

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.490 OF 2001

Ashok s/o Sampat Bhosale
Age-27 years, Occu:Labour,
R/o-Hangewadi, Tq-Paranda,
Dist-Osmanabad.

...APPELLANT
(Orig. Accused No.1)

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr. Hemantkumar F. Pawar Advocate h/f.
Mr. R.B. Ade Advocate for Appellant.
Mr. K.D. Mundhe, A.P.P. for Respondent.
...

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

DATE OF RESERVING JUDGMENT : 7TH JUNE,2016.

DATE OF PRONOUNCING JUDGMENT: 16TH JUNE, 2016.

JUDGMENT :

1. The Appellant - original accused No.1 in
Sessions Case No.61 of 2000 decided by Ad-hoc

Additional Sessions Judge, Osmanabad on 7th November 2001, has been convicted under Section 395 of the Indian Penal Code, 1860 ("IPC" in brief) and sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.1000/- and in default to suffer further rigorous imprisonment for six months. The other three accused came to be acquitted. It appears that some other accused involved in the incident are absconding.

2. The case of the prosecution, in brief, is as follows:-

A). On 12th April 1996 one Jagannath Baba Umbre filed First Information Report ("FIR" in brief) at police station Ambi, Tq-Paranda of Dist-Osmanabad reporting that he is working for one Mahadeo Ramrao Huke and Shantabai Mahadeo Huke (PW-7) and in the night between 11th April 1996 - 12th April 1996 they had slept in the house which

is in the field at Sakat Khurd. In the night at about 2.00 a.m., 7-8 unknown persons suddenly attacked them when they were sleeping, and beat them. Those persons had sticks and the complainant and his employers were beaten and they broke the lock of the house and took away the *Mani-Mangalsutra* of gold and other ornaments. The FIR mentions details regarding the said ornaments. The FIR gives the details as to the manner in which the complainant and his employers were beaten. The FIR mentions that when the complainant and nearby residents were proceeding to the police station in the morning, they came to know that 7-8 thieves had similarly committed dacoity at the place of one Jaishree Gorakh Kharat also, residing at some distance and ornaments and other articles were stolen from there also. The mother-in-law of said Jaishree Kharat (PW-5), namely Shantabai Kharat (PW-7), and Vaijayanta Kharat (PW-6) were also beaten and robbed. The police registered offence at Crime No.25 of 1996 at 9.30 a.m.

B). PW-12 P.S.I. Abasaheb Kakade carried out investigation after offence was registered. Spot Panchnama of both the places Exhibit 62 was recorded. In the investigation, the Appellant - accused came to be arrested on 18th April 1996. While he was in police custody, he agreed to show where *Mani-Mangalsutra* robbed in the course of dacoity was hidden and his memorandum Exhibit 51 came to be recorded on 26th April 1996. The Article-1 which was before Court, came to be discovered when the Appellant - accused led the police and Panchas to his house and it was found that it was hidden in the clothes near the waist of Abai, the wife of Appellant - accused. The said ornament was identified before police by PW-7 Shantabai, regarding which Panchnama Exhibit 62 came to be recorded. Further investigation was done by PW-13 P.S.I. Gaikwad, who submitted the charge-sheet.

3. The Appellant - accused and others came to be tried. Prosecution brought on record evidence of 13 witnesses. The defence of the Appellant - accused in the trial Court was of denial. The trial Court considered the oral and documentary evidence brought on record and after discussing the evidence, concluded that for want of test identification parade and failure of prosecution to prove that there was sufficient light at the two spots, the identification done by witnesses of the Appellant - accused in the Court would be risky to rely on. However, the trial Court found that the happening of dacoity was established and the discovery of the *Mani-Mangalsutra* at the instance of the Appellant - accused was proved and it linked him to the dacoity in view of Section 114 of the Indian Evidence Act and held the Appellant - accused guilty under Section 395 of IPC and convicted him as mentioned above.

4. Now, the learned counsel for Appellant - accused has argued before me that the evidence against the Appellant - accused was insufficient to hold him guilty under Section 395 of IPC. According to the learned counsel, the Appellant - accused was arrested on 18th April 1996 and was remanded to police custody. Later on further remand was taken till 25th April 1996. On 25th April 1996 further remand was taken and the discovery is then shown as of 26th April 1996. According to the counsel, the Article-1 claimed by PW-7 Shantabai to be her ornament, is commonly available article. Panch PW-2 Shankar had turned hostile, and only Panch PW-3 Dattatraya supported the prosecution. It is argued that the Memorandum Exhibit 51 and Panchnama Exhibit 53 did not disclose the distance between the police station and the house of accused where it is claimed that the accused took the police and Panchas, and seizure was made. The learned counsel referred to findings recorded by the trial Court in its

Judgment in Para 29 to submit that the reasonings recorded by the trial Court regarding discovery, could not be maintained. It is argued that discovery is doubtful. The learned counsel relied on the Judgment in the case of ***State of Rajasthan vs. Talevar and another, reported in A.I.R. 2011 Supreme Court, 2271*** to submit that recovery of stolen articles on disclosure statement would not be sufficient to hold the accused guilty if discovery was not in close proximity of time from the date of incident. Learned counsel submitted that in the course of third remand the discovery is given and thus it should be disbelieved. Learned counsel also relied on unreported Judgments - i) *in the matter of Raja Mohammed and others vs. State - by Inspector of Police, Vadalur Police Station in Criminal Appeal No.318 of 2007 of Madras High Court* and ii) *in the matter of Ghanshyam @ Bablu vs. State in Criminal Appeal No.757 of 2007 and other companion matters of*

Delhi High Court, to submit that in those matters also on the basis of discovery, conviction was not upheld.

5. Learned A.P.P., however submitted that soon after the incident, the accused was arrested and although he avoided giving discovery earlier, police succeeded to interrogate the accused and the same led to the discovery of stolen ornaments of PW-7 Shantabai and the reasonings recorded by the trial Court are maintainable. The A.P.P. supported the reasons recorded by the trial Court. According to him, it is not the case of the accused that the said ornament belonged to him or his wife. The ornament was not seized from the neck of the wife of the accused but she had hidden the same in her clothes.

6. Before discussing the evidence, it would be appropriate to refer to the Judgments relied on by the learned counsel for the Appellant -

accused. I have gone through the Judgment in the matter of **Ghanshyam @ Bablu**, cited supra, which is from the Delhi High Court, as well as Judgment in the matter of **Raja Mohammed and others**, cited supra, which is from the High Court of Judicature at Madras. Both the Judgments can be distinguished on facts. As regards the Judgment in the matter of **State of Rajasthan vs. Talewar** (referred supra), it is from the Hon'ble the Supreme Court. It can be seen that it was an appeal against acquittal and the Hon'ble Supreme Court considered the points raised regarding Section 114 [Illustration (a)] of the Indian Evidence Act in the context of offence under Section 395 of IPC and other Sections. The Hon'ble Supreme Court in Para 7 considered the question whether adverse inference could be drawn against the accused merely on the basis of recoveries made on their disclosure statements. In Para 7.1 of the Judgment, the Hon'ble Supreme Court referred to the case of **Gulab Chand vs. State of M.P., A.I.R. 1995 SC**

1598, where Supreme Court had upheld the conviction for committing dacoity on the basis of recovery of ornaments of the deceased from the possession of the person accused of robbery and murder immediately after the occurrence. The Supreme Court also referred to the Judgment in the matter of **Geejaganda Somaiah vs. State of Karnataka, A.I.R. 2007 SC 1355**, and observations in that Judgment that culpability for the aforesaid offences will depend on the facts and circumstances of the case and the nature of evidence adduced. The Supreme Court further referred to other Judgments in this context and found in Para 8 as follows:

"8. In the instant case, accused Kuniya was arrested on 24.12.1996 and a silver glass and one thousand rupees were alleged to have been recovered on his disclosure statement on 29.12.1996. Again in disclosure statement dated 2.1.1997, a scooter alleged to have been used in the

dacoity, was recovered. Similarly, another accused Talevar was arrested on 19.1.1997 and on his disclosure statement on 26.1.1997, two thousand rupees, a silver key ring and a key of Ambassador car alleged to have been used in the crime were recovered. Thus, it is evident that recovery on the disclosure statements of either of the respondents/accused persons was not in close proximity of time from the date of incident. More so, recovery is either of cash, small things or vehicles which can be passed from one person to another without any difficulty. In such a fact-situation, we reach the inescapable conclusion that no presumption can be drawn against the said two respondents/accused under Section 114, Illustration (a) of the Evidence Act. No adverse inference can be drawn on the basis of recoveries made on their disclosure statements to connect them with the commission of the crime."

. Then the Hon'ble Supreme Court referred to the fact that the Appeal before the Hon'ble

Supreme Court was against acquittal and Judgment of the High Court acquitting the Respondents in that matter was well reasoned and thus the Hon'ble Supreme Court refused to interfere.

7. Keeping the observations of the Hon'ble Supreme Court in view, it is clear that it would be necessary for me to consider the facts of the present matter. The Hon'ble Supreme Court has, in Para 7.4 referred to the Judgment of **Earabhadrapa vs. State of Karnataka, A.I.R. 1983 S.C. 446**, where it was observed that no fixed time-limit can be laid down to determine whether possession is recent or otherwise.

8. In the present matter, there does not appear to be dispute with regard to the evidence of the witnesses that in the night of 11th - 12th April 1996 concerned, there was dacoity at the house in the field of Mahadeo Huke and there was also dacoity at another nearby spot in the house

in the field of Jaishree Kharat (PW-5). There is evidence of PW-1 Dr. Arjun, who examined various injured persons from both the spots and found that they had been beaten, and issued medical certificates. Prosecution brought on record the evidence of complainant PW-4 Jagannath supported by PW-7 Shantabai and PW-11 Narayan Huke regarding the dacoity which was committed at the place of Mahadeo Huke. Similarly, prosecution brought on record evidence of PW-5 Jaishree Kharat, her mother-in-law PW-7 Shantabai and grand mother-in-law Vaijayanta Kharat, regarding the dacoity which occurred at their house in the agricultural land. In the evidence of these witnesses, disputes were raised regarding visibility and whether tube light which was on, was broken. The trial Court has already recorded findings in this regard in Para 28 of its Judgment that no identification parade was held and the witnesses identified the accused in the Court after gap of six years and that presence of burning tube light was doubtful and so

mere version of the witnesses regarding identification could not be considered. The trial Court, however, considered the evidence regarding discovery and held the Appellant - accused guilty.

9. It appears from record and it has been deposed by PW-12 PSI Abasaheb Kakade that the Appellant - accused Ashok came to be arrested on 18th April 1996. The Panch regarding discovery, PW-2 Shankar Gatkhal turned hostile. However, there is evidence of Panch PW-3 Dattatraya Mali and the investigating officer PW-12 PSI Abasaheb Kakade. It appears from the evidence of these witnesses that while the Appellant - accused was in custody, he stated before the police that he has kept the *Mani-Mangalsutra* with his wife and will produce the same. Police prepared Memorandum Panchnama Exhibit 51 on 26th April 1996 between 7.50 a.m. - 8.10 a.m. The evidence is that the accused then took the Panchas and police party in the police vehicle to Ukkadgaon bus stand via Anala road and

from there the vehicle was taken towards Hangewadi village. At Mauje Hangewadi, the vehicle was stopped at some distance and the accused led the police and Panchas towards his house. The way went from a Nala. The accused led them to his wife and from near her waist it was found that she had bundled up the Article - 1, *Mani-Mangalsutra* of gold. Thus the Article -1 came to be seized at the instance of Appellant - accused. The Panch PW-3 Dattatraya came to be cross examined. He accepted that Hindu ladies possess *Mangalsutra* and *Dorla*. The other suggestions which were put up to him were denied by him and the witness remained unshattered. Thus, the discovery was proved by the prosecution.

10. Although the learned counsel for the Appellant - accused is submitting that after the third remand was taken the accused gave discovery, that by itself is not sufficient to doubt the discovery. The accused was arrested on 18th April

1996. The incident had occurred in the night of 11th - 12th April 1996. It is clear that soon the accused came to be arrested. If for some days the accused resisted to give discovery, it would rather show that he tried his best to avoid giving discovery but later on conceded to the interrogations and the stolen article was discovered on 26th April 1996. It is tried to claim that the *Mangalsutra* is common article and it is found with every Hindu woman. However, in the present matter, at the time of FIR itself the complainant had given description of the *Mangalsutra* which had been stolen and the *Mangalsutra*, after it was seized, was got identified by the police in the presence of PW-9 Panch Kerba Huke, and Panchnama Exhibit 62 was prepared. The witness PW-9 Kerba identified the Article even in the Court. It is not a case that the Article was found being worn by the wife of the Appellant - accused. It was kept hidden by her in the clothes and looking to all these facts it

does not appear that the findings recorded by the trial Court regarding the discovery of stolen Article needs to be interfered with. *Mani-Mangalsutra* of gold does not appear to be an Article which could easily change hands. Even if such Article is taken to gold-smith, the gold-smith, in ordinary course, would try to verify the source of the ornament to be legitimate or otherwise. Looking to the facts of the present matter, where soon after the incident the Appellant - accused came to be arrested and while in custody he resisted for some time to give discovery, and later on the Article was seized as hidden with his wife, and was seized at the instance of the Appellant - accused, I find that the findings recorded by the trial Court to hold Appellant - accused guilty resorting to Section 114 of the Indian Evidence Act are maintainable. There is no reason to interfere with the conviction as recorded by the trial Court. I do not find any substance in the arguments raised by

the learned counsel for the Appellant.

11. The Appeal is dismissed. The Appellant -
accused shall surrender to his Bail Bonds. The
trial Court shall ensure the execution of
sentence.

[A.I.S. CHEEMA, J.]

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