CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.
DATE : JANUARY 21, 2015

JUDGMENT :

1] The Appellants are the original accused, who are
convicted for the offence punishable under Section 395 of I.P.C. and

sentenced to suffer RI for 7 years and to pay fine of Rs.5,000/- in default to suffer further RI for 15 months; Accused No.5 further convicted and sentenced for the offence punishable under Section 4/25 of Arms Act and sentenced to suffer RI for one year and to pay fine of Rs.2,000/-, in default to suffer RI for three months, by the Court of Additional Sessions Judge, Malegaon, Dist. Nashik, by Judgment dated 28.06.2011, have preferred this appeal challenging their conviction and sentence.

The brief facts, which are necessary for deciding this appeal, can be stated as following :-

2] On 21.07.2010, while P.W. 1 Pavan Prakash Tak, Manager of Mahavir Grocery Shop was present in the shop alongwith owner of shop Hiralal Chhajed and his sons P.W.3 Nilesh, P.W. 6 Vijay and grand son Kalpesh, at about 07.45 p.m. 5 to 6 unknown persons entered into shop pelting stones with the aid of slings. Those persons were also having handles of the spade and one country made revolver. They were shouting to shut down the shop. They assaulted Kalpesh, Hiralal, P.W. 3 Nilesh and P.W. 6 Vijay with stones and handles of spade. All the four sustained injuries. Those persons were inside the shop for 5 to 7 minutes. They snatched the gold chain and gold ring of Hiralal and cash amount of Rs.2,25,000/- from the counter. They also took away with them mobile phone of Samsung company belonging to P.W. 6 Vijay Chhajed (P.W.6). After committing the theft, they ran thereafter towards the agricultural field.

3] P.W. 1 Pawan took injured to Dr. Manoj and thereafter to Navkar Hospital and admitted them there. He then gave information of incident to P.W. 9 Ravindra Narshingh Deshmukh who registered the offence bearing C.R.No.204/10 and set investigation in motion. In the course of investigation, the search of the accused persons was taken and the accused came to be found. On 25.07.2010, in search of the hut of Accused No.1 Kalusingh, various articles came to be seized, like mobile phones, silver utensils, bag of Puma company, which was used for carrying cash amount and some cash amount. The country made revolver also came to be recovered from his personal search. In personal search of the Accused No.2 Mansingh, sling cash amount, mobile and spanner were recovered. In personal search of Accused No. 3 Ramsingh also two slings and mobiles were found. The accused were accordingly arrested and their test identification parade came to be conducted by P.W. 10 Tahsildar Shri Shivkumar Avalkanthe on 06.09.2010. In the test identification parade, P.W. 1 Pavan, P.W. 2 Nilesh and P.W. 6 Vijay identified all the four accused. Hence, after completion of due investigation, the chargesheet came to be filed against them for the offences under Sections 395, 397 and Section 4/25 of Arms Act.

4] On the case being committed to Sessions Court, the Trial Court framed charge against the accused vide Exhibit 4. The Accused abjured the guilt and claimed trial.

5] To prove the guilt of accused, the prosecution examined in all 13 witnesses, including P.W. 1 Pawan, the Manager of the shop and eye witnesses P.W. 3 Nilesh and P.W. 6 Vijay. The prosecution also relied on the evidence of P.W. 4 Sunil, panch witness to the Panchnama, which led to recovery of wooden handles and the evidence of P.W. 12 Shivkumar Avalkanthe, the Tahsildar who conducted test identification parade in presence of P.W. 5 Bharat Vithalrao Deore. The prosecution further placed reliance on the evidence of P.W.11 Dr. Sweety Chordiya who examined and issued injury certificates of Kalpesh, Hiralal, P.W.6 Vijay and P.W.3 Nilesh. The prosecution then examined P.W. 12 Sk. Haroon Sk. Gulab, who has given his SIM card to Vijay for his mobile. Lastly, the prosecution examined three investigating officers and closed its case.

6] The Trial Court relied upon evidence led by the prosecution and convicted and sentenced the Appellants as stated above for the offence under Section 395 of IPC while acquitting them under Section 397 of IPC.

7] This judgment of the Trial Court is being challenged in this appeal. I have heard the submissions advanced by the learned counsel for the appellants and learned APP. For appreciating their submissions, it would be useful to refer to the evidence on record.

8] This case is based on the evidence of three eye witnesses. Out of them, two are injured in the incident and one is informant.

First of all, I deal with the evidence of P.W. 1 Pavan Prakash Tak, the manager of the Mahavir Kirana Shop. He has deposed about the manner in which the incident has taken place. He was present at the time of incident in the shop alongwith Hiralal, then P.W. 6 Vijay, P.W. 3 Nilesh, Hiralal and Kalpesh. He heard the noise of pelting of stones on rear shutter of shop. He found P.W. 3 Nilesh was injured by the pelting of stone on his forehead. Further, he noticed that 5 to 6 unknown persons had entered into shop holding handles of spade in their hands. Out of them, one had a country made revolver. He had further clarified that out of 5 to 6 persons, three were having handles and one had the country made revolver. They were speaking in Hindi language, shouting to shut down the shop. They had already injured P.W. 3 Nilesh and P.W. 6 Vijay. They also beat Kalpesh and Hiralal. When P.W.1 tried to resist one of the assailants rushed towards him with country made revolver, therefore, he concealed himself in the bathroom. Those persons were inside the shop for 5 to 6 minutes and during that period, they snatched gold chain and gold ring of Hiralal. They also took away the amount of Rs.2,25,000/- from the counter. They further took with them the mobile phone of P.W.6 Vijay and ran towards the southern side and thereafter towards the agricultural field.

9] P.W. 1 Vijay then took the injured to Dr. Manoj Hiray and from there to Navakar Hospital. He had lodged the complaint of incident vide Exhibit 13 immediately thereafter on the same night. The complaint-Exhibit 13 reveals that crime was registered at 11.30

p.m. bearing C.R.No.83 of 2010 for the offences under Section 395 and 397 of I.P.C.

10] This witness is cross examined at length, but except for the fact that there were 10 to 13 neighbours present in the shop, nothing much is elicited from his cross examination. He had denied the suggestion that as he was in the bathroom, he could not see who had beaten whom and which articles were stolen from the shop. He has also denied suggestion that five to six persons who entered into shop had covered their faces with clothes. Thus, there is nothing in his cross examination to disbelieve his evidence or his presence in the shop at the time of incident.

11] Moreover, it is also completely corroborated by prompt lodging of the complaint within 3-4 hours after the incident and also from the medical evidence produced on record. He has identified accused persons in test identification parade and also in the court. He has also further identified the country made revolver, Article-2 which accused No. 5 was carrying and the wooden handles, which were recovered from the hut of the Accused No.1 Kalusingh.

12] The only challenge raised to his testimony is that the assailants were present in the shop only for 5 to 6 minutes and therefore, he had no occasion to witness the entire incident. However, his evidence is sufficient to prove that he had sufficient opportunity to see them and also opportunity to observe that the

accused had assaulted Nilesh, Vijay, Kalpesh and Hiralal. His evidence clearly goes to prove that thereafter, only when he tried to resist, one of the accused, rushed on him with country made revolver, he has to hide himself in the washroom. Therefore, he had occasion and opportunity to witness major part of the incident and it cannot be accepted that he is not an eye witness to the incident.

13] Then there is evidence of P.W. 3 Nilesh, who was injured in the incident. He has deposed that while he was in the shop alongwith his brother p.w. 6 Vijay, father Hiralal, Kalpesh, and P.W. 1 Manager Pavan Tak, at about 8 p.m. one stone hit to the rear shutter. Therefore, he ran to see, what has happened. He saw 4 to 5 persons alongwith the wooden handles and pistol entering into shop. Two persons were at the front side of the shop. These persons were pelting the stones with the aid of slings. Those persons started beating him and his father with handles on head and face. They snatched gold chain and gold ring of his father. They took Rs.2,25,000/- from the counter and mobile of Samsung company from his brother Vijay. Then they ran away towards pomegranate orchard. Even while running away, they were pelting the stones with slings. His evidence is further to the effect that his nephew was also injured by the stone. In his evidence before the Court he has identified, Article-2 revolver, Article-1 Bag, Articles- 4 to 6 wooden handles. He further identified Article-4 mobile phone and the accused persons. Moreover, his evidence that he was injured in the incident is also corroborated by the medical evidence of P.W. 11 Dr.

Sweety Chordiya.

14] P.W. 6 Vijay is again an injured eye witness in the incident. His evidence is on the same line like that of his brother P.W. 3 Nilesh. He has also deposed that while he was present in the shop alongwith his father Hiralal, Kalpesh, P.W. 3 Nilesh and P.W. 1 Pavan, some persons alongwith the wooden handles and revolver entered into shop. They attacked him, one wooden handle was landed on his head and he ran away at back side. These persons also assaulted his brother P.W. 3 Nilesh. Due to their terror, the labourers ran way. The amount of Rs.2,25,000/- was removed by the assailants from the counter; the golden ring and chain of his father were snatched. They also took away his mobile of Samsung company. Thereafter, they ran away pelting the stones.

15] According to him those persons took the cash amount in bag of PUMA company which he has identified as Article-1. Further, he has identified Article-2 revolver. According to his evidence, it was in the hand of Accused No. 2 Mansingh. He has further identified the mobile handset and SIM card number of the said mobile. The only inconsistency brought out in his evidence is that whereas other witnesses have stated that revolver was in the hands of accused No. 5, this witness has stated that it was in the hands of accused No.2 Mansingh. In the considered opinion of this Court this minor inconsistency does not in any way discredit his testimony or raise suspicion about his presence at the spot.

16] The evidence of P.W. 11 Dr. Sweety goes to prove injuries caused to these witnesses in the said incident. She is a Medical Practitioner in Navkar Hospital and she has examined all four injured, namely Kamlesh, Hiralal Hansraj, P.W. 6 Vijay and P.W. 3 Nilesh. On examination of Kalpesh, she found following injuries and issued certificate at Exhibit 38.

- (a) Swelling and pain in his right foot. Difficulty in waling.
- (b) Multiple contusion.

On X-ray, he was having fracture first meta-tarsal bone.

Nature of injury-grievous.

17] On examining Hiralal Chhaged, she found following injuries and issued certificate at Exhibit 39.

- (a) Peritally scalp, active bleeding, 5X3X2 c.m.
- (b) Right shoulder contusion interiorly 5X5 c.m.
- (c) Right wrist contusion, 5X5 c.m.
- (d) Left wrist contusion, 5X5 c.m.

18] She, further examined P.W. 6 Vijay Chhaged and found following injuries and issued certificate at Exhibit 40.

- (a) Multiple laceration on head. CT scan shows cerebral edima.
- Nature of injury-grievance.

19] On examining P.W. 3 Nilesh Chhaged, she found following injuries on his person and issued certificate at Exhibit 41.

- (a) Active bleeding from left forehead. 5X2X1 c.m.
- (b) Left posterior hypochondrium contusion 5X5 c.m.
- (c) Right leg anterior middle third heart contusion 5X5 c.m.
- (d) On CT Scan, there was cerebral edema.

Nature of injury – Grievous.

In cross examination, the only suggestion put to her was that the contusion injuries are possible, if a person falls. However, no such material is brought on record to support this contention. As a matter of fact, even cursory glance to the injuries is sufficient to prove that they cannot be caused due to fall. The injury certificate and evidence of P.W. 11 Dr. Sweety, therefore, clearly supports the evidence of P.W. 3 Nilesh and P.W. 6 Vijay.

20] There is recovery of articles, which is proved through panch and investigating officer. P.W. 4 Sunil Laxman Bhamne is panch to memorandum Panchnama (Exh.19) of Accused No.1 Kalusingh, at whose instance, there is recovery of wooden handles Articles 4, 5 and 6 under seizure panchnama (Exh.20). There is also corroborating evidence of investigating officer to that effect.

21] Further, there is evidence of P.W. 7 Sainath, panch witness in whose presence search of Accused and their huts took place. In that search, slings, country revolver, and mobiles were recovered under Panchnama (Exh.30). There is evidence of P.W. 9 P.S.I. Ravindra Deshmukh, who has conducted search of the Accused

and found in the possession of accused No.1 Kalusingh, mobile of Samsung Company displaying the photograph of Vijay Chhajed's mother. In his search a country made revolver Article-1, including PUMA company bag were also seized. There is nothing to shake his evidence about recovery of stolen articles, especially mobile, weapon like country made revolver and wooden handles.

22] As regards ownership of the Samsung mobile recovered from the accused No.1 Kalusingh, evidence of P.W. 6 Vijaykumar reveals that SIM card in the said mobile was of P.W.12 Haroon Shaikh. The prosecution has examined this witness Haroon Shaikh and he has also deposed that as P.W. 6 Vijay was his classmate and friend, he has given his SIM card to Vijay.

23] Lastly, there is evidence of Test Identification Parade of all the accused. The prosecution has examined panch to the Test Identification Parade, namely P.W. 5 Bharat and P.W. 10 Tahsildar Shivkumar Avalkanthe. The Test Identification Parade was conducted on 06.09.2010 in five rounds. As per their evidence, P.W.6 Vijay and P.W. 1 Pavan, identified all the accused.

24] In this case, there is thus evidence of two eye witnesses, who were injured in the incident, recovery evidence of weapons and stolen articles, corroborated by the evidence relating to the test identification parade. The recovery is made within seven days of incident. The accused have been identified in test identification

parade and also in the court. The witnesses had sufficient opportunity and time also to observe accused at the time of incident. In the face of such strong and clinching evidence on record, it has to be held that the prosecution has succeeded in proving its case against the present appellants, beyond reasonable doubt.

25] The submission of Learned Counsel for the appellants is to the effect that in this incident, none of the person has sustained grave injury. Though the prosecution witnesses have deposed that the accused were carrying revolver, there is no evidence of the revolver being used in the incident, therefore, the punishment which the Trial Court has imposed on the Appellants that of seven years I.R., is excessive in nature. It is submitted that since the date of arrest of the appellants in July, 2010, they are in Jail. They have already undergone punishment of more than four years and it may be considered as sufficient punishment.

26] Per contra, Learned APP has submitted that punishment for offence as prescribed under Section 395 of IPC being R.I. for life or R.I. for a term which may extend upto 10 years, the punishment of R.I. for 7 years imposed by the Trial Court, is just and reasonable and no interference is warranted therein.

27] In considered opinion of this Court also, having regard to the nature of offences and the fact that in the said incident four persons were injured, punishment awarded by the Trial Court is just

and reasonable. Hence, no interference is warranted therein.

28] Consequently, this appeal holds no merits, hence, stands dismissed.

29] The amount of fees for Learned Counsel for appellants appointed by the Legal Aid is quantified to Rs.5,000/-.

[DR. SHALINI PHANSALKAR-JOSHI, J]