

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

CRIMINAL APPEAL NO.268 OF 1998

The State of Maharashtra,
Through P.S.O., Sailu P.S.O.,
Dist. Parbhani

..Appellant
(Prosecution)

Vs.

1. Rajendrasingh s/o. Bhagwansing
Babri, Age 35 years, r/o. Partur,
Dist. Jalna

*(Deleted as per Court's order
dated 11.1.2000)*

2. Rajendrasingh s/o. Bahadursing
Tak, Age 22 years, r/o. As above

3. Ajitsing s/o. Khushalsing Juni,
Age 28 years, r/o. As above

4. Bichusingh s/o. Bhimsingh Bhond,
Age 27 years, r/o. As above

5. Digamber s/o. Dattatraya Shahane,
Age 32 years, r/o. As above

..Respondents
(orig. accused)

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Mr.A.R.Borulkar, A.P.P. for applicants

Mr.P.P.Kothari, Advocate i/b. Mr.S.S.Bora,
Advocate for respondent nos.2 and 4

Mr.B.U.Sagade, Advocate for respondent no.3

Mr.M.M.Joshi, Advocate for respondent no.5

**CORAM : S.S. SHINDE AND
SANGITRAO S. PATIL, JJ.
DATE : SEPTEMBER 22, 2016**

JUDGMENT (PER SANGITRAO S. PATIL, J) :

This appeal challenges the judgment and order dated 20.05.1998 passed in Sessions Trial No.127 of 1996 by the learned Addl. Sessions Judge, Parbhani, whereby the respondents came to be acquitted of the offences punishable under Sections 396 and 397 of the Indian Penal Code ("I.P.C.", for short).

2. Briefly stated, it is the case of the appellant (hereinafter referred to as "the prosecution") that on 02.04.1995 at about 2.00 a.m., the informant Rohini Sanjay Rajurkar, resident of Babasaheb Road, Sailu, heard shouts of the parents of her husband. Her husband and herself got up from the sleep. Her husband opened

the door of their own room. They found that 7 to 8 dacoits had entered into their house and that they were beating the parents of the husband of the informant. The husband of the informant namely, Sanjay went to rescue his parents. At that time, the dacoits beat him also. The dacoits were holding iron bars and knives. They had worn banians and underpants. They had covered their faces with black clothes. Their eyes only were visible. One of them had worn a blue coloured sweater and he was talking in Hindi. The other dacoits were talking in Marathi. They threatened the father-in-law of the informant as he was shouting and asked him to deliver to them whatever he had. They severely beat the father-in-law, mother-in-law, brother-in-law and husband of the informant. The father-in-law of the informant sustained serious injuries. He became unconscious. The dacoits took away the gold rings, which were in the fingers of her husband and that of the

brother-in-law; two gold bangles weighing four tolas; one gold locket weighing one tola; one gold locket of the husband of the informant; all the ornaments which were on the person of the mother-in-law of the informant and all the cash amount that was in the house. The dacoits had broken the iron shutter of the house of the informant and entered into it for committing dacoity.

3. As the wife of the brother-in-law of the informant namely, Kanchan informed the police on phone about the incident, the police arrived at the spot of the incident. The informant narrated about the incident before the police, which was reduced into writing in the form of the First Information Report ("F.I.R.", for short). On the basis of that F.I.R., Crime No.37 of 1995 came to be registered against unknown persons for the offence punishable under Section 397 of the I.P.C. The injured family members of the informant i.e.

father-in-law namely, Prabhakar Rajurkar, brother-in-law namely, Raju, husband of the informant namely, Sanjay and the informant herself were taken to the Doctor for medical treatment. Since Prabhakar Rajurkar succumbed to the injuries sustained by him, the offence punishable under Section 396 of the I.P.C. also came to be added.

4. The investigation followed. The spot pachnama was prepared. The statements of the witnesses were recorded. Respondent nos.1 to 4 came to be arrested on 11.05.1995. The amount of Rs.29,200/- came to be seized from the house of respondent no.2 consequent upon the disclosure statement made by him on 03.06.1995. He gave one more disclosure statement on 06.06.1995, on the basis of which a tin box containing gold ornaments worth Rs.46,000/- came to be recovered from under a drainage. One Vishwambhar Bahiwal had found a tin box under a drainage wherein there were gold

ornaments. He sold out a pair of Zumbers to one Rambhau Kukde, who produced the same before the police on 09.06.1995. It was transpired from the statement of Vishwambhar Bahiwal that other gold ornaments were given by him to respondent no.5. Therefore, respondent no.5 also came to be arrested. One Sundar Mundhe, who allegedly was the driver of the Trax car, in which the dacoits had gone to the house of the informant for committing dacoity, came to be arrested. Respondent no.4 – Bichusingh and the said Sundar Mundhe were subjected to test identification parade on 07.08.1995. They were identified by the informant, her husband Sanjay, her brother-in-law Raju and the wife of her brother-in-law namely, Kanchan. Sundar Mundhe offered to confess the guilt and become an approver. Accordingly, he was produced before the learned Chief Judicial Magistrate, Parbhani, who recorded the statement of Sundar Mundhe as an approver.

5. Post mortem of the body of Prabhakar Rajurkar was conducted by Dr.Kulkarni, who opined that Prabhakar Rajurkar died due to shock due to head injury.

6. After completion of the investigation, it was found that the respondents and other six persons committed dacoity and committed murder of Prabhakar Rajurkar while committing dacoity. Therefore, the Charge Sheet came to be filed against the respondents and other six absconding accused in the Court of the learned Judicial Magistrate First Class, Sailu on 11.09.1995. Since the case was exclusively triable by the Court of Session, the learned Judicial Magistrate First Class committed it to the Sessions Court for trial vide order dated 04.10.1996.

7. The prosecution examined twenty two witnesses to bring home guilt of the respondents.

After evaluating the evidence produced by the prosecution, the learned trial Judge found that no offence has been established against the respondents. He, therefore, acquitted them of the offences punishable under Sections 396 and 397 of the I.P.C. as per the impugned judgment and order. The case of the prosecution is mainly depending on the following circumstances :-

1. The evidence of the approver namely, Sundar Mundhe (PW 1).
2. Recovery/discovery of the stolen articles.
3. Identification of respondent no.2 in test identification parade.

**THE EVIDENCE OF THE APPROVER NAMELY,
SUNDAR MUNDHE (PW 1)**

8. Sundar (PW 1)(Exh.42) claims himself to be an accomplice to the offence of committing dacoity and murder. An accomplice means a guilty associate

or partner in the crime. He is a person who is believed to have participated in the offence. He must admit that he had conscious hand in commission of the offence. He should be a person supposed to have directly or indirectly concern in or privy to the offence. Therefore, it will have to be seen, whether Sundar (PW 1) can be characterised as an accomplice.

9. Sundar (PW 1) deposed that he was the owner and driver of the Trax car bearing registration number MH-21-A-8394. According to him, respondent no.3 - Ajitsing and the accused Dharasing had booked the Trax car for going to attend a marriage ceremony. They had agreed to pay him Rs.500/- as the fare. Accordingly, he took his Trax car to the house of accused no.4 - Bichusing at Partur. Respondent nos.2 to 4 and other six persons boarded into that car. Sundar (PW 1) drove that car to Sailu, as directed by respondent no.4.

When the car was at the distance of about 3 kms. away from Sailu, accused – Gokulsing asked Sundar (PW 1) to stop the car by pointing a knife to him. Accordingly, he stopped the car. He states that accused – Gokulsing informed that they were going for committing theft, asked him not to disclose that fact to anybody and threatened that otherwise, he would be finished. Accused – Rupsing and Gokulsing compelled him to accompany them under the threat that otherwise, he would be finished. When he expressed his reluctance, accused – Rupsing beat him. Due to the fear of the accused persons, he accompanied them and went to Babasaheb Mandir at Sailu. There was a bungalow near that Mandir. Respondent no.3 – Ajitsing and Rupsing went near the gate of that bungalow. Sundar (PW 1) further states that the accused Gokulsing was standing near him pointing a knife to him. Rest of the accused surrounded the bungalow from all the sides. Respondent no.3 – Ajitsing and Rupsing entered that

bungalow by breaking open its collapsible gate. The accused Gokulsing took him to that collapsible gate and threatened him to stand near the gate by pointing the knife to him. Thereafter, the accused Rupsing pushed the bell of that bungalow, whereon one old aged woman opened the door from inside. Then, the accused Rupsing gave two slaps to that old woman. She started shouting. Thereafter, one aged person came from inside the house. Respondent no.3 – Ajitsing and Rupsing entered into the bungalow and started beating that old man. Respondent no.3 – Ajitsing demanded keys from that old man and asked as to where money was kept. When that old man did not hand over the keys, he was again beaten. The other inmates of the bungalow also came and they dashed the head of respondent no.3 – Ajitsing against the wall of the bungalow. Respondent no.3 became unconscious and fell on the ground. Thereafter, accused – Rupsing, Zipusing and Dharasing entered into that bungalow and started

beating the inmates of the bungalow. The accused – Dharasing gave blow of iron bar on the head of the old man, who was inside the bungalow. By that time, respondent no.3 regained consciousness and stood up from the place where he was lying. There were 4-5 female members inside the bungalow. Respondent no.3 demanded keys of the underground treasure from them. One of the female members gave the keys to respondent no.3. Thereafter, respondent no.3 and accused – Rupsing opened the room by means of the said keys and brought money therefrom. Sundar (PW 1) further states that he wanted to run away, but the accused Rupsing and Gokulsing beat him and did not allow him to run away. He further states that he was not ready to go back to Partur but the accused persons beat him and compelled him to take all the nine persons back to Partur. He states that he took the car to the house of respondent no.4, when all the nine accused persons alighted from the car and dispersed.

10. Sundar (PW 1) states that on the next day morning, he met the Police Head Constable Guthe and Constable Kakde in a hotel at Mondha and narrated them the incident. They took him to the Deputy Superintendent of Police – Babasaheb More at Partur. Sundar (PW 1) narrated about the incident to Dy.S.P. – Babasaheb More also. Dy.S.P. – Babasaheb More asked to meet him in the Rest house at Mantha in the evening. Accordingly, he went to the Rest House at Mantha in the evening and narrated the entire incident to Dy.S.P. – Babasaheb More. Dy.S.P. Babasaheb More advised him to go out of Partur for 20-25 days in order to save himself from the accused persons. Accordingly, he remained outside Partur. Thereafter, the accused persons were arrested. He came back to Partur after about one and half months and thereafter, he was arrested.

11. Sundar (PW 1) states that after about 8 days of his arrest, he was taken to Police Station,

Sailu, where he narrated the incident in detail before P.S.I. and C.P.I. He was then produced before the learned Chief Judicial Magistrate – Shri. Kamble, who recorded his statement.

12. From the above evidence of Sundar (PW 1), by no stretch of imagination, it can be said that he willingly participated in commission of the alleged offence of dacoity. On the contrary, if his version is accepted as it is, it will be clear that he, in fact, was the victim and not a perpetrator of the crime. According to him, the offence was committed against his wish and that he acted under the threats of being killed. He cannot be said to be a co-accused or a person who consciously participated in commission of the offence with guilty mind. At the most, he can be characterised as an eye-witness to the incident of dacoity.

13. As seen from the evidence of Sundar (PW 1) after about 8 days of his arrest, he narrated the

entire incident before the P.S.I. and C.P.I. in Police Station, Sailu from where, he was produced before the learned Chief Judicial Magistrate at Parbhani, who recorded the statement. He does not state that he claimed pardon. There is nothing on record to show that the learned Chief Judicial Magistrate followed the procedure laid down in Section 306 of the Code of Criminal Procedure (Cr.P.C.", for short) for tendering pardon to Sundar (PW 1). It was incumbent on the part of the learned Chief Judicial Magistrate to record reasons for tendering pardon to Sundar (PW 1), as mandated under sub-section (3) of Section 306 of the Code. It was also necessary for him to record, whether the tender was or was not accepted by Sundar (PW 1). The procedure laid down under Section 306 of the Code has not at all been followed by the learned Chief Judicial Magistrate. In the circumstances, Sundar (PW 1) cannot be characterised as an approver.

14. The evidence of Sundar (PW 1) as a witness does not at all inspire confidence. Had he narrated the incident on the next day morning of the incident before the Police Head Constable Guthe and Police Constable Kakde in the police station itself, necessary action against the dacoits would have immediately been initiated by the police. It is stated by Sundar (PW 1) that he was taken by them to Dy.S.P. - Babasaheb More at Partur before whom, also he narrated the incident, but no cognizance was taken. It is strange to note that an Officer of the rank of the Deputy Superintendent of Police would not take any action immediately after knowing about commission of a serious crime and would advise Sundar (PW 1) to keep himself away from Partur for 20-25 days in order to save himself from the dacoits. Even after knowing from Sundar (PW 1) that a cognizable offence was committed, no Police Officer of the rank of the Deputy Superintendent of Police would give such an advise.

No Police Head Constable would ignore the information in respect of commission of such a grave offence. The evidence of Sundar (PW 1) in this regard is not at all believable. It follows that Sundar (PW 1) had not at all disclosed about any incident to the above-mentioned Police Head Constable, Police Constable or the Deputy Superintendent of Police, as claimed by him. It further follows that it is only after about one and half months of the incident, he disclosed about the alleged incident for the first time. The delay in disclosing the said incident after such a long time, without there being any reason, itself indicates that Sundar (PW 1) was not knowing about the incident. It seems that after about one month of the incident, since there was no progress in the investigation and considering unrest and uproar because of the failure of the police to trace out the accused persons, an attempt was made to show Sundar (PW 1) as an approver to anyhow connect

somebody with the incident of dacoity. The evidence of Sundar (PW 1) in respect of the alleged incident of dacoity is not at all natural and believable. He is obviously a got up witness. The learned trial Judge has rightly disbelieved the evidence of this witness.

RECOVERY/DISCOVERY OF THE STOLEN ARTICLES

15. C.P.I. Narhari Thakur (PW 22) (Exh.134) states that when respondent no.2 was in the police custody, he gave statement before two panchas and offered to produce cash amount from his house. Accordingly, memorandum (Exh.75) of his statement was recorded. Respondent no.2 then took the panchas to his house and produced an iron box wherein an amount of Rs.29,200/- was kept. The said amount was seized vide panchnama (Exh.76).

16. Ramchandra (PW 9) (Exh.74) and Madhavrao (PW 19) (Exh.112) happened to be the pancha

witnesses to the memorandum (Exh.75) and the panchnama (Exh.76). Both of them flatly denied that respondent no.2 gave any discloser statement before them as mentioned in panchnama (Exh.75). Their evidence is of no use to the prosecution to prove discovery of Rs.29,200/- from the house of respondent no.2 pursuant of his alleged discloser statement. The cash amount does not have any specific identification marks so that it can be connected with the cash amount alleged to have been stolen away from the house of the informant before about two months of recovery thereof. In the circumstances, the seizure of the amount of Rs.29,200/- would be of no help to the prosecution to connect respondent no.2 with the incident of dacoity.

17. C.P.I. Narhari Thakur (PW 22) further deposes that on 06.06.1995, when respondent no.2 was in the police custody, he gave a statement vide

memorandum (Exh.113) and offered to produce a tin box from under a drainage near his house. He further states that respondent no.2 took both the panchas and himself to his house and took out a tin box from under a drainage. He states that in that tin box, there were two gold bangles, two pieces of gold bangles, two gold lockets, seven pieces of gold lockets, one pair of gold Zumbers, one small gold box, 65 gold beads and seven pieces of necklace, which came to be seized under panchanama (Exh.114). Madhavrao (PW 19) and one Sudhakar Padulkar (PW 20) happened to the witnesses to the memorandum (Exh.113) and seizure panchnama (Exh.114). They denied that respondent no.2 gave the statement as mentioned in Memorandum (Exh.113) and produced the tin box, as mentioned in panchnama (Exh.114). Thus, their evidence is of no use to the prosecution.

18. Here, reference may be made to the evidence of Vijay (PW 10) (EXh.77), who states that

one Kachru and himself, being the sweepers, found a tin box containing gold ornaments i.e. gold bangles, gold zumbers, gold beads, broken pieces of gold chains etc. while cleaning drainage in the Shikalkari Mohalla area at Partur. They took the box containing the gold ornaments to respondent no.5 and kept it with him on receiving Rs.1,300/- and a pair of gold zumbers from him. They sold out the said pair of gold zumbers to Vishwambhar (PW 11). Vishwambhar (PW 11) also states that Vijay (PW 10) and the said Kachru had sold out a pair of gold Zumbers to him for a consideration of Rs.2,000/- and that after knowing that the said ornaments were stolen property, he produced the said Zumbers in the police station at his own.

19. From the above evidence, it is clear that the tin box containing gold ornaments alleged to have been stolen and concealed in drainage, was already taken out by Vijay (PW 10) and Kachru. If

that be so, the evidence of C.P.I. Narhari Thakur (PW 22) that the said tin box was again discovered at the instance of respondent no.2 cannot at all be believed. It is clear that the said tin box was subsequently planted to make a show of its discovery at the instance of respondent no.2. In the circumstances, the recovery of the said tin box containing gold ornaments cannot be used against respondent no.2.

**IDENTIFICATION OF RESPONDENT NO.2 IN
TEST IDENTIFICATION PARADE**

20. Respondent no.4 and Sundar (PW 1) were arrested on 11.05.1995. The test identification parade has been conducted on 07.08.1995. It is the case of prosecution that Raju (PW 5) (Exh.59), Vimalbai (PW 4)(Exh.58), the informant – Rohini (PW 2) (Exh.52) and Kanchan Rajurkar identified respondent no.4 during the test identification parade. Moreover, the said witnesses and one Sanjay

Rajurkar identified Sundar (PW 1) during the test identification parade. However, none of these witnesses had given the features or description of the dacoits in their statements before police. On the contrary, from their evidence, it is clear that the dacoits had covered their faces with black clothes and their eyes only were visible. They have not even given the general features of the dacoits, like, having beard, worn turbans, were of any particular ages etc., so as to connect the suspects with that description. In the circumstances, without even disclosing the characteristics or features of the dacoits, pointing respondent no.4 and Sundar (PW 1) as the persons, who were involved in the dacoity, cannot at all be believed.

21. Mohd. Abdul Rashid (PW 14)(Exh.83), the Tahsildar, who had conducted the test identification parade of respondent no.4 and Sundar (PW 1) in the presence of Abdul Gani (PW 17)

(Exh.110) and one Deepak Dhapse. Mohd. Abdul Rashid (PW 14) states in his cross-examination, that he was not aware about the rules framed by the High Court for conducting the test identification parade, as mentioned in the Criminal Mannual. The test identification parade panchnamas Exhs.84 to 88 in respect of respondent no.4 contain the names of the dummies, who were aged about 48 years, 62 years, 55 years, 50 years, 30 years, 27 years and 45 years. Respondent no.4 was aged about 27 years. Mohd. Abdul Rashid (PW 14) states that he could not get the persons similar to the age and appearance of respondent no.4. Abdul Gani (PW 17) specifically states that respondent no.4 alone had a turban on his head and none else, at the time of the test identification parade. In such circumstances, the identification of respondent no.4 by the abovenamed witnesses, cannot be attached with any evidentiary value.

22. The same is the position in respect of the test identification parade of Sundar (PW 1). The panchnamas Exhs.89 to 93 contain the names of the dummies who were aged about 50 years, 35 years, 50 years, 30 years, 27 years, 55 years, and 45 years. Sundar (PW 1) was aged about 19 years. The dummies were not similar in age and appearance as that of Sundar (PW 1). Moreover, none of the witnesses had given description of Sundar (PW 1) or the role played by him at the time of the alleged dacoity. In the circumstances, the identification of Sundar (PW 1) also cannot be attached with any evidentiary value.

23. The test identification parade was conducted on 07.08.1995. There is absolutely no reason assigned by the prosecution for this long delay in conducting the test identification parade. Considering the latches on the part of Mohd. Abdul Rashid (PW 14) in conducting the test

identification parade and unexplained delay in holding the same, in view of the judgment in the case of **Satrughana alias Satrughana Parida and ors. Vs. State of Orissa, 1995 Supp(4)SCC 448**, respondent no.4 cannot be connected with the dacoity in question and cannot be convicted.

24. As stated above, there is neither direct nor circumstantial evidence worth believing to connect the respondents with the above-mentioned offences. The learned trial Judge has rightly appreciated the facts of the case and the evidence on record. He has rightly held the respondents not guilty of the above-mentioned offences. The impugned judgment is supported by the evidence on record. We do not find any reason to interfere in the findings recorded by the learned trial Judge and the resultant acquittal of the respondents. The appeal is devoid of substance. It is liable to be dismissed.

25. Hence, the order :-

The appeal is dismissed.

[SANGITRAO S. PATIL, J.]

[S.S. SHINDE, J.]

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