

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.497 OF 2005

- 1) Uttam s/o Shivram Shinde,
Age 25 years, Occ. Agriculture &
Labour, R/o Pimpalgaon Gholve,
Taluka Kej, District Beed
- 2) Madhukar s/o Shivram Shinde,
Age 25 years, Occupation &
R/o as above. ... APPELLANTS

VERSUS

The State of Maharashtra ... RESPONDENT

.....
Shri S.G. Chapalgaonkar, Advocate for appellants
Shri A.M. Phule, A.P.P. for respondent/ State
.....

CORAM: A.I.S. CHEEMA, J.

DATED: 8th June, 2016.

Date of reserving judgment : 3rd May 2016
Date of pronouncing judgment : 8th June, 2016.

J U D G M E N T :

1. The appellants - original accused Nos.1 and 2, who were charged with offence of dacoity under Section 395 of the Indian Penal Code, 1860 (I.P.C. in brief) before the 2nd Adhoc Additional Sessions Judge, Beed in Sessions Case No.11/2002 on 7.5.2005, came to be convicted for the said offence. They have

been sentenced to suffer rigorous imprisonment for four years and to pay fine of Rs.4000/- and in default to suffer rigorous imprisonment for one year.

2. Along with the appellants - accused No.1 and 2, other six persons were also arrayed as accused in the charge sheet. It appears, the charge sheet was required to be split up as the other accused were absconding. The trial has taken place with regard to the present appellants - accused.

3. The case of prosecution is as under :

- (a) Bibhishan Tandale (P.W.1) was running a Dhaba from his field in Tandalyachiwadi abutting Beed - Ambajogai Highway. The said Dhaba or hotel was near the Tandalyachiwadi within the area of Neknoor Police Station in District Beed. The incident occurred in the night between 26.7.1992 to 27.7.1992 at about 1.00 a.m. Bibhishan along with one of his relatives Nandu Jaybhay (P.W.3) and employee Pintu Tandale (P.W.6) slept at the Dhaba after finishing work. At about 1.00 a.m., due to barking of dogs, the sleep of P.W.1 was disturbed and he noticed

some persons near the Dhaba, who were carrying instruments like sticks, iron rod and gupti. When enquired as to from where they appeared, they threatened to kill. Consequently, P.W.1 Bibhishan and his relative Nandu ran towards the road. They were obstructed there also and stones were thrown at them. They separated in different directions and Nandu reached the village and brought help. The servant Pintu also hid himself and had seen the incident. Brothers of P.W.1 Bibhishan reached the spot. Bibhishan claimed that he knew the dacoits were from Pimpalgaon Gholve, Taluka Kaij. The dacoits had left the spot before P.W.1 Bibhishan alongwith help reached back the spot. They took note of the articles and money which was stolen and P.W.1 Bibhishan along with others proceeded to Pimpalgaon Gholve. At that village, with the help of Police Patil of that Pimpalgaon, Ambrushi Gholve (P.W.7), complainant went to the house of Pardhi (absconding accused No.8) and saw the present accused and other two accused in that house. They had wet mud soiled feet. He also noticed his aluminum pot which had been stolen at that house.

Arjun Tandale, the brother of P.W.1 Bibhishan, who was police Patil of Tandalyachiwadi, was asked to go and file F.I.R. He took a lift by truck to Neknoor Police Station and in the morning filed F.I.R. (Exh.16). The police came to the spot and did panchanama (Exh.25) and proceeded to Pimpalgaon and at Pimpalgaon, seized the aluminum pot from the house of Digambar Jaldya Shinde (Pardhi) (accused No.8). Wife of the said accused was present there. The present accused persons came to be arrested on the same day.

- (b) Police investigated the matter and charge sheet came to be filed.
- (c) Prosecution brought on record evidence of 8 witnesses to prove the charge against the accused persons. The accused persons have denied the charge and their defence is of total denial.

4. Trial Court considered the oral and documentary evidence brought on record, and by judgment referred above, convicted and sentenced the accused persons.

5. By this appeal, the appellants - accused No.1 and 2

(hereinafter referred as accused) have claimed and it has been argued by the learned counsel for the accused that the german or aluminum utensil was seized from the house of absconding accused Digambar vide panchanama Exh.33. It is common household utensil which did not have any name. The accused were not known since before the incident, but still no test identification parade was held. The evidence showed that, P.W.1 Bibhishan had asked the dacoits from where they had come and thus, he did not know to which place they belonged. According to the counsel, it was surprising that immediately after the incident P.W.1 along with others proceeded in jeep to Pimpalgaon and searched out the accused. According to the Advocate for accused, the investigation was almost completed by P.W.1 himself who pursued the accused rather than going and reporting the matter to police. The trial took place after 13 years of the incident and thus, according to the counsel, the identification of accused in the Court should not be accepted. Although it was stated that the utensil was seized vide panchanama Exh.33, the servant P.W.6 Pintu had deposed that, on the next day morning P.W.1 Bibhishan had come with the utensil. P.W.6 Pintu had stated that, he had in his police statement stated that, when he woke up, the dacoits had left the hotel. The evidence of P.W.7 Ambrushi showed that accused were doing labour work and there

was no earlier complaint of theft against them. Although accused Nos.1 and 2 were in police custody for 5 days, nothing was seized from them. For such reasons, the learned counsel argued that, these accused are entitled to benefit of doubt. Alternatively, it is argued that, as undertrial, the accused persons were in jail for almost one year and the sentence should be reduced to the period undergone.

6. Against this, the learned A.P.P. supported the reasons recorded by the trial Court to convict the accused. According to the learned A.P.P., even if P.W.6 Pintu stated that the utensil was brought on next day, the panchanama Exh.33 itself shows that by that time the utensil had been seized and so may have been brought at the Dhaba.

7. It is now necessary to consider if there is sufficient evidence available on record and the conviction is justified.

Regarding the incident, there are three witnesses, P.W.1 Bibhishan, his relative P.W.3 Nandu, who had slept at the Dhaba along with P.W.1, and P.W.6 Pintu, the servant, who was also sleeping at the Dhaba. P.W.1 Bibhishan and P.W.3 Nandu deposed as to how they had met on that date of 26.7.1992 and

came to sleep at the said Dhaba. It appears, P.W.1 is son of mother's sister of P.W.3 Nandu. The evidence is that, after completing the work at the Dhaba, these three persons slept at the Dhaba at about 11.00 p.m. At about 12.00 in the night, P.W.1 claims, 2-3 persons from village Sarni came and wanted to have meals, but were required to be told that the hotel is closed. Then they went away. Evidence shows that, at about 1.00 a.m., the sleep of these people got disturbed because of barking of dogs. P.W.1 claimed that, he saw four persons on the eastern side of his hotel. They were having sticks, iron rod and gupti in their hands. P.W.3 corroborated P.W.1 Bibhishan that those persons had sticks and gupti in their hands. P.W.6 claims that, they had gupti, sword and iron rod. Evidence of Bibhishan is that, he asked those persons from where they came. In the English version of the evidence of Bibhishan, the evidence has been translated to read that he asked those persons from which place they have come. However, the Marathi portion is much clearer that he asked them as to from where they came. It does not mean that he was enquiring from those persons the name of their village. The learned counsel for the accused has argued that, P.W.1 Bibhishan was asking the dacoits from which village they are and if he did not know, how he could later on say that they came from Pimpalgaon. I do not find any force in this

argument after I have gone through the Marathi version of the evidence which clearly shows that, what P.W.1 asked was as to from where they have come, which would mean that, he was asking them how they have appeared there. The evidence of P.W.1 and P.W.3 shows that, when Bibhishan enquired from those persons, they threatened to kill and it appears that, these persons ran from the spot. Evidence is that, the said dacoits started pelting stones at P.W.1 and P.W.3. P.W.6 claims that, seeing the said dacoits, P.W.1 and P.W.3 ran away from the hotel and those persons started chasing them and he also ran away from the hotel. He claims that, he hid himself. Evidence is that, one of the stones pelted at P.W.1 and P.W.3 hit P.W.3 on his leg.

8. Evidence of P.W.1 and P.W.3 shows that, when they ran up to the road, three persons came in front of them and pelted stones. So, P.W.1 Bibhishan went towards Parali-Beed Road while P.W.3 Nandu ran towards the house at village Tandalyachiwadi.

9. The evidence of P.W.6 is that, he ran from the hotel and hid himself and the dacoits took bicycle, hens, one german utensil and clothes of P.W.1 Bibhishan as well as cash Rs.1500/- from the hotel. P.W.6 identified accused Nos.1 and 2 before the

Court as amongst the said dacoits. He deposed that, he had seen their faces in the light of electric bulb in the hotel of P.W.1 Bibhishan on the date of incident. P.W.1 Bibhishan was asked and he told that, there was electric metre in his hotel and that he had been paying electric bill. Of course, he did not remember the electric metre number, which is natural.

10. In the cross-examination of P.W.3, the Advocate for accused himself brought on record that there was electric bulb in the hotel of P.W.1 Bibhishan and that he had seen four persons from the distance of 20 ft. The cross-examination of investigating officer P.W.8 Prakash further brought on record that, at the field concerned, where the Dhaba was situated, there is a well and there is electric connection for taking water from the well and that, P.W.1 Bibhishan has taken electric supply from the electric pole near the well. The cross-examiner kept searching for electric bill and electric metre number, but I do not find that the same is material. There is sufficient evidence that there was electric connection and the electric bulb was on, in which the dacoits, who came to the spot, were seen by these witnesses.

11. The evidence of P.W.3 Nandu read with the evidence

of P.W.2 Arjun, the complainant, shows that, P.W.3 Nandu had run shouting to the village, which appears to be about one and a half Km. away as per the spot panchanama. He reached the village shouting and this attracted the villagers, whom he informed that there is a dacoity at the Dhaba of Bibhishan and evidence shows that, the complainant along with others reached the spot. P.W.1 Bibhishan also came back to the spot when other villagers gathered and by that time the dacoits had left. Bibhishan took note of the things which had been stolen. Evidence of complainant shows that Bibhishan expressed that the dacoits were belonging to Pardhi community and they were from Pimpalwadi and that he knew them by face. Evidence of P.W.1 Bibhishan also is that he was knowing the dacoits by their face, but could not tell their names. Bibhishan deposed that, he along with his brother Madhu and Anna as well as Jalindhar went to Pimpalgaon, by jeep in search of the dacoits. Evidence of P.W.3 Nandu is also that, after the incident P.W.1 Bibhishan stated that the dacoits were from Pimpalgaon. He also claims to have gone to Pimpalgaon along with Bibhishan and others.

12. Evidence of P.W.1 Bibhishan and P.W.3 Nandu read with P.W.7 Ambrushi Gholve (Police Patil of Pimpalgaon) shows that, Bibhishan along with other villagers in the night itself went

to Pimpalgaon by taking some jeep and went to meet this Police Patil of Pimpalgaon and along with him, reached the house of accused No.8 Digambar. The evidence of these witnesses read with the evidence of P.W.7 Ambrushi shows that, at the said house, accused No.1 Uttam and accused No.2 Madhukar along with accused No.3 Sampat and absconding accused no.8 Dighya were seen there and P.W.7 Ambrushi deposed that, Bibhishan (P.W.1) identified them. Bibhishan stated at that time that, these four persons along with others had committed dacoity at his hotel.

13. The evidence of P.W.1 Bibhishan and P.W.3 Nandu shows that, when they had gone to such house, they had seen the four dacoits mentioned above and they had mud stained legs. Complainant identified his german utensil to be in that house.

14. The evidence of complainant P.W.2 Arjun is that, after P.W.1 Bibhishan told about the dacoits to be from Pardhi community and from Pimpalgaon and that he knew them by face and that they had gone by private jeep to the said village. He deposed that, one person came and told him that P.W.1 Bibhishan had asked him to lodge complaint and consequently he went and filed the complaint Exh.16 at Police Station, Neknoor.

He has deposed and even the F.I.R. Exh.16 mentioned that, in the night there was no mode of transport and so, the complainant had come in the morning and was giving the complainant. P.W.2 deposed that, he went to the Neknoor Police Station on 27.7.1992 at about 7.30 a.m. and lodged the report and that he reached late as no vehicle was available in the night.

The counsel for accused objected to the delay, claiming that, the evidence shows that, in the night itself these witnesses managed to have a jeep to go to Pimpalgaon and there was no reason why the vehicle was not used to go the police station. I find that, once P.W.1 Bibhishan had reached the house of one of the dacoits and accused No.1 and 2 had been found to be there, he may have thought it to be more proper to remain there and let his brother go and file the F.I.R. and call police. If this took some time looking to the fact that the Police Station is 13 Kms. away, it cannot be said to be fatal. The delay has been explained in the F.I.R. itself and there is no reason not to accept the same.

15. The F.I.R. filed by P.W.2 Exh.16 shows as to how at about 1.00 o'clock in that night P.W.3 Nandu came shouting and because of which, this complainant thus came out and they ran

up to the Dhaba after coming to know about the incident from Nandu. F.I.R. mentions that, Bibhishan informed regarding the theft of cycle, 7 hens, 1 pant, 1 shirt, Rs.1500/- and german utensil and a box. The F.I.R. then concludes that, dacoity as such has taken place and that Bibhishan had said that, the thieves were from Pardhi people. The F.I.R. then has a compound sentence in inclusive format "We", stating that when "we" went to Pimpalgaon Pardhi Vasti and Bibhishan had along with police patil of Pimpalgaon gone and found the accused persons having mud soiled feet a person had come and asked the complainant to go and file the F.I.R. The compound sentence starting by using of the word "We" ends with the words "a person came back and told him and accordingly, the complainant had come to file the F.I.R." Perusal of the evidence of P.W.2 makes it clear that, he had himself not gone to Pimpalgaon along with Bibhishan. Thus, what happened at Pimpalgaon as stated by him in the F.I.R. is on the basis of hear-say for this complaint.

16. P.W.8 P.I. Prakash Jadhav stated that, when the F.I.R. was filed, he went to the spot and prepared panchanama Exh.25. The panchanama has been proved by prosecution after bringing on record evidence of P.W.4 Shahu and P.W.5 Gayas.

Although P.W.4 Shahu turned hostile, P..5 Gayas supported the prosecution. P.W.8 then deposed that, P.W.1 Bibhishan had chased the dacoits to Pimpalgaon and so he along with officials went to Pimpalgaon. He called the police patil and arrested accused Nos.1 and 2 and another accused Sampat. It appears that, accused Digambar had by that time run away from the said house. He prepared seizure panchanama Exh.33. The said panchanama was admitted by the accused in the trial Court. It shows that, from the house of Digambar Pardhi, german utensil, identified by P.W.1 Bibhishan to be his, was seized. No doubt the said german utensil did not bear the name of P.W.1 Bibhishan, but P.Ws.1, 3 and 6 all the witnesses identified the article. P.W.6 being servant at the Dhaba, must have had opportunity to handle the utensil and he has also identified the same. Thus, only because name had not been put on the utensil would not make any difference.

17. It has been argued that, no identification parade was taken and the accused were shown to the witnesses on next day of the incident. However, as the above discussion shows, P.W.1 immediately after the incident, had expressed that the dacoits were Pardhis from Pimpalgaon and the evidence shows that he along with P.Ws.3 and others took some jeep and immediately

went to Pimpalgaon in the same night and with the help of local Police Patil of that village, reached the house of accused Digambar, where accused Nos.1, 2 as well as another absconding accused Sampat and Digambar were there with mud soiled feet and complainant noticed his stolen utensil at that place. The evidence of P.Ws.1, 3 and 6 read together shows that, at the Dhaba there was electric bulb burning and thus, there was light, which had enabled these persons to see the accused. After incident, P.Ws.1 and 3 chased the accused to the home of absconding accused No.8 and again saw and identified them. In such set of facts, I do not think that not holding of test identification parade should be treated as fatal.

18. It has been then argued that, P.W.6 Pintu had deposed that, in the morning, Bibhishan had returned from Pimpalgaon along with german utensil. According to the counsel, how could this happen if the utensil was seized vide panchanama Exh.33 admitted by the accused. The seizure panchanama was recorded at 10.15 - 10.30 a.m. on 27.7.1992. There is substance in the arguments of A.P.P. that the panchanama being of the same day and same morning, coming down to Dhaba with the utensil cannot be so read that it had not been seized.

19. The learned counsel for accused then submitted that, P.W.6 Pintu has stated that, he had told police that when he woke up, the dacoits had left hotel of Bibhishan. The witness had, in his examination-in-chief, clearly given all the details as to how the incident occurred and how he hid himself and saw the dacoits in the light of the electric bulb. In the cross-examination, he deposed that, he knows the accused from the date of incident as he had seen them on the date of incident itself. No doubt he accepted that he had not stated to the police that he ran away from the hotel. However, his evidence regarding he going and hiding and seeing the incident remained unshattered. This witness was deposing after 13 years of the incident and in the cross-examination, a stray sentence was put to him that he had stated to police that, when he woke up, the dacoits had left. The sentence was put up to the witness without reference to context and by such vague admission, which is also limited to what was stated to police (and not what happened), cannot be read in isolation to wash out the evidence of his seeing the incident.

20. Reading the evidence of the eye witnesses along with the evidence of the investigating officer, I do not find that there is any material contradiction or omission proved so as to discredit the witnesses. The trial Court went through the evidence of

these witnesses and recorded detailed reasons why it found that the witnesses were reliable, and accepted their evidence to hold the accused guilty. I have also gone through the evidence and do not find any reason to disagree with the trial Court. The accused have been rightly convicted of the offence punishable under Section 395 of the Indian Penal Code. There is no substance in the arguments of learned counsel for accused.

21. In the cross-examination of P.W.1 Bibhishan and complainant P.W.2, it was claimed that, the accused persons had to recover money of labour, which they did at the field of P.W.2 Arjun and thus, to avoid the payment false case is filed. The suggestion on this count has not been accepted by any witness and the defence on this count has no substance. Rather, it would show that, these witnesses had reason to know these accused persons.

22. The learned counsel for the appellants - accused, alternatively argued that, looking to the age of the accused persons, benefit of Probation of Offenders Act should be given to them. He submitted that, P.W.7 has deposed that, before the present incident, the said Police Patil has not received any previous complaint of theft or dacoity against these accused and

that, they were doing labour work. Going through the judgment of the trial Court shows that, on the count of sentence, the accused had claimed to be of young age with responsibilities of families. They claimed that, they had children and wives and their father had also been arrested in the same case a fortnight before sentence was being passed. They claimed that there was nothing on record to show that they were previously convicted. However, trial Court recorded that, accused No.2 accepted that there was one Criminal Case under Section 379 of the Indian Penal Code pending against him. Trial Court considered young age and that there was no previous conviction, and observed that, leniency was required to be shown. It convicted the accused and sentenced to suffer four years imprisonment. Looking to the nature of offence and these factors, I find that, one more aspect needs to be kept in view, which is the poverty and illiteracy of these accused. Apparently, they were labourers and stole petty things like hens and used clothes and ordinary article like used utensil. It would be appropriate to show some more leniency than what was shown by the Additional Sessions Judge. However, looking to the fact that, it is a matter of dacoity committed in the night time, sentence of imprisonment is necessary. I thus pass the following order :

ORDER

23. The conviction of the appellants - accused under section 395 of the Indian Penal Code is maintained. However, the appeal is partly allowed with reference to the sentence. Instead of the sentence passed by the trial Court, it is directed that the appellants - original accused Nos.1 and 2 shall suffer rigorous imprisonment for three years and shall pay fine of Rs.4000/- (Rupees four thousand) each, and in default, they shall suffer further rigorous imprisonment for six months. They would be entitled to set off period they have been in jail as undertrial. Appellants - accused Nos.1 and 2 shall surrender to their Bail Bonds. Trial Court shall ensure execution of the sentence.

With such modification of sentence, the appeal stands disposed of.

(A.I.S. CHEEMA, J.)